

A. V. & Son and another - - - - - Appellant.

v

Akoojee Jadwet & Co. - - - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 11TH NOVEMBER, 1941

Present at the Hearing :

LORD ATKIN

LORD THANKERTON

LORD ROMER

SIR GEORGE RANKIN

SIR SIDNEY ABRAHAMS

[*Delivered by* LORD ROMER]

The respondents, Akoojee Jadwet & Co., are the sub-agents in the area comprising Moulmein and its neighbourhood for the distribution of the products of the Indo-Burma Petroleum Company Limited. The appellants A. V. & Son, of which the appellant Valliappa Chettiar was at all material times the managing partner and is now the sole proprietor, are a firm carrying on business in the same area. By a letter dated the 15th June, 1934, and addressed by the respondents to the appellant firm the respondents appointed the appellant firm to be sole distributors in the area of the petrol of the Indo-Burma Petroleum Company as from the 1st May, 1934. The only clauses of the letter that need be mentioned are the following :

2. Overriding Commission. You will pay us commission at the rate of Rs.15 per wagon of 830 tins petrol sold to you by us.

6. You will remain the sole distributor of I.B.P. petrol in Moulmein and district for a period of three years from 1st May, 1934, subject to our holding the I.B.P. sub-agency, with the option of renewal of this distributorship for a further period of two years on terms which shall be mutually agreed upon.

The parties acted upon the terms contained in this letter down to the 30th April, 1937, when the appellant firm's appointment expired, subject to the possibility of their obtaining a renewal of it in exercise of the option given to them by Clause 6. Whether they obtained such a renewal depended, of course, upon whether they and the respondents could mutually agree upon the terms on which the renewal should take place. It should be mentioned that while they were acting as distributors up to the 30th April, 1937, the godown in which the petrol was stored was rented in the name of the appellant firm. The necessary licence enabling them to deal in that commodity also stood in their name, though it would appear that the rent of the godown and the fees payable for the licence were ultimately borne by the Indo-Burma Company.

Now it is alleged by the appellants that by an oral agreement made on the 1st June, 1937, between the appellant Valliappa on behalf of the appellant firm and E. M. Jadwet on behalf of the respondents the appointment of the appellant firm was renewed for two years from the 1st May, 1937, upon the same terms as those contained in the letter of the 15th June, 1934. The respondents on the other hand deny that any such

agreement was made or that the appointment of the appellant firm was renewed on the terms of that letter or upon any other terms. The appellants accordingly on the 20th August, 1937, instituted the present suit for the purpose of recovering damages from the respondents for their repudiation and breach of the alleged oral agreement of the 1st June, 1937. The Judge of the District Court of Amherst decided in favour of the appellants and by decree of the 30th January, 1939, awarded them a sum of Rs.15,000 odd by way of damages, but his judgment and decree were reversed on appeal by the High Court of Judicature of Rangoon who by decree dated the 29th May, 1939, dismissed the appellants' suit with costs. From this decree of the High Court the appellants now appeal to His Majesty in Council. The question to be decided on the appeal is obviously a pure question of fact depending upon the proper conclusion to be drawn from the evidence adduced at the trial. Such evidence was partly documentary and partly oral and so far as now material was as follows

On the 5th April, 1937, the respondents wrote to the appellant firm a letter in these terms:

DEAR SIRs,

PETROL.

As you are well aware that the agreement appointing you as sole dealers for the sale of I.B.P. petrol will soon expire by the end of this month, we shall be glad to know as to what arrangement have you intend to make for renewal of it for another two years for which you have been given option conditionally on certain terms to be mutually agreed upon. We therefore beg to propose fresh terms by imposing our overriding commission at Rs.25 15 0 per wagon load of 830 tins of petrol. An early reply will be much appreciated.

Valliappa was at this time in India and during his absence the business of the appellant firm was being managed by one Venkatesan, who on the 25th April, 1937, wrote to the respondents informing them that he had been instructed by Valliappa to request "that execution of the agreement be postponed until the 31st May, 1937, as he is returning to Burma with his family not later than that date." In the meantime Venkatesan had had an interview with Ebrahim Jadwet, the respondents' managing partner, at which the latter had agreed to reduce the proposed overriding commission from Rs.25 15 0 to Rs.17 8 0. On the 30th April, 1937, the respondents, in reply to Venkatesan's letter of the 25th April, wrote to the appellant firm agreeing to grant the time for which the letter had asked. It is to be noticed that what Valliappa had requested and what the respondents had agreed to grant was a postponement of the "execution" of the agreement. At this time therefore both parties contemplated that, if the appointment of the appellant firm was renewed at all, such renewal would be effected by means of a written and not a merely oral agreement.

Valliappa arrived at Rangoon from India on the 31st May, 1937, and at Moulmein early on the morning of the 1st June. In his evidence given before the District Judge he stated that on that same morning he went to the respondents' shop in Moulmein accompanied by Venkatesan. His account of what then took place was as follows:

"We met Ebrahim Mahomed Jadwet and he took me and Venkatesan upstairs. We then discussed renewal of the contract for a further term of two years. Ebrahim demanded commission Rs.17 8 for a wagon load of petrol. The previous rate was Rs.15. I asked him to accept the old rate of Rs.15. He finally accepted the Rs.15 rate. It was agreed that the contract should be renewed on those terms for two years."

The witness then added these very significant words:

"He said that he would prepare the contract and that he would send for me to sign it."

From this account of the crucial interview on the 1st June two things emerge quite plainly. The first is that a written contract was to be prepared and presented to Valliappa for signature at a later date. The second is that the only term of such contract that was discussed and settled at the interview in question was the amount of the respondents' overriding

commission. As to this however Venkatesan, who was examined upon commission, would seem at first sight to have gone rather further. For his account of the interview was as follows: "Valliappa Chettiar requested Ebrahim Jadwet not to raise the overriding commission from Rs.15 per wagon. After some discussion between them they agreed that the period of agreement should be extended for two years on the same terms and conditions as in the agreement of 1934." But the inference to be drawn from this is that the only matter that was the subject of the "discussion" was the commission; and it seems probable that this question having been settled it was assumed by Venkatesan that, as no further terms were discussed, a renewal of the employment of the appellant firm on the same terms as before followed as a matter of course. For in his cross-examination are to be found the following question and answer: "(Q.) Is it not true that the defendants could terminate the relationship with A. V. & Son after 30th April, 1937, if they wished to do so without giving time till 31st May, 1937? (A.) No, they cannot. A. V. & Son had the option of renewing the agreement for a fresh period of two years." In this, of course, the witness was wholly mistaken. The appellant firm's option was not to renew the agreement, but to renew the distributorship on terms which should be mutually agreed upon. It is possible that Valliappa was himself labouring under the same mistake. It should be added that Venkatesan confirmed the latter as to it having been arranged at the interview that the parties should in a few days "execute" a short agreement to the effect that he had described.

This evidence of Valliappa and Venkatesan was flatly contradicted by E. M. Jadwet who denied that those two gentlemen came to see him on the 1st June at all. According to him Valliappa did not come to see him until the 4th June, and on that day came alone. He said that nothing was then settled, but that on the 8th June Valliappa again came to see him and again came alone; that on that day the three following points were discussed and settled: (1) that the respondents' commission should be Rs.15. (2) that the licence and godown lease should be in the respondent's name. (3) that there should be no further option of renewal; and that Valliappa would "execute" the agreement in a day or two.

It is in their Lordships' view quite immaterial which of these two widely different accounts of what happened down to the 8th June be accepted. For it is quite clear that not only had no oral agreement been arrived at as to all the terms upon which the appointment of the appellant firm should be continued, but that neither party intended that the matter should be concluded by an oral agreement at all. The parties were to "execute an agreement" or "sign a contract"; that is to say enter into an agreement in writing. That this was so is made still clearer by what took place on the 10th June. Upon that date Valliappa went to see E. M. Jadwet accompanied by his clerk Xavier. Jadwet produced a written agreement for signature by Valliappa, such agreement embodying all the three points that according to Jadwet had been settled on the 8th June. Valliappa says that though he was willing to forego the right of renewal of the appointment he objected to the provision as to the licence and godown lease being in the name of the respondents and refused to sign the agreement containing that provision. He accordingly (and, as he says, at the request of Jadwet) caused Xavier then and there to prepare an agreement such as he was prepared to sign. This document which was marked Exhibit M at the trial was in these terms:

"It is hereby agreed between the contracting parties signed under that the petrol agreement dated the 15th June, 1934, be renewed and is renewed hereby for a further period of two years with effect from the 1st May, 1937, on the terms and conditions stipulated herein."

The word "herein" may perhaps have been a mistake for "therein" though in view of the answer given in cross-examination by Valliappa presently to be mentioned this is by no means certain. But, however that

may be, it is plain that the document was not intended to be a mere memorandum in writing of an oral agreement already concluded. The words "it is hereby agreed" and the words "is renewed hereby" are wholly inconsistent with such an idea. The question is however placed beyond all controversy by the following answer given by Valliappa in cross-examination: "Exhibit M draft was written by Xavier under my instructions. . . . No mention was made in the draft about the option clause. Jadwet was at liberty to add anything to it except in the matter of the godown lease and the petrol licence."

In the end neither the document produced by Jadwet on the 10th June nor the draft prepared by Xavier proved acceptable to both parties, and no agreement was ever signed. In these circumstances the respondents' pleader on the 17th June, 1937, wrote a letter to the appellant firm in these terms:

DEAR SIRS,

I am instructed by my clients Messrs. Akoojee Jadwet & Co., Sub-Agent, The I. B. P. Co. Ltd., Moulmein to address you as follows:—

That on the 15th June 1934 you are appointed sole distributors of I. B. P. Petrol in Moulmein and district for a period of three years from 1st May 1934 on terms and condition stated in my clients' letter dated the 15th June 1934. That my clients before the expiry of the said period of three years called upon you to come to fresh term if you desire to renew the agreement for another period of two years. That on the 25th April 1937 your Manager requested my clients to grant time till the 31st May 1937 as the principal Mr. Valliappa was not in Burma then. That up to now, you have not come to fresh terms and conditions though you were called upon to agree to such fresh terms and conditions. I am therefore instructed by my clients to inform you, which I hereby do, that you have by your conduct ceased to be representative of my clients any longer and I am further instructed by me clients to call upon you, which I hereby do, to furnish accounts of empty tins, Lubricating oils, cans and to make over the petrol godown and the license for the same, to my clients within three days from the receipt hereof, failing which legal steps will be taken against you, without further reference in the matter.

Yours faithfully,

(Sd.) S. A. JABBAR,

Pleader for Messrs. AKOOJEE JADWET & Co.

Reference to this letter is made necessary by the fact that at the hearing before their Lordships the learned Counsel for the appellants contended that the respondents had admitted the making of an oral agreement with the appellant firm, and that the only question to be decided on the appeal was, therefore, what were the terms of that agreement. This contention was based upon the following passage in the respondents' written statement: "The defendants beg to submit that on the 8th June, 1937, the terms mentioned in the agreement hereto annexed"—this was the document produced by Jadwet on the 10th June—"was finally agreed upon between the parties and accordingly the defendants gave the said agreement to the plaintiffs for execution on the 10th June, 1937, but the plaintiffs after retaining it for some days and for reasons best known to themselves, changed their minds, refused to sign the same, and repudiated the contract."

This passage certainly seems at first sight to afford some justification for the appellants' contention. But the written statement which is dated the 8th September, 1937, is signed by the same pleader who had written the letter of the 17th June—less than three months before—and it seems improbable that, having in the letter denied the existence of any agreement between the parties, he should plead one in the written statement. Their Lordships think it more probable that by "the terms mentioned in the agreement" the pleader meant no more than the three points which are alleged by the respondents to have been discussed on the 8th June and which were subsequently embodied in the draft prepared by Jadwet, and

by "the contract" the settlement of those points alleged by the respondents to have been then arrived at. But, however this may be, the evidence adduced at the trial shows that the parties never got beyond the stage of negotiation, and that the renewal of the appointment of the appellant firm was never finally agreed. This was the conclusion arrived at by the High Court, and in that conclusion their Lordships concur.

It only remains to mention one other matter. The appellants sought to find some support for their contention that a binding oral agreement was reached on the 1st June, 1937, in the fact that a wagon of petrol was delivered to the appellant firm on the 8th June of that year and another on the 12th June. In the High Court the learned Chief Justice dealt with this fact as follows: "I cannot myself find this conclusive of any more than that there was a mutual desire to achieve some continuity and that whilst negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms, and it is clear that it was to everyone's interest that Moulmein should not be without supplies of petrol, and the gap during which negotiations took place was bridged by the offer and acceptance of the two consignments." With these observations their Lordships are in complete agreement.

For these reasons, which are substantially those given by the High Court, their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the respondents' costs of the appeal.

In the Privy Council

A. V. & SON AND ANOTHER

v.

AKOOJEE JADWET & CO.

DELIVERED BY LORD ROMER

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