Privy Council Appeal No. 58 *of* 1934.

Dawsons Bank, Limited - - - - - - - *Appellants*

v.

Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Company, Limited) - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY, 1935.

Present at the Hearing:

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

The appellants are a limited company incorporated under the Indian Companies Act. They carry on the business of bankers in Burma through the head office at Pyapon and various branches, one of which was at Bogale. They may be conveniently referred to as the Bank. The respondents to the appeal are a trading company incorporated in Japan. They carry on business in Burma, and in the course thereof they purchase rice from paddy traders. They may be conveniently referred to as the Japanese company, or as the plaintiffs.

In the neighbourhood of Bogale are to be found rice mills to which the traders bring their paddy for the purpose of having it milled. One of these mills, the Natchaungwa Mill, had been mortgaged by its owner to the Bank, and at all times relevant to this appeal the Bank were mortgagees in possession of this mill and were milling paddy there for various paddy traders. For brevity's sake this mill will be referred to as the N. mill. It was managed by one Ba Maw, under the general supervision of the Bank's branch manager at Bogale, one Pya Cho.

Paddy traders are, not unnaturally, desirous of anticipating to some extent the realisation of the value of the produce which they bring to be milled; and in order to do so they obtain advances from the Bank on the security of the produce, the advances being repaid when the produce is sold as rice.

The procedure was as follows:—When a trader desired an advance on the security of his produce, the mill owner or his manager would fill in a printed form (called warrant of goods) showing the amount of paddy held on behalf of the trader and its value. The warrant of goods recites (anticipatively) that the Bank has granted to the trader an advance, and contains undertakings to hold the produce, with the consent of the trader (who had to sign the document), on behalf of the Bank as security for the advance; not to deliver up possession of the produce except under the written directions of the Bank; and to affix labels on or near the produce so as to identify it as the Bank's security. On receipt of this warrant the Bank manager would visit the mill and verify the quantity of produce. If satisfied, the Bank would then make an advance to the trader, the trader signing in favour of the Bank (1) a letter of hypothecation which, after acknowledging the warrant of goods as constituting a security for the advance, authorised the Bank in default of payment to sell, and (2) a promissory note for the amount of the advance. Before the millowner or his representative (in this case Ba Maw) parted with any rice to a purchaser he would require authority from the Bank manager so to do, which would only be given after the security had been cleared.

The facts which gave rise to the present litigation may now be stated. One of the traders who brought his paddy to be milled at the N. mill was one Saw Kai. On the 18th April, 1930, a contract in writing was entered into between Saw Kai and the Japanese company by which the former sold to the latter 1,200 bags of Ngasein big mill special rice at a price therein mentioned, to be delivered on the 15th May, 1930, and to be milled at the N. mill. This contract was witnessed by Ba Maw, describing himself as manager of the N. mill. It is not in dispute that Saw Kai's produce at the N. mill was in fact subject to securities (of the nature hereinbefore described) in favour of the Bank for advances made to him, though it is denied that that fact was known to the Japanese company. All Saw Kai's produce at the N. mill was noted in the paddy register kept at the mill as being under security to the Bank.

By the 30th April, 1930, the milling of Saw Kai's produce had proceeded so far as to have produced 700 bags of the contract rice, which lay at the N. mill subject to the Bank's security. On that day two documents were signed by Saw Kai. One was a delivery order addressed to " the Godown Master " at the N. mill requesting him to deliver to the Japanese company or order " 700 bags Ngasein big mill special rice, each bag weighing

224 lb. nett." The other was an invoice or bill to the Japanese company for Rs. 8,310-6-6, the price of the 700 bags, and stating that each bag weighed 224 lb. net. Each document had on it a reference to the identifying mark which was on the bags containing the rice, viz., " Mark B.M.S.—B_4." On each document were placed the letters O.K., and Ba Maw signed his name underneath those letters.

It would seem that those two documents were handed to R. D. Patel, the agent of the Japanese company, by their vendor, Saw Kai, and that thereupon the Japanese company paid to Saw Kai the amount shown on the invoice. This document has written on it the words and figures " Checked and paid. R. D. Patel. 30.4.30."

A further block of 350 bags was the subject-matter of a similar delivery order and invoice dated respectively the 1st and 2nd May, 1930, payment of the invoice price (Rs. 4,155-3-0) being made to Saw Kai on the latter date. The final block of 150 bags was the subject-matter of a similar delivery order and invoice dated the 10th May, 1930, payment of the invoice price (Rs. 1,780-13-0) being made to Saw Kai on the 11th May, 1930.

Saw Kai, having received the money, absconded without having paid off the Bank's security, with the result that Ba Maw received no authority from Pya Cho to release the 1,200 bags of rice. On the 26th May, 1930, Ba Maw wrote Patel a letter refusing to deliver the rice. On the 5th June the Bank telegraphed to the Japanese company that as Saw Kai had not cleared his produce loan, they could not deliver. This was followed by a letter of the same date, asserting their security but making alternative suggestions to relieve the situation. These suggestions were not acceptable to the Japanese company, and on the 25th June, 1930, the plaint in this suit was issued by the Japanese company as plaintiff against Saw Kai and the Bank, as co-defendants.

The claim was for Rs. 14,905-7-0, made up as follows :— (1) Rs. 14,449-7-0 being the contract price with interest at 12 per cent. from the 15th May, 1930, to the date of the plaint, and (2) Rs. 456-0-0 the value of bags and twine supplied for bagging the contract rice. The cause of action alleged was, as against the Bank, wrongful conversion, the Bank having sold the rice ; but the vital issue between these parties was whether the Bank was entitled to assert its security against the claim of the Japanese company to delivery of the 1,200 bags.

In view of the divergent allegations made by or on behalf of the Japanese company in the course of the litigation, their Lordships think it advisable to examine the plaint and the evidence with some care.

The plaint alleges (paragraph 2) that the contract of the 18th April, 1930, was made with the approval of Ba Maw, and that it was agreed that the Japanese company on payment of

the contract price would be given delivery of the rice. Particulars delivered allege that this agreement was made between Ba Maw and Patel at the same time as the contract for purchase, that it was oral, and that as evidence of it Ba Maw attested the contract for 1,200 bags. The whole of this appears to be fiction, for Patel, according to his own evidence, was not present.

The plaint further alleges (paragraph 5) that when the delivery order and invoice of the 30th April, 1930, were signed by Saw Kai and signed by Ba Maw with the letters O.K., Ba Maw gave the Japanese company " to understand " or " an undertaking " that the 700 bags would be delivered on presentation of the delivery orders. It would seem as if a similar allegation is intended to be made in paragraph 6 in relation to the later delivery orders and invoices. These are allegations of contracts made on those respective dates by Ba Maw, presumably on behalf of and binding the Bank.

In paragraph 7 the allegation is made that Ba Maw represented that delivery would be made in terms of the delivery orders; and in the alternative, that Ba Maw's conduct led the Japanese company to believe that on making payments they would be receiving delivery according to the delivery orders without any claim being made by the Bank. Finally, in paragraph 8 it is pleaded that the Bank's claim to security had been " waived," or that the Bank were estopped from asserting the claim, the representation alleged to ground the estoppel being thus defined : " that on payment of the several sums aggregating Rs. 14,246-6-6, delivery of the 1,200 bags in suit would be given."

Patel in his evidence had a very different story to tell. According to him, Ba Maw, on behalf of the Bank, guaranteed the due performance of all contracts entered into with the Japanese company by traders whose paddy was milled at the N. mill : Ba Maw was to countersign the trader's contract " because if the contract was not fulfilled by the trader, he would fulfil the contract." He added that he would not have entered into the contract with Saw Kai if Ba Maw had not guaranteed its due performance. He gave no evidence of any such verbal representation by Ba Maw as to delivery as is referred to in paragraphs 7 and 8 of the plaint, or of any such contract or waiver as are alleged in paragraphs 5, 6 and 8 of the plaint.

Although some of the other witnesses for the Japanese company gave evidence supporting the story of a guarantee by Ba Maw of the due performance by the traders of their contracts, no one gave evidence of any such verbal representation or contract or waiver as aforesaid.

Ba Maw denied the story of the guarantee of the contracts. He further denied that by words or conduct did he guarantee that the rice would be delivered.

The District Judge who tried the case, dealt with a multitude of issues, some sixteen in number. He rejected the whole story about the alleged guarantee. He found that there was no agreement by Ba Maw to deliver the rice on payment of the contract price of the 1,200 bags. He found that Ba Maw did not represent to the plaintiffs that the rice would be delivered in terms of the delivery orders or lead the plaintiffs by his conduct to believe that such delivery would be made. He found that the Bank had not waived their claim by way of security, nor were they estopped from asserting the same by the conduct of Ba Maw. He dismissed the suit as against the Bank.

The Japanese company appealed to the High Court of Judicature at Rangoon, which varied the decree of the District Court by directing that there should be a decree in favour of the Japanese company against the Bank, the exact details of which need not be set out. It is sufficient to say that the decree proceeds upon the footing that the Japanese company was entitled to recover from the Bank the full amount claimed in the plaint.

The learned Judges of the High Court allowed the appeal upon (to quote the language of Cunliffe, J.) " a point of estoppel, what may be termed a double estoppel." The learned Judge, in the first place, held that whatever might have been the real authority of Ba Maw, as between himself and the Bank, in regard to parting with rice which was still subject to the Bank's security, persons dealing with the mill assumed that Ba Maw had the full power of an ordinary mill manager, which would include the power " to deliver rice and to deal with delivery orders." Accordingly, he held the Bank bound by the consequences of Ba Maw's representations and precluded from denying his apparent general authority.

It is unnecessary for their Lordships to say whether this ruling fits in with the actual facts of this case ; but they understand it to mean that as between the Bank and the plaintiffs, the Bank were bound by and estopped from denying the truth of representations made to the plaintiffs by Ba Maw. The learned Judge having established the first limb of " the double estoppel," then dealt with its second limb. This part of the judgment is crucial, and as their Lordships read it, it depends entirely upon the meaning and effect of the letters O.K. which Ba Maw placed upon the delivery orders. Cunliffe, J., holds that they amount to a statement " that there will be no insistence upon any check on delivery," and he then proceeds thus :—

> " In this connection the only check . . . was the operation of the lien, the effect of which is waived by the letters O.K. In other words, I take the view that the second part of the estoppel consists of an estoppel of a principal by the waiver of his agent, in this case the estoppel of Dawson's Bank by the waiver of Ba Maw."

These words, which are the true foundation of the judgment, disclose, in their Lordships' opinion, a confusion of thought upon the subjects of estoppel and waiver.

The question of estoppel is governed by section 115 of the Indian Evidence Act, which for the present purpose seems to their Lordships not to differ from the law in England in regard to estoppel *in pais*.

Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.

Baguley, J., bases his judgment also on estoppel, but upon a different estoppel, which he established thus:—A firm called Tata's had been in the habit of buying rice milled at the N. mill. Tata's banked with the Bank and paid the traders through or at the Bank, with the result that the Bank's security was always discharged and the rice was always delivered to the purchaser. At some time Ba Maw is said to have told Tata's agent that if he put O.K. on the delivery order "Tata's were certain to get the rice free of lien." The learned judge, accepting the view that the arrangement was that the plaintiffs "should do business with Ba Maw on the same lines as Tata's did business with Ba Maw," held that because Ba Maw did not tell the plaintiffs that the letters O.K. on their delivery orders bore a different meaning from the meaning which they bore on Tata's delivery orders, the Bank were estopped from denying that they had the same meaning.

Their Lordships think it unnecessary to consider whether the actual circumstances of this case could justify the grounding of an estoppel upon this alleged omission on the part of Ba Maw. It will, however, be seen that both judgments ultimately depend upon the meaning of the letters O.K. on the delivery orders.

Without some assistance in the way of evidence their Lordships might have found themselves in a difficulty, and all

the more so since the origin of this commercial barbarism (which, according to the Oxford Dictionary, was already in use as far back as 1847) is variously assigned in different works of authority. The general view seems to be that the letters hail from the United States and represent a spelling, humorous or uneducated, of the words " All correct." Another view is that they represent the Choctaw word *okeh*, which signifies " So be it."

The evidence in this case as to the meaning of the letters O.K. is sometimes confused with the witness's contention as to what Ba Maw intended them to denote. Thus Patel says, " The words O.K. were put to indicate that payment had been made . . . and that he was bound to make the delivery mentioned in the delivery order." He added later, " I think the meaning of the letters O.K. is ' all correct,' because these letters are in general use. The initials O.K. are in general use by all sorts of people, and it is not limited to any trade." Prabhulal, one of the plaintiffs' rice brokers, said, in regard to other transactions, " By the letters O.K. Ba Maw meant that the number of bags specified on the delivery orders went over into the safe custody of the mill, and that we would have sole lien over the bags—so much so that not even a sample would be given out of those bags to anybody else " : which, if true, would indicate a triumph of conciseness. Ba Maw explained the meaning of the letters O.K. thus : " The letters O.K. signify the existence of the seller's rice at the mill. . . . I meant to signify that the bills had been checked and found correct. I put the letters on the bills and delivery orders to show that it is more business-like and also for the satisfaction of the buyers and the sellers regarding the existence of the rice and the correctness of the calculations." Later he said, " I simply meant that the particular quantity of bags was in existence in the mill."

The question is not what Ba Maw intended to represent by placing the latters on the delivery orders, but what the letters mean when placed there.

The only conclusion at which, in their Lordships' opinion, it is possible to arrive, is that the letters O.K. on the delivery orders and bills mean substantially what Ba Maw said that they meant, viz., that the details contained in those documents were correctly given ; in other words, they constituted a statement by Ba Maw that there was at the N. mill the specified number of bags of the specified rice with the specified mark, and of the specified weight, the property of Saw Kai. This was a statement which Ba Maw was entitled to make, and it therefore binds the Bank ; but it is in no wise a statement that the rice is unencumbered. It is certainly not a representation that in fact the rice is free of all encumbrances, and it therefore cannot ground an estoppel so as to prevent the Bank from asserting and proving their rights as encumbrancers. A statement to ground

an estoppel must be clear and unambiguous. (*Low* v. *Bouverie* [1891], 3 Ch. 82.)

But even if their Lordships were to accept the meaning attributed to the letters O.K. by the plaintiffs and the High Court, it would be impossible to hold that they constitute a representation which could ground an estoppel: for the meaning so attributed, is not a representation of an existing fact, but a representation of a future intention, which might or might not be enforceable in contract. "The words O.K. must mean that the actual delivery of the goods would not be opposed, and that the Bank would waive their lien upon the goods so that the purchaser could obtain delivery": that is the High Court's statement of the plaintiffs' contention: and in his judgment, Cunliffe, J., states that the letters O.K. imply "that there will be no insistence upon any check on delivery."

But the difficulties of the plaintiffs on this appeal do not end there. There is complete absence of any evidence that Patel, when he paid the money to Saw Kai, relied upon the presence of the letters O.K. on the delivery orders or bills, and this is an essential element in establishing the plaintiffs' plea of estoppel. Indeed, it is difficult to see how Patel could have given any such evidence, for his contention throughout was that the Bank, through Ba Maw, had guaranteed the due fulfilment by the traders of all their contracts with the plaintiffs; and if that were so, there could be no reason for Patel to place any reliance upon the letters O.K., whatever their meaning, in parting with the purchase money. According to him, the Bank were liable for any default by Saw Kai.

It was conceded and properly conceded, by Counsel for the Japanese company, that as the case had developed at the trial, they could only successfully resist this appeal if the Bank were estopped from asserting their rights under their security. For the reasons given, their Lordships are of opinion that the estoppel has not been established, with the result that the appeal must succeed.

Before indicating the order which their Lordships think should be made, they desire to call attention to a series of mistakes which have occurred in the course of this litigation as regards joinder of parties, due apparently to a misapprehension on the part of all concerned as to the legal position of a limited company incorporated under the Indian Companies Act, which has gone into liquidation. The plaintiffs sued to enforce causes of action against Saw Kai and a limited company, viz., the Bank, and these two were rightly made the only two defendants to the suit. The plaint adds in the title of the suit after the name and description of the Bank, the words:—"by its General Manager, E. A. Heaton." This addition may perhaps be necessary under the local procedural rules; but it does not make Mr. Heaton a party to the suit. The second defendant is the Bank and the Bank alone.

Issues were settled on the 29th September, 1930. Subsequently the Bank went into voluntary liquidation, and Mr. Laurence Dawson and Mr. Heaton were appointed liquidators. Thereupon the plaint was amended by striking out the name of the Bank as second defendant, and inserting the name of Mr. Laurence Dawson as second defendant and the name of Mr. Heaton as third defendant, both being jointly described as "Liquidators of Dawson's Bank, Ltd. (in liquidation), Pyapon." The Bank thus ceased to be a defendant to the suit. The only defendants then, were first defendant Saw Kai, second defendant Mr. Laurence Dawson, and third defendant Mr. Heaton; and so constituted the suit was tried, the suit being dismissed against the second and third defendants with costs by a decree dated the 6th October, 1932. There had been no fresh settlement of issues; these had been framed, and were answered by the judge, on the footing that the second defendant to the suit was the Bank. After the trial, as their Lordships were informed, the liquidation of the Bank was stayed or otherwise put an end to, so that the limited company was able to carry on its business as before the liquidation.

On the 4th January, 1933, a memorandum of appeal was presented by the plaintiffs and an application was made by them praying that the cause title might be amended. This was acceeded to by an order of the High Court, and the title of the proceedings on the hearing of the appeal disclosed the Japanese company as appellants against the Bank by their secretary, Hugh Dawson, as sole respondents: in other words, an appeal by the plaintiffs from a decree in a suit to which the Bank were not parties, is brought by the plaintiffs against the Bank as sole respondents. The decree made by the High Court on the hearing of the appeal is thus entitled :—

NIPPON MENKWA KABUSHIKA KAISHA (The Japan Cotton Trading Co., Ltd.) Incorporated in Japan, 554, Merchant Street, Rangoon, represented by their Manager Mr. T. Saito ... ... *Appellant (Plaintiff).*

Versus

DAWSONS BANK LTD., a public company incorporated under the Indian Companies Act having its Head Office at Pyapon by its Secretary Hugh Dawson ... ... *Respondents (2nd & 3rd defendants).*

By its operative part it provides for a decree "against the respondents the second and third defendants" for a large sum; it further orders "the respondents, second and third defendants" to pay a sum for the appellants' costs of the appeal; and finally it orders "the respondents second and third defendants" to pay the plaintiffs' costs in the lower court.

Their Lordships feel grave doubts as to the exact effect of such a decree. The second and third defendants in the suit were Mr. Laurence Dawson and Mr. Heaton; but they were not respondents to the appeal. The only respondents to the appeal were the Bank, who were not parties to the suit when the

decree which is appealed from was pronounced. Mr. Laurence Dawson and Mr. Heaton cannot be the victims aimed at by the High Court decree; yet if "the second defendant" referred to in the High Court decree means the Bank, it would seem that the appellate tribunal is exercising original jurisdiction over a company which was not a party to the suit when the decree appealed from was pronounced, and is even ordering that company to pay the costs of the original hearing. Further, if "the second defendant" means the Bank, then "the third defendant" can only mean Mr. Hugh Dawson, who is no party either to the action or the appeal, and against whom no claim has ever been made.

Here, indeed, is a comedy of errors, all of which might have been avoided if the Bank had remained throughout the sole co-defendant with Saw Kai. The liquidation could make no difference in this regard: the claim of the plaintiffs was a claim against the Bank, and not against the liquidators. The change which was brought about by the liquidation in regard to the suit was merely this, that in the conduct of their defence the Bank would, before liquidation, act through the directors, during liquidation through the liquidators, and after the termination of the liquidation through the directors once more. If these considerations had been kept in mind, the present tangle could never have arisen.

Their Lordships have thought it right to call attention to these errors in order that in the future such mistakes may be avoided. In the present case these mistakes might well have made it difficult to proceed with the hearing of the appeal, but for the fact that, as their Lordships were informed, the decree of the High Court had actually been enforced upon the footing that it was an effective decree made against the Bank as sole co-defendant to the suit with Saw Kai; and that the Bank were willing to waive any irregularity and treat the decree as an effective decree, as indicated above.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the District Judge restored without variation. The respondents must pay the appellants' costs of the appeal to the High Court, and of this appeal.

In the Privy Council.

DAWSONS BANK, LIMITED,

v.

NIPPON MENKWA KABUSHIKI KAISHA
(JAPAN COTTON TRADING COMPANY, LIMITED).

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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