

Elvira Rodrigues Siqueira - - - - - *Appellant*

v.

Gondicalo Hypolito Constancio Noronha - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH FEBRUARY, 1934.

Present at the Hearing:

LORD ATKIN.

LORD THANKERTON.

SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

Their Lordships do not think it necessary to hear Counsel for the respondent.

This is an appeal from a judgment of the Court of Appeal for Eastern Africa varying a judgment given in the Supreme Court of Kenya by the then Chief Justice, Sir Jacob Barth. They varied the judgment by increasing the amount due.

The claim of the plaintiff arises in these circumstances. It appears that before and up to 1911 a Mr. Siqueira carried on the business of a general store in Nairobi. In that year he died, leaving as his widow the present appellant, Mrs. Siqueira. Mrs. Siqueira does not seem to have taken an active part in the conduct of the business, and from 1913 it seems to have been conducted up to the year 1922 by her brother, the second defendant, Mr. Rodrigues, under a power of attorney, granted by the lady.

The plaintiff, Noronha, had been carrying on business before 1913 elsewhere, and in 1931 he joined this business and worked under Rodrigues, who happened to be his brother-in-law, Rodrigues being, as stated, the brother of Mrs. Siqueira, and the plaintiff being a cousin of the lady and of Rodrigues as well as his brother-in-law. He was employed continuously in the

business from 1913 to the beginning of 1928, except for a short absence in India at one time. During the whole of the time, the plaintiff's salary had never been definitely settled. There seems to have been a sort of understanding that he should get something, not less than what he had been getting before, which was 150 rupees per month, and commission; but the exact extent of the salary never was settled during the whole time that he was there. The business went on in the ordinary way, except that in 1922 Rodrigues became a partner, until, in 1930, the business was wound up.

In January, 1928, the plaintiff left his employment by agreement and went off to India to better himself, and it is plain from the evidence that, before he went, he asked Rodrigues for a statement of his account, and Rodrigues promised to send it, and in due course he sent it.

During the whole of this period the plaintiff had been making drawings of different amounts from the cash of the business, which he had entered in the books which he kept, or which he had caused to be entered in the books, in some cases by a subordinate. The accounts showed drawings for his own purposes, and in some cases he had provided cash for the purposes of Mrs. Siqueira in respect of some passage money which had been paid on her account. At any rate, at the time he left there were in the books of the business statements of certain drawings, and there were no credits in the books for salary at all, because the salary had never been fixed by the employer.

Eventually, in March, 1928, Rodrigues, who was then, and had been for a long time, the managing partner, sent the document which is to be found at page 6 of the record. It is headed: "In Account with B. C. Siqueira, Nairobi and Mombasa," and is dated March 27th, 1928. It begins: "By Balance due on 31st December, 1921," 26,000 odd shillings. It then states accounts for the ensuing six years, entering debits during the years in one instance of 5,162 shillings, and salary and other credits 9,968 shillings. Then 1923: "To total debits for the year, 5,818 shillings," and "By salary for the year and refund of passage, 4,914 shillings." It proceeds in that way to deal with the debits, which vary each year: 1,315 shillings; 1,350 shillings; 773 shillings; and the last year, 3,014 shillings. The last year also contains as a credit item "By Salary and Bonus for the year, 4,700 shillings," which is the amount to credit in each year. It ends "By Balance in your favour on 31.12.27, 42,458.84." On that document Mr. Rodrigues put two stamps of 10 cents. each, which appear to have no real legal significance, or revenue significance as far as one can see, and over the stamps he signed: "For and on behalf of B. C. Siqueira"—which is the firm's name—"B. A. Rodrigues, Managing Partner."

Upon that document the plaintiff sued, representing it as

an account stated, and their Lordships have no doubt that is the substance of the claim.

When the claim was brought forward there was an attack made upon it in the first instance on the ground that the settlement had been collusive between Rodrigues and the plaintiff. The trial judge negatived that. There was no evidence to support it, and the case comes before their Lordships as one in which there were genuine business relations between the parties and a genuine settlement.

The next matter that was sought to be said against the account was that Rodrigues had no authority to settle such an account as this. The learned judges have held in favour of Rodrigues that he had such authority, and it appears to their Lordships quite plain from the nature of the case that Rodrigues was the one person who could have settled it: he was the one person who had the adequate knowledge, and it was quite within the ordinary and regular course of the business that he should settle an outstanding account of this kind with one of the servants of the business. Their Lordships therefore find it unnecessary to say anything further on the question of authority.

Now, when the Courts came to deal with this matter they appear, as it seems to their Lordships, somewhat unfortunately, to have been asked to deal with the matter upon the footing that this, which was alleged to be an account stated, amounted to an implied promise to pay without consideration, and, having got that in mind, they then began to consider questions that arise under the Indian Contract Act and the Indian Limitation Act, which are applied to Kenya by appropriate Orders in Council, which it is unnecessary to deal with here.

The account itself goes back to the whole of the period from 1913, and it obviously relates to items and transactions which happened long before the period of three years, which is the appropriate period of limitation for simple contracts, or contracts for service under the Indian Limitation Act.

There was an argument put before the learned judges that this was an acknowledgment under the Limitation Act. The acknowledgment has to be made during the period of limitation, and the question might have arisen as to whether or not this was or was not an acknowledgment within the meaning of the Act.

Then the matter was thought to be disposed of by the terms of section 25 of the Indian Contract Act. That section deals only with the question of promises made without consideration. The relevant part of that Act provides that an agreement when made without consideration, is void unless it is expressed in writing; but it says by sub-section 3: "unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specifically authorised in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

An interesting argument was addressed to the Courts there, and would probably have been addressed to their Lordships by Mr. Evershed, if it had not turned out to be unnecessary, to the effect that the promise which is by law implied from an account stated, even though the account is stated in writing, is not a promise made in writing, and therefore such a promise would not be one which would come within sub-section 3.

In the opinion of their Lordships this question does not arise because it appears to them reasonably plain that, in this particular case, the account stated is in fact an account from which there arises a promise made for good consideration to pay the balance shown in the account. Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described. Probably the best authority for that definition on an account stated is that which was selected by Viscount Cave in the case of *Camillo Tank Steamship Company Limited v. Alexandria Engineering Works* (38, *Times L.R.*, 134), which was in the year 1921, although the account in that case was not an account of the nature described because it was merely a repairer's account with the items probably only on one side. Viscount Cave, in dealing with the various descriptions in law of an account stated goes on to cite this passage at page 143 :—

“ There is a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by Mr. Justice Blackburn, in *Laycock v. Pickles*,” 4 B. & S. 497, “ a ‘ real account stated,’ and he describes it as follows : ‘ There is a real account stated, called in old law an *insimul computassent*—that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts *in*

præsenti, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side, and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated.’ ”

By that must be meant, in view of many subsequent authorities, would be invalidated to the extent of those items which are objected to on that footing. Although Mr. Justice Blackburn does not, in fact, deal with debts which are barred by the statute of limitation, yet he says it is not necessary that the debts should be *in præsenti* or that they should be legal debts. That is borne out by the fact, as is shown by the case of *Ashby v. James*, 11 M. & W., 542, that though some of the items in the account are items which would have been barred by the statute of limitation, yet they are similarly deemed to have been paid. That was the precise position in *Ashby v. James*.

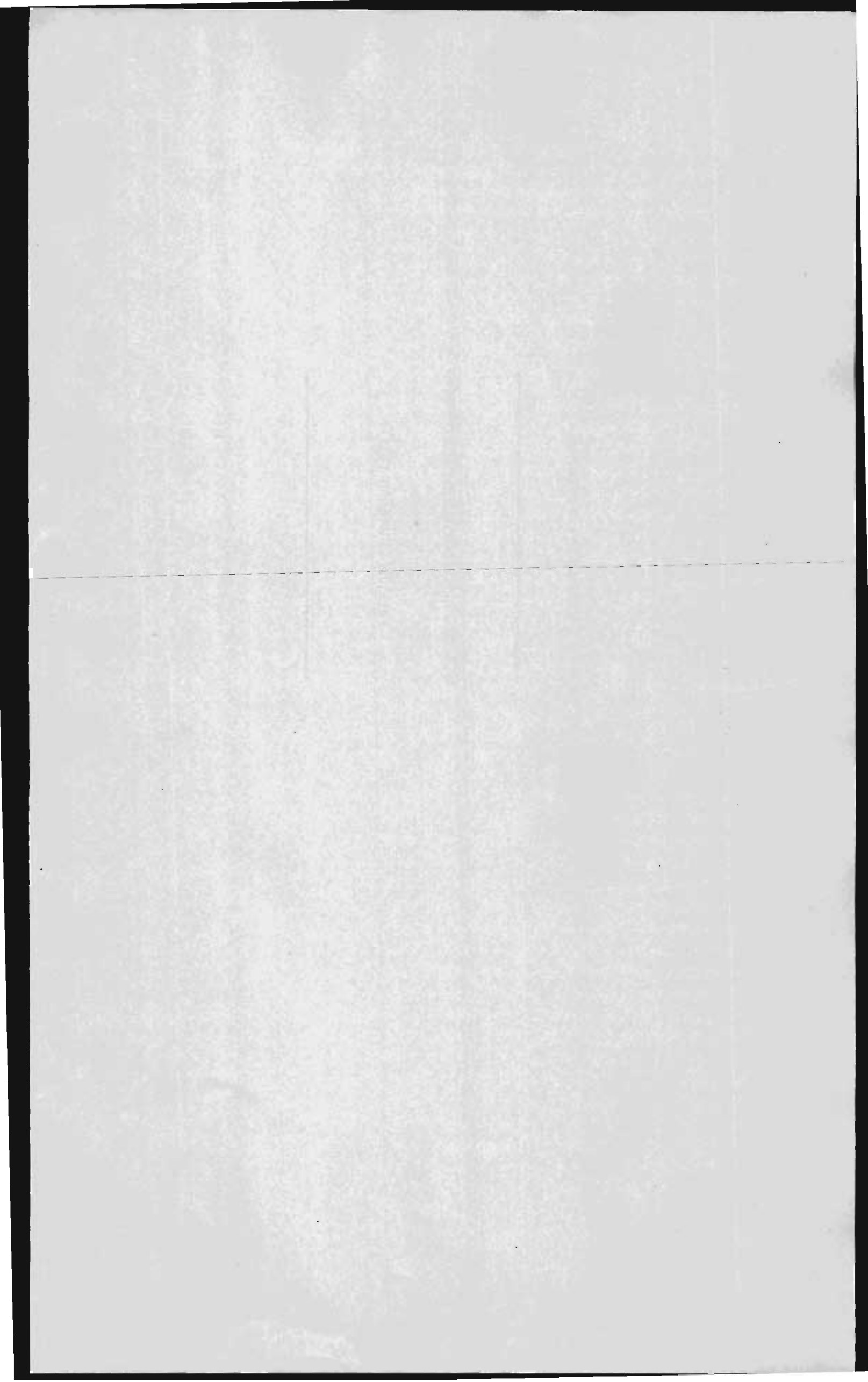
In these circumstances this seems to their Lordships to be precisely the kind of account stated which was mentioned by Mr. Justice Blackburn. Here is an account which has been running over a period of about fifteen years, the remuneration has never been fixed; apparently the parties expected, though there was no legal bargain to that effect, that the remuneration should include the consideration of commission or share of the profits, or a bonus based upon the profits. Salary had never been quantified at all, and, more than that, the items of debits had never been agreed at all. So that at this particular time, when the employment had just ceased and when the ex-servant desired to receive his proper remuneration for the whole of that period, it was open to the employer to investigate each and all of the items that appeared in the books to determine for himself what the remuneration should be, and certainly to determine so as to bind the other side what his share of the profits, if any, should be. That was done. The man writes an account which was demanded by the servant for the express purpose of knowing what sum he would be entitled to get and which, it seems to their Lordships, was stated by the managing partner of the business, for the sole purpose of enabling the servant to know what his final remuneration was to be. To make quite clear that it was intended to express something in the nature of an obligation he authenticated the document—and that can be the only effect of that particular part of the transaction—by writing his signature over two 10-cent stamps.

In their Lordships' view, that was a plain case of a promise made to pay the balance for a good consideration. One cannot help thinking that if an account stated in those circumstances did not give rise in Kenya to the promise to pay, and for a good

consideration, Kenya would be certainly without one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English contract law.

For these reasons, it appears to their Lordships that the decision of the Court of Appeal was quite correct, though perhaps for different reasons from those which commended themselves to the members of the Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and appellant must pay the costs of the appeal.



In the Privy Council.

EYVIRA RODRIGUES SIQUEIRA

o.

GONDICALO HYPOLITO CONSTANCIO NORONHA.

DELIVERED BY LORD ATKIN.

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