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[IN THE PRIVY COUNCIL]

1957 *Present*: Earl Jowitt, Lord Morton of Henryton, Lord Tucker,
Lord Keith of Avonholm and Lord Denning

K. M. PERERA, Appellant, and H. G. MARTIN DIAS, Respondent

PRIVY COUNCIL APPEAL No. 10 OF 1956

S. C. 444—D. C. Kurunegala, 3705

Appeal—Finding of fact of trial judge—Reversal by appellate court—Importance of proper perception of facts—Omnibus Service Licensing Ordinance, 1942.

Where a trial judge has believed one party and disbelieved the opposite party on a question of fact and has found the primary facts accordingly, an appellate court will reverse the trial judge on his *perception* of those facts when it is convinced by the plainest considerations that it would be justified in doing so.

Nine persons, each of whom owned one or more omnibuses, formed a partnership known as the K. A. B. Bus Co., whose business was to ply their buses for hire along a particular route. One of these partners was the plaintiff. Another was the defendant, who was the manager of the partnership business. In 1942 the Omnibus Service Licensing Ordinance was passed in order to avoid competition between bus owners. Under the new licensing system introduced by that Ordinance, the licence to ply buses along the route where the K. A. B. Bus Co. had plied their buses was given solely to another Company, the Sri Lanka Bus Co., Ltd. The result was that if the bus owners of K. A. B. Bus Co. were to continue to run their buses on this route, they had to come to some arrangement with the Sri Lanka Bus Co., Ltd. They did so. Each bus owner sold his bus, or buses, to the Sri Lanka Bus Co., Ltd. and received shares in that Company in lieu of cash. The partnership ceased to carry on business and was treated by the Sri Lanka Bus Co. as one of their branches called "Branch G". By agreement between the directors of the Sri Lanka Bus Co. and the aforementioned nine persons, the defendant was appointed manager of the "G" branch upon terms according to which the manager was expected to pay ten per cent. of the gross takings to the Sri Lanka Bus Co. and the balance of ninety per cent. was to be used by him for his allowance as manager and for the expenses relating to the maintenance, repair and replacement of the buses. The question for determination in the present action was whether the defendant agreed to divide the profits from that ninety per cent. between the nine persons (one of whom was the plaintiff) according to the value of their buses or whether he only intimated that he would give them a bonus on takings without being under any

legal liability to do so. The defendant did not produce any books to prove that the profits were distributed according to the takings. The trial judge gave judgment in favour of the defendant, although the evidence of the defendant was in direct conflict with the contemporary documents.

Held, that inasmuch as the contemporary documents were in direct conflict with the evidence of the defendant and showed plainly that there was an agreement between the nine persons to share the profits an appellate court was entitled to set aside the contrary finding of the trial judge on that point.

Held further, that inasmuch as it seemed on the facts far more probable that the profits were to be shared according to the value of the buses and not according to the takings, an appellate court was entitled to hold accordingly.

APPEAL from a judgment of the Supreme Court.

C. Thiagalingam, Q.C., with *Sirimewan Amerasinghe*, for the defendant-appellant.

Robert M. Hales, with *A. K. Waddle*, for the plaintiff-respondent.

Cur. adv. vult.

June 25, 1957. [*Delivered by* LORD DENNING]—

This is an appeal from the Supreme Court of Ceylon (Rose, C.J., and Sansoni, J.) who reversed the trial judge (Spencer, A.D.J.) on a question of fact. He had believed the defendant and disbelieved the plaintiff, and had found the primary facts accordingly. Yet the Supreme Court has reversed him on his *perception* of these facts. The question is whether the Supreme Court were warranted in taking so unusual a course.

The case concerns buses on the roads of Ceylon. Before 1942 there was much wasteful competition between them. Buses were owned by individuals who used to race one another and to undercut fares. In consequence a traffic expert, Mr. Nelson, came from England and recommended the introduction of a licensing system. The government accepted his recommendations and passed an ordinance to give effect to it called the "Omnibus Service Licensing Ordinance 1942". In order to facilitate the change, the owners of buses were advised to form themselves into groups, so that they could eliminate competition between themselves.

One of the groups so formed was the K. A. B. Bus Company. It consisted of nine persons who ran buses on the route from Kurungala to Alawwa and the feeders to it. Seven of them owned one bus each, and two of them two buses each, making eleven buses in all. Some of the owners drove their own buses. Some did not. One of them, for instance, was a woman who owned a bus but did not drive it. They registered themselves as a partnership firm on 20th July, 1942, describing their business as the plying of omnibuses for hire. One of these partners was Martin Dias, the plaintiff, who owned one bus. Another was K. M. Perera, the defendant, who owned two buses.

Now K. M. Perera was the best educated of the nine partners, and he became the manager of the partnership. All the takings were paid to him. He made the disbursements for the expenses and made the

distribution of profits to the owners of the buses. He kept books of account for the purpose. Each month he called a meeting of the partners at which he put before them the profits and losses for the month for their consideration.

The new licensing system was due to come into force on 1st January, 1943: and applications for licences had to be made to the Commissioner for Motor Transport before 24th December, 1942. Unfortunately, Mr. K. M. Perera, the defendant, "did not bother to find out when the exclusive route licence system would be enforced". The result was that he did not lodge the applications for licences for the K. A. B. Company until a week late, the 31st December, 1942. He was told that they were out of time, and that licences had already been issued to another company, the Sri Lanka Bus Company. He therefore withdrew the applications and endorsed them "Application withdrawn, and the timetable, fare-table, plan of route taken for re-submission through Sri Lanka Bus Co."

The result was, of course, that if these bus owners were to continue to run their buses on this route, they had to come to some arrangement with the licence-holders, the Sri Lanka Bus Company Limited. They did so. Each bus owner sold his bus, or buses, to the Sri Lanka Bus Co. Ltd. and received shares in that company in lieu of cash: and, pending a settlement, the buses were run on the route, the drivers paying their takings to the Sri Lanka Bus Co. Ltd. and receiving wages. The Sri Lanka Bus Co. treated it as one of their branches called "Branch 'G'" and the partnership ceased to carry on business.

On the 12th March, 1943, the directors of the Sri Lanka Bus Co. had a meeting with the nine persons who had previously owned these buses and were now shareholders of the Sri Lanka Bus Co. (Their Lordships find it convenient to call them "the nine".) A discussion was held as to the future terms of working branch "G". The Sri Lanka Bus Co. wanted to appoint a manager of the branch. The manager would be expected to pay ten per cent. of the gross takings to the Sri Lanka Bus Co. and also one rupee per bus per day to the Sri Lanka Bus Co. The balance of ninety per cent. was to be used to pay the drivers and employees, to buy new buses, to repair vehicles, to supply petrol, and so forth. Any profit or loss was to go to the benefit or debit of the branch manager. The Sri Lanka Co. had wanted Mr. K. M. Perera to become manager on these terms, but he had refused. He was afraid that he might not be able to bear the expenses involved. The Sri Lanka Bus Co. directors then asked that one of the previous owners should become manager of all the buses on the route: but each of them wanted to run his own bus individually. The Sri Lanka Bus Co. directors made it clear that, if no one of the nine would take charge of the branch, they would have to appoint an outsider who would be in a position to dismiss them. The nine of them then went outside and had a discussion. After about half-an-hour they returned and told the directors that the defendant Mr. K. M. Perera was willing to accept the post as manager of the "G" branch on the original terms offered by the Sri Lanka Bus Co. to them. A few days later, on the 16th March, 1943, the company sent to Mr. K. M. Perera a letter appointing him manager and setting out the

terms, including the stipulation " You are to maintain, repair and replace" the buses, and finishing with the clause : " The Company will pay 90 % of the collections from omnibuses under your charge for your expenses and your allowance as manager ".

The question in the case is whether Mr. K. M. Perera was entitled to take the profit from that 90% for his own benefit or whether he was to divide it between the nine.

A fortnight after the meeting Mr. K. M. Perera sent out a letter to the nine giving notice of a meeting of " our " branch. It was held on 8th April, 1943. There was a dispute at the trial as to what took place at that meeting. The plaintiff Martin Dias and another one of the nine, Pabilis Appuhamy said that at that meeting it was agreed that out of the 90% Mr. K. M. Perera should pay the expenses, and take a remuneration of 100 rupees a month to himself, and that the profits should be divided among the nine according to the value of the shares allotted to them (which had been based on the value of their buses). Mr. K. M. Perera denied there was any agreement to share the profits. He said that on that day he increased the salary of drivers and conductors ; but they wanted more : and he told them that if they increased their daily collections and brought in more money, then, if he found a reasonable profit, he would give them 10% to 15% of the gross amount on what each man brought in daily in respect of his bus.

The difference thus disclosed was the principal issue in the case. It may be stated thus : Did the defendant, K. M. Perera, agree to share profits with the nine (and thus impliedly they would share losses) ? Or did he only intimate that he would give them a bonus on takings (without being under any legal liability to do so) ? In deciding this issue, it becomes very material to consider the subsequent letters which passed between Mr. K. M. Perera and the others.

There are a series of letters from June to November, 1943, in which Mr. K. M. Perera called monthly meetings of the nine. The first was 21st June, 1943, which said :

" A meeting will be held at 11 a.m. on the 23rd instant for the purpose of checking accounts and for sharing the profits and losses of this branch for the month of May, 1943, therefore your presence is solicited ".

The last was 4th November, 1943, which said :

" As there will be a meeting on the 7th November at 11 a.m to decide the profits and losses of the month of September, 1943, your presence is essential ".

The plaintiff Martin Dias said that at those meetings he was paid Rupees 350, 275, 145, 200.20 as his monthly shares and he gave receipts for them. The defendant K. M. Perera admitted that he made payments, but said they were paid on his basis and not that alleged by the plaintiff. In November, 1943, Mr. K. M. Perera ceased to pay anything, and has paid nothing since. He gave as his reason a conversation he had

with a director of the Sri Lanka Bus Co. named Mūdaliyar Madanayake who said that he ought to buy some new chassis, and he must reserve money for the purchase of new buses for the running of the branch.

Although Mr. K. M. Perera ceased to pay anything after November, 1943, nevertheless a long time passed before any of the nine made any complaint. Six months later, on 31st May, 1944, Mr. K. M. Perera dismissed the plaintiff Martin Dias from his post as inspector. The plaintiff, with three others, then, on 13th June, 1944, asked that a meeting of the shareholders of the "G" branch be convened, and on 23rd June, 1944, asked the manager of the Sri Lanka Bus Co. to take necessary action, but the plaintiff did not make any complaint that the defendant had withheld money from him until April, 1945. He then launched a criminal charge of misappropriation against the defendant. This failed. On 21st August, 1946, Mr. K. M. Perera dismissed another one of the nine—Pabilis Appuhamy. Nine days later, on 30th August, 1946, plaints were issued on behalf of the plaintiff Martin Dias, Pabilis Appuhamy, and three others of the nine, all in similar terms, against the defendant K. M. Perera claiming an account of moneys collected by him as manager of the "G" branch and payment of the sum found due. The plaint of Martin Dias has been tried and forms the subject of appeal to their Lordships. The four other plaints are still pending and await the result of this appeal.

The validity of the claims depends entirely on what took place at the meetings on the 12th March, 1943 (when the nine had a discussion between themselves and afterwards told the Sri Lanka Bus Co. that Mr. K. M. Perera was willing to be manager of the "G" branch), and on the 8th April, 1943 (as a result of which Mr. K. M. Perera made payments to them from June to November 1943).

The trial did not take place until more than 5 years after those meetings. It was held before a District Judge on 14 days spread over the 19 months from May 1948 to December 1949, with long intervals between the hearings. The District Judge reserved his judgment and delivered it on 20th March, 1950. He accepted the evidence of the one side (the defendant) and rejected that of the other (the plaintiff) and gave judgment for the defendant accordingly. The losing side appealed to the Supreme Court of Ceylon. The appeal did not come on for hearing until more than 4 years later. It was heard on 8 successive days in June and July, 1954. The Supreme Court reserved judgment and delivered it on 4th August, 1954. They came to just the opposite conclusion from the District Judge. They rejected the evidence which he accepted, and accepted the evidence which he rejected, and gave judgment for the plaintiff accordingly. There is now an appeal to their Lordships seeking to restore the judgment of the District Judge. It comes on for hearing 3 years after the decision of the Supreme Court and 14 years after the events which are in dispute.

Mr. Thiagalasingam for the appellant reminded their Lordships of the weight which an appellate court should always give to the findings of fact of the trial judge and referred to the well-known decisions of the

House of Lords in *Powell and Wife v. Streatam Manor Nursing Home*¹ and *Watt or Thomas v. Thomas*². He urged that the Supreme Court was not justified in reversing the trial judge on what was in truth his perception of the facts, not his evaluation of them—a distinction drawn by the House of Lords in *Benmax v. Austin Motor Co., Ltd.*³

Whilst their Lordships appreciate the force of this argument, they cannot accept it because in their opinion the evidence of the defendant was in direct conflict with the contemporary documents. The letters written by the defendant between June and November, 1943, show plainly that there was an agreement between these nine people to share the profits and losses from the "G" branch. They are quite inconsistent with the notion that the defendant only said he would give a bonus on takings. His evidence on that point must therefore be rejected.

It is one thing, however, to reject the defendant's evidence: but it is quite another to put the plaintiff's evidence in its place. Disbelief of the defendant does not mean belief of the plaintiff. Both may be in error. Their Lordships have therefore carefully considered what is proved and what is not. The letters show conclusively that there was an agreement to share the profits and losses of the "G" branch; but they do not show how those profits were to be shared. Were they to be shared according to the takings from the buses? Or according to the value of the buses (as represented by the shares in the Sri Lanka Bus Co.)?

The defendant said that the profits were distributed according to the takings, but he never produced any books or accounts to support his statement. Their Lordships think it would be contrary to the very objective they all had in mind for if the profits were to be shared according to the takings, there would still be competition between the buses. The defendant himself said that "competition would not have been reduced in any degree if the bus owners were paid their profits in proportion to their takings". It seems to their Lordships far more probable that the profits were to be shared according to the value of the buses. This is what the plaintiff and his witness said was agreed: and their Lordships think it should be accepted.

The next question is how were the profits to be calculated. It seems clear to their Lordships that the defendant K. M. Perera would be bound to carry out his obligations to the Sri Lanka Bus Co. before he could distribute any profits to the others. The nine must have realised this when they agreed that he should be manager. When he received the gross takings, he would have to set aside 10 per cent. for the Sri Lanka Bus Co. and one rupee per bus per day for them. He would then, out of the 90 per cent., have to pay the running expenses, such as petrol, garage hire, repairs, wages of drivers and conductors, and his own remuneration. He would presumably have to set aside a sum as a reserve for replacements, and so forth. After all proper calculations had been made, the ensuing profit or loss would have to be divided between the nine according to the value of their shares. This is a matter of accountancy.

¹ [1935] A. C. 243

² [1955] A. C. 370 at p. 373

³ [1947] A. C. 484

Finally, there was a good deal of evidence for the plaintiff which went to show that, on the monthly distribution, the defendant K. M. Perera divided two-thirds of the profits for the month amongst the nine and kept back one-third as a reserve. The defendant denied this. This does not appear to their Lordships to be a material difference, because this division would clearly be provisional only, like the drawings of partners, and would have to be adjusted when the yearly accounts were taken.

Mr. Thiagalingam rightly stressed the failure of the plaintiff to make any complaint for a long time, but this does not, in their Lordships' opinion, outweigh the considerations to which they have drawn attention.

In considering this case their Lordships call to mind the wise words of Lord Greene, M.R., in *Yuill v. Yuill*¹ when he said: "We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge had been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction". The Supreme Court here was convinced that the trial judge had formed a wrong opinion: and their Lordships think the Supreme Court were right. Mr. Thiagalingam did draw attention to some errors which he said were to be found in the judgment of the Supreme Court but these were not of sufficient moment to affect their conclusion.

Mr. Thiagalingam further said that in the plaint it was alleged in paragraph 7 that there was a contract between the Sri Lanka Bus Co. and the nine for the running of the buses by the nine, whereas they only proved a contract between the Sri Lanka Bus Co. and the manager for the running of the buses by him. Their Lordships think that this is rather too fine a point to prevail. The plaint makes it clear that the Sri Lanka Bus Co. wished one person to represent the nine: and then goes on to allege in paragraph 11 the real substance of the case that at the meeting of 8th April, 1943, there was an agreement between the nine for the division of profits. Their Lordships realise that the facts which they find to be established differ in some minor details from those which were pleaded, but the difference is not such as to prejudice the defendant in any way and he should not be allowed to take advantage of it.

A point was raised about prescription but it soon appeared that the period of limitation in this case was three years, and the action was brought, within that time.

Their Lordships are of opinion therefore that the plaintiff has established his right to an account of moneys received by the defendant as moneys of the "G" branch from November 1943, until 30th August 1946, and to payment of the amount found due. The account should be taken on the lines already indicated. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

¹ [1915] P. at p. 19.