Privy Council Appeal No. 76 *of* 1928.

Albert Bonnan - - - - - - - - - *Appellant*

v.

The Imperial Tobacco Company of India, Limited - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JUNE, 1929.

Present at the Hearing:

LORD BLANESBURGH.
LORD DARLING.
LORD TOMLIN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The suit out of which this appeal arises is the offshoot of a case which came before this Board and was decided adversely to the present respondents (the then appellants) in May, 1924. The facts leading up to the litigation are fully set out in the report, *Imperial Tobacco Company of India, Ltd.*, v. *Bonnan* [1924], A.C. 755; for the purposes of the present appeal they may be summarised as follows:—

The respondents, a limited company incorporated in India, but to a certain extent apparently subordinate to the British-American Tobacco Company, Ltd., in this country, who hold some 80 per cent. of the Indian Company's shares, had been importing and selling Wills' Gold Flake cigarettes upon monopoly terms in India since 1910, and had no doubt built up an exceedingly valuable trade. In 1921 the appellant (Bonnan) purchased some millions of genuine Wills' Gold Flake cigarettes from the British Army canteen authorities at a price which would enable him to undersell the respondents in the Indian market. He shipped a considerable quantity of these to India and offered them for sale in Bombay and Calcutta. He succeeded in disposing of

his earlier consignments upon favourable terms, but subsequent arrivals were detained by the Indian Customs authorities at the instance of the respondents, who alleged that they were counterfeit. On the 11th May, 1922, after reference to the British-American Tobacco Company in London, the respondents instituted a suit in the Calcutta High Court against the appellant, claiming to be entitled to restrain him from selling his cigarettes there, and on the 22nd of May a similar suit was instituted in Bombay. In both suits applications were made by the respondents for an interim injunction. The injunction was granted in the Calcutta suit on the 11th May, 1922; in the Bombay suit the appellant gave a formal undertaking to the Court not to sell. In both cases the respondents also gave what has been described as "the usual undertaking in damages," which their Lordships understand to mean an undertaking to make good to the appellant in each of those suits any damages which the Court might hold to have been reasonably consequential on the action taken by the respondent if ultimately held to have been unjustified.

The Calcutta suit was prosecuted by the respondents up to this Board, and was finally disposed of in May, 1924, as above stated, it being held by their Lordships, in affirmance of the decrees of both Courts in India, that the appellant's cigarettes were genuine articles, lawfully acquired from the lawful manufacturers, and that as such the appellant (Bonnan) had a right to sell them in India.

The Bombay suit, which had been stayed pending the final decision of the Calcutta suit, was dismissed by consent in November, 1924.

No proceedings were taken by the appellant either in Calcutta or Bombay to enforce the undertaking in damages given by the respondents, but on the 21st January, 1925, he instituted in the Calcutta High Court the suit out of which the present appeal arises, claiming from the respondents damages (amounting in all to over seven lakhs of rupees) on the allegation that the former proceedings were taken maliciously without reasonable or probable cause. The trial Judge (Pearson J.) held that this had been established by the appellant; the Court of Appeal held that it had not, and the main argument before their Lordships has turned on this difference of opinion, it being now admitted by the appellant that if the view taken by the Appeal Court is right, his suit, as a substantive claim for damages, must necessarily fail. It had been contended in India that proof of malice and want of reasonable and probable cause was not of the essence of such a suit as that brought by the appellant, but this contention was not pressed before their Lordships.

When the first consignment of the appellant's cigarettes arrived in Calcutta in March, 1922, the respondents seem to have consulted their local solicitors, who were evidently not prepared to advise legal proceedings. Mr. Abbott, the Chairman of the respondent Company, wrote to the British-American Tobacco

Company in London, apprising them of the arrival of the competing goods, and giving them the name of the shipper (Bonnan) and details of the mark upon the packages. In answer to this letter the respondents received a cable dated the 4th April, from a Mr. Macnaghten, to the effect that the sale of these cigarettes would be an infringement of the respondents' mark, and suggesting certain steps that might be taken to prevent it. This was followed on the 10th April by a second and more explicit cable from Mr. Macnaghten, expressing disagreement with the Calcutta solicitor's advice, reiterating the opinion that the sale would be an infringement of the respondents' mark, and adding that he had taken the opinion of a well-known Counsel in England, who concurred. It appears that Mr. Macnaghten was a Director of, and the standing Solicitor to, the British-American Tobacco Company, and he is referred to by Mr. Abbott in his evidence as "our legal adviser in London."

At the trial before Mr. Justice Pearson the first cable of the 4th April was put in evidence by the appellant, but that of the 10th, though tendered at the hearing and referred to in the evidence, was rejected, apparently on the ground that it had not been duly disclosed, and the learned Judge, excluding this obviously important document entirely from his consideration, held that the respondents had no reasonable or probable cause for the institution of their suits and that malice had been established. In the Court of Appeal the cable of the 10th April appears to have been treated as being before the Court. Both the Chief Justice and Mr. Justice Ghose, before whom the appeal came, express themselves as unable to understand why it should have been excluded, and founding upon it as expressing the considered opinion of the respondents' competent legal advisers in London, they held that the respondents were entitled to act upon it.

Their Lordships are in general agreement upon this point with the learned Judges of the Court of Appeal. They think that on this question of reasonable and probable cause Mr. Macnaghten's second cable was clearly relevant and indeed of much weight. It may be that the respondents' legal advisers did not in the first instance realize its importance, and that its non-disclosure was wrong. But when once a question was raised (as it was by the appellant's counsel) as to the advice upon which the respondents had acted, and the first cable of the 4th April was put in evidence, the second cable of the 10th was clearly admissible. Reading the evidence of Mr. Abbott and of Mr. Ryan, the solicitor-secretary of the respondent Company, though their depositions may not be wholly satisfactory on other questions, their Lordships have no doubt that it was in reliance upon the expert advice so received from London that the proceedings were instituted, and that though, as the event proved, that advice was wrong, it would be impossible rightly to hold that the respondents in acting upon it had no reasonable or probable cause for the course they took.

Their Lordships having come to this conclusion, it is not material for them to consider what other conditions may be necessary to enable a plaintiff to succeed in a suit of this nature. There was much discussion in India, and some also before this Board, as to the principles to be deduced from the judgments in *The Quartz Hill Consolidated Gold Mining Company* v. *Eyre* (11 Q.B.D. 674). Their Lordships, however, make no pronouncement upon this aspect of the case, which may require further consideration on some future occasion.

With regard to the action of the Customs authorities, for which the respondents may well have been legally responsible, and by which it is at least probable that the appellant was damnified, it is only necessary to state that it has been held by both Courts in India that any claim under this head is barred by the provisions of the Indian Limitation Act, and this finding has not been contested here. Nor has the appellant questioned before their Lordships the appellate Court's finding that no case of slander of goods has been made out against the respondents, though on this part of the case the learned Judges appear to have dissented from the view of the trial Judge.

It only remains to consider a question which arose in connection with certain qualified relief allowed to the appellant by the Indian Courts. Though it was held against him that his suit for damages could not as such be maintained, the learned Judges were prepared to treat the claim made by him as an application in the former suit (instituted by the respondents in Calcutta) for an inquiry as to damages arising from the grant of the injunction of the 11th May, 1922, as to which the respondents had given the undertaking already referred to, and a formal reference for this purpose was embodied in the decree of the Appeal Court. Neither the competence nor the propriety of this reference has been questioned by the respondents, but the appellant objects to the exclusion by the Appeal Court from the consideration of the Referee of one particular head of damage under which a large claim was made in the plaint.

It appears that at the date of the injunction the appellant had outstanding in the hands of his vendors a large quantity of cigarettes, no doubt intended for the Indian market, but on which only a deposit had been paid. On the 17th May, 1922, he wrote to his vendors, asking them to cancel the goods, as owing to the injunction he would be unable to dispose of them in India. This was confirmed by another letter of the appellant dated the 6th June, 1922, despatched only two days before the injunction was dissolved, and at a time when he knew (as the terms of the letter show) that his vendors were still prepared to keep the contract open. Under these circumstances the Appeal Court were of opinion that the cancellation was not due to the granting of the injunction, but was a voluntary act on the part of the appellant for which the respondents were not liable.

In this conclusion their Lordships concur. It is obvious that the appellant was not prepared to wait, even a short time, before giving final instructions for the cancellation, to see whether the injunction was to be continued as to future importations, nor did he care, on its discharge, to cancel his letter of the 6th June, as he could easily have done by cable. There may have been business reasons, quite apart from the injunction, making it prudent to cancel, such as the imminent approach of the monsoon, by which further importations might have suffered, or difficulties of finance.

Their Lordships also agree with the Court of Appeal that this question having been considered and decided against the appellant, ought not to be reopened before the Referee.

For the reasons above stated, their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty that it should be dismissed. The appellant must pay the costs.

In the Privy Council.

ALBERT BONNAN

v.

THE IMPERIAL TOBACCO COMPANY OF INDIA, LIMITED.

DELIVERED BY SIR GEORGE LOWNDES.

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