

Privy Council Appeal No. 112 of 1917.

A. V. Joseph - - - - - *Appellant*

v.

R. Shew Bux - - - - - *Respondent*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8TH NOVEMBER, 1918.

Present at the Hearing :

LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from a decree of the Chief Court of Lower Burma, reversing the decision of the learned Judge sitting on the Original Side of that Court.

The action was brought for damages for not taking delivery of a quantity of sleepers. The defendant disputed the breach; disputed the regularity of the contractual process necessary for the assessment of damages, and disputed that there were any damages. Both Courts have found that there was a breach, and their Lordships do not think it necessary to go further into that matter.

With regard to the contractual assessment of damages, that was to be fixed in a particular manner :—

“ It is also agreed that in case the said Shew Bux Baboo fails to take delivery of the timber in time, the said A. V. Joseph & Co. will dispose of locally, and the said Shew Bux Baboo will pay the difference in price what the said Company may have suffered.”

In fact, Joseph & Co. put this property up for auction in an apparently regular manner; there was an auctioneer employed; it was advertised; and, at the request of the defendants, the auction was postponed, and then held. Very few purchasers came forward; they were not people of much importance, and it is possible, as was shrewdly suspected, that in the end, Joseph & Co. may have bought back a good deal of what was sold. It was no fault of theirs that the auction was not better attended, and it may very well be that if they took such a step, which is only a matter of suspicion, and not of proof, they assisted the defendants, because the goods might have been "slaughtered" if they had not intervened, or procured people to intervene.

The learned Judge in the Court of first instance took an unduly suspicious view of the conduct of Joseph & Co., and said it was their duty to disprove a shadowy charge of fraud, and that they had not disproved it, a very unusual method of procedure. The Chief Court on appeal set that right and agreed that Joseph had taken the right course to estimate the damage. But the learned Judges in that Court came to the conclusion that Joseph, the present appellant, the plaintiff, had not proved his damage sufficiently. Now what he had got to do was this: This was a c.i.f. contract with this peculiarity, that the money was to be paid as the goods were inspected and before they were put on board. Therefore, Joseph had, for his money, still to provide tonnage and pay freight and pay the insurance; and, when he comes to estimate his loss, he has, first of all, on the one side to put the contract price of the amount of timber in question, which was 507 tons, then to add to it the expenses of the auction, then to deduct from it what was realised at the auction, and also to deduct from it his necessary expenditure in completing his bargain, which really comes under four heads: the freight, which was the biggest thing; the insurance; the loading charge, and certain port or Customs duties. No doubt he was bound to give some evidence as to what those figures were, and no doubt he did give somewhat shadowy evidence: he said that the freight less rebate was 16 rupees 8 annas per ton. He was faced with a letter in which he threatened, during the course of the discussion between the parties, the other parties with the penalties which would ensue if they did not take delivery, and in which he, apparently, asserted that freight would run up to the rate of 28 rupees; and he was cross-examined as to whether he had not taken rates in April, 1914, and whether these rates might not have gone up; and one of his witnesses said they might have gone up in September or October. He gave evidence as to the loading; he gave evidence as to the Customs duty. And as to the insurance, he gave evidence that the total combined ordinary maritime risk and war risk—it being questionable whether he would have to pay the war risk—came, in the following February, to 10/16ths per cent., and, in a general way, he implied that this was the rate of insurance which he thought was due at the time. The evidence was not of the very best, and every presumption should be made against him; if there is any range, the range should be taken against him;

but the defendant called no evidence on these points at all, and the Board is entirely without trace of any suggestion on the defendant's behalf that these expenses would have wiped out the otherwise apparent great loss. Nevertheless, the Chief Court on appeal, after having decided in favour of the plaintiff to the effect that there was a breach and that he had taken the proper steps to have the breach measured, came to the conclusion that he had not given sufficient evidence to show the cost; that he had made one or two small misstatements as regards some of his expenses; and that, on the authority of a case, which their Lordships think the learned Judges somewhat misread, or, at any rate, misapplied, he could get nothing but nominal damages. Really that would be a very serious thing to hold. Without making the deductions for freight, loading, Customs and insurance, if you simply take the gross cost, and deduct from it the sale price, here is a sum of 33,000 rupees, and to show that that is to be reduced to 1 rupee, the Court would have to be satisfied that the freight and the other minor charges would come to an approximately equal figure. It is quite obvious in the case, both on the evidence given and, what this Board very much relies on, the way the case was conducted in the Court of first instance, that no such case was intended to be made.

Accordingly their Lordships have come to the conclusion that there must be a very substantial verdict for the plaintiff. There is an element of uncertainty which might have made it desirable that this matter should be sent back for enquiry, but neither counsel has pressed for that, and, their Lordships think, very wisely, because the amount that could be taken off on a possible enquiry would bear a very small proportion to the expenses of such an enquiry.

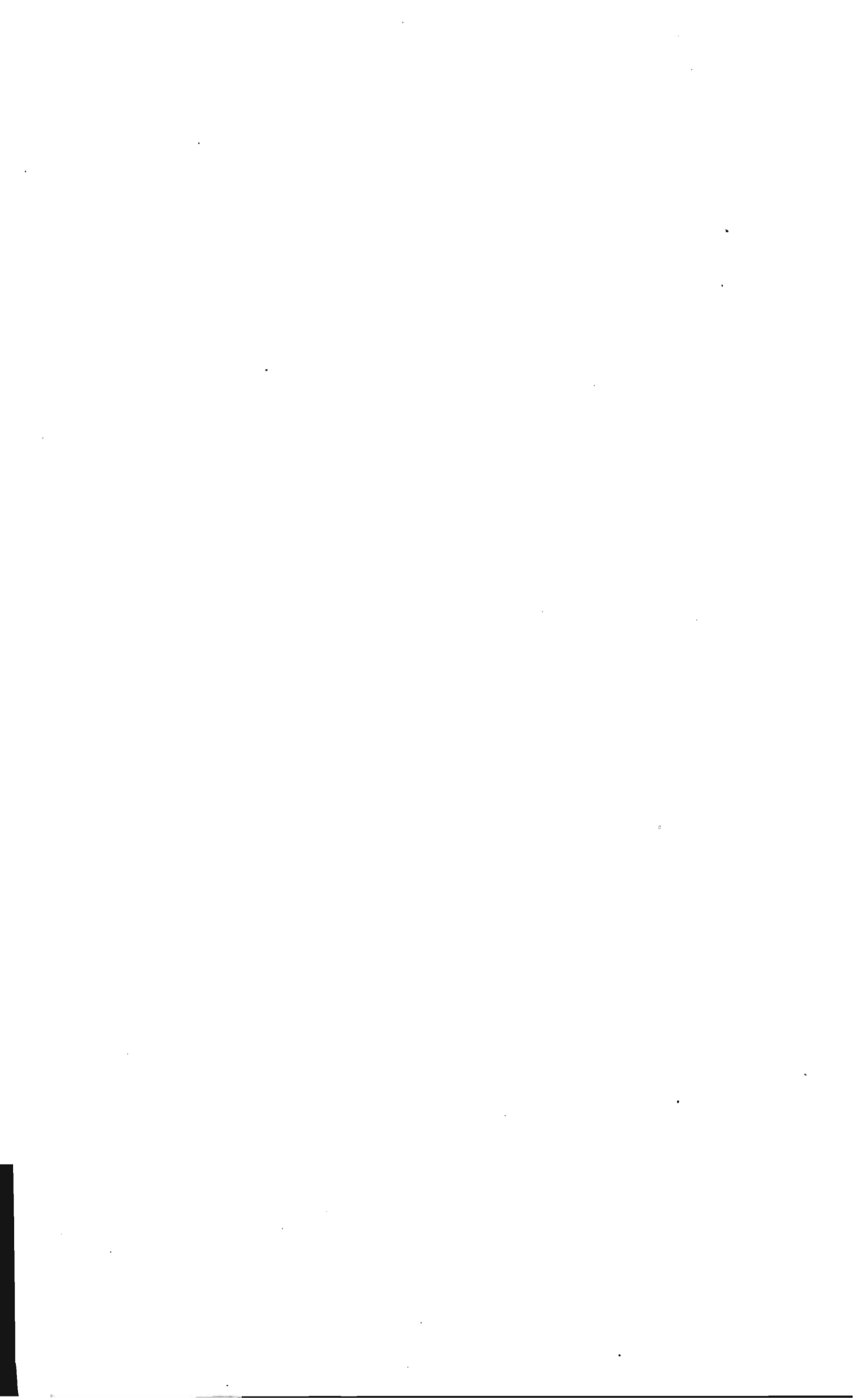
Therefore their Lordships, without dissent of Counsel, have taken the matter into their own hands; and it is enough to say that they have, of course, reduced the minor claims in respect of the auction expenses to the figure at which they stand in the bill which is annexed to the statement of claim, instead of the figures which were incorrectly stated in the statement of claim.

The original contract price and the sale price are fixed figures. The loading and the Customs, two small items, have been, in their Lordships' opinion, proved. The insurance, their Lordships think, can be safely taken at 10/16ths per cent., without their Lordships deciding whether or not the plaintiff is responsible for the war risk (which, on a c.i.f. contract, is by no means necessarily the case), as the Counsel for the appellant has consented to have that taken against him.

Then that leaves the one large item, the freight. As regards the freight, it is possible that plaintiff will suffer owing to his carelessness, but their Lordships think the safe thing to do is to take it at the largest figure which has been suggested here, namely, that figure which he threatened the other side with in the letter to which their Lordships have referred. That would be at the rate of 28 rupees, or, with a deduction of 1 rupee rebate,

27 rupees. Making those deductions, their Lordships bring out the figure of damages at 18,502 rupees, and that, in their Lordships' opinion, is the sum for which judgment should be entered.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed ; that the decree of 1 rupee as damages should be converted into a decree for 18,502 rupees, and that the plaintiff, who has won all through, should have his costs below and of this appeal.



In the Privy Council.

A. V. JOSEPH

v.

R. SHEW BUX.

DELIVERED BY LORD PHILLIMORE,

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