

(1927) 06 BOM CK 0009
In the Bombay High Court

Lim Yam Hong

APPELLANT

Vs

Lam Choon and Company

RESPONDENT

Date of Decision : 18-06-1927

Acts Referred:

Citation : (1928) 30 BOMLR 757

Hon'ble Judges : Warrington, J;Haldane, J;Darling, J;Blanesburgh, J;Atkinson, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Darling, J.—This case was tried by Sir James Murison, Chief Justice, and the nature of the matter in dispute is sufficiently stated by him in these words :-

The plaintiffs in this case sue the defendants for \$ 10,164 for breach of contract to take delivery of fifteen tons of Singapore Standard Flat Bark Crepe at \$ 1,03 1/4 per pound, The defendant denies that he ever made such a contract. The damages represent the difference in price when the rubber in question was sold in the open market after defendant's repudiation of the agreement.

The only issue is whether defendant made the agreement or not.

The plaintiff says that the agreement was made on his behalf by Cheng Kee, clerk of Messrs, Green & Collier, Brokers, with the defendant on August 4, 1925.

The burden of proof lies upon the plaintiff, His witnesses are Cheng Kee, clerk to Messrs. Green & Collier, and Mr. Green.

2. The Chief Justice was not satisfied that the plaintiffs had proved the making of the alleged contract, and he therefore entered judgment for defendant. On appeal to the Supreme Court of the Straits Settlements, this judgment was set aside and judgment entered for the plaintiffs for the amount claimed, Mr. Justice Reay dissenting from the opinion expressed by Mr. Justice Brown and Mr. Justice Deane, the other members of that Court.

3. The evidence given by Mr. Green for the plaintiffs, although I accepted entirely by the learned Chief Justice, was rightly declared by him to be of itself quite insufficient to prove the making of the contract, For that purpose, therefore, reliance was placed on the testimony of Cheng Kee, a clerk or broker I employed by the plaintiffs. This man the learned Chief Justice; qualified as "not a very bad witness," and added that if he could get definite corroboration of his story the denials of the defendant and his witnesses would not have availed to displace the evidence called on behalf of the plaintiffs. "But," said the I Chief Justice, "I find very great difficulty about the corroboration of Cheng Kee's evidence." He, therefore, held that the burden of proof was not discharged; and so he pronounced in favour of the defendant.

4. The corroboration of Cheng Kee mainly relied upon by plaintiffs' counsel was the established fact that a confirmation slip of the contract was prepared in the plaintiffs' office, and, further, that Cheng Kee swore that he himself on August 4 gave this note into the defendant's own hand. This statement was denied by the defendant, who swore that he did not see Cheng Kee on that day.

5. It was stated by Mr. Green that on August 11, he, with Cheng Kee, went to the defendant's office and there saw his manager, Ah Choon, "who said he had seen Cheng Kee hand our confirm- I action slip to the defendant." It was not alleged that the I defendant was then present, and it is clear that, he being absent, this conversation was not evidence against him. Further, Cheng Kee, in his evidence, was allowed to say: "On August 11, the defendant's manager (Ah Choon) told the plaintiffs' towkay and Green, that he had seen the confirmation slip," This also is not evidence against the defendant, and regarding it Ah Choon swore "Cheng Kee did not call on August 4. I did not see him. I never said I had see the confirmation slip-Cheng Kee said that."

6. Now all this evidence was relied on by the two learned Judges, who allowed the appeal, and especially by Mr. Justice Deane, as being sufficient corroboration of Cheng Kee's testimony to justify the reversal of the judgment of the Chief Justice.

7. It is true that the evidence of what Ah Choon, who was not alleged to have any authority to represent the defendant, had said in his absence was not objected to by the defendant's counsel, but sfcill the fault of an advocate cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay. Yet this was also accepted as good evidence of the contents of a written document; since the paper, said to have been delivered to Ah Choon, was treated as a note confirming a contract. Moreover, it was impossible to treat statements by Cheng Kee as corroborating his " own evidence, for these were merely parts of that very evidence itself.

8. To their Lordships it appears that the two learned Judges of the Supreme Court, who came to a conclusion opposed to that of the Chief Justice who had

tried the case, did so upon grounds which cannot support their conclusion.

9. Their Lordships agree with Mr. Justice Reay—who dissented from the opinions expressed by his colleagues in the Supreme Court—that the Chief Justice's decision was attacked on the ground that he overlooked, or did not attach sufficient weight to this (Ah Choon's) admission. It is a sufficient and it is obvious a fair answer to this attack that the admission was irrelevant, and that the evidence regarding it should not have been admitted. If it was disregarded, it was rightly disregarded".

10. Applying the well-established rules as to the amount of regard to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him, and having considered all the evidence admitted, their Lordships are of opinion that the judgment of Chief Justice. Murison should stand, and they will therefore humbly advise His Majesty that this appeal should be allowed with costs, the judgment of the Court of Appeal set aside, and the judgment of the Chief Justice restored with costs in both Courts.