ORIGINAL CIVIL.

Before Panckridge J.

RAM SWAROOP MAM CHAND

v.

CHAJU RAM & SONS.*

1936

Aug. 20.

Principal and Agent—Agent employed to sell goods upon a remuneration—Agent buying for himself—Remuneration, If such agent is entitled to—Indian Contract Act (IX of 1872), ss. 215, 220, 63.

An agent, employed to sell goods upon a remuneration, forfeits his remuneration if he buys the goods for himself, and this notwithstanding that his principal knew at the time of performance that the agent was buying for himself.

Salomons v. *Pender* (1) and *Andrews* v. *Ramsay & Co.* (2) followed.

Obiter. Where the principal cannot, by reason of the limitations imposed by s. 215 of the Indian Contract Act, repudiate a contract on the ground merely that the agent has dealt on his own account in the business of the agency, there can be no question of the principal's electing to accept from the agent any satisfaction other than the performance of the obligation contemplated by the contract.

ORIGINAL SUIT.

The facts material for this report and arguments of counsel appear from the judgment.

K. P. Khaitan and *S. R. Das* for the plaintiffs.

S. B. Sinha and *S. P. Chaudhuri* for the defendants.

PANCKRIDGE J. This is a claim by a firm of brokers for Rs. 9,715-3-9.

The case for the plaintiffs is that they entered into various contracts of sale of jute fabrics on behalf of

*Original Suit No. 925 of 1936.

(1) (1865) 3 H. & C. 639; 159 E. R. 682.

(2) [1903] 2 K. B. 635.

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the defendants between December, 1934, and March, 1936. The brokerage provided for by the contracts is at the rate of one half per cent. on the value of the goods so sold at the sale rates. The plaintiffs state that the brokerage earned in this way amounted to a sum of Rs. 9,088-9. They also state that they presented their brokerage bills amounting in all to that sum to the defendants for payment and that the defendants accepted the claim as correct. There is moreover a claim for interest.

It is not now suggested that there has been any express admission of liability on the part of the defendants and the question is whether or not the plaintiffs have earned the brokerage which they are claiming.

On the first day on which the case was heard it became necessary to amplify the pleadings by written statements filed by the respective parties. The position is that the contracts fall into various groups. They are all in the form prescribed by the Indian Jute Mills Association. With regard to the first group the plaintiffs inform the defendants that they have sold by the defendants' order and on their account a certain quantity of jute fabric to a specified buyer. I take as a specimen of such contracts, Contract No. 26527 of December 4, 1934, showing a sale made by the plaintiffs on the defendants' account to Messrs. Andrew Yule & Co., Ltd. (Export Department), of 100,000 yards of hessian cloth at a rate specified. With regard to contracts which are in this form no dispute arises, because the defendants admit that they are liable to pay brokerage calculated in manner provided by the respective contracts.

There is a second group of contracts, of which a specimen is Contract No. 28635 of July 20, 1935,

whereby the plaintiffs sell by the defendants' order and on their account "to undersigned" 50,000 yards of hessian cloth at a rate specified. There is provision for brokerage at the rate of $\frac{1}{2}$ per cent. The defendants admit that they are liable to pay brokerage in respect of all contracts in this form.

With regard to the two groups of contracts which I have described, the defendants' liability can be ascertained by a very simple calculation, and learned counsel for the parties have said that they hope to agree on a figure by to-morrow.

The remaining contracts constitute a single group and are subdivided into two classes although the difference between them is immaterial for the purpose of this case. An instance of the first class is Contract No. 26617 of December 15, 1934. By that contract the plaintiffs sell by the defendants' order and on their account "to our principals" 300,000 yards of hessian cloth at a rate specified in the contract. An example of the second class is Contract No. 27241 of March 5, 1935. The only difference in form between that contract and Contract No. 26617 is that in Contract No. 27241 the words "our principals" are followed by the words "(not to be declared)"

Learned counsel for the plaintiffs stated that some of these contracts were contracts entered into by the plaintiffs acting on behalf of existing principals. The defendants admit that in cases where the plaintiffs are in a position to show that there actually was a principal to whom the plaintiffs were selling the goods on the defendants' behalf, the defendants are liable to pay brokerage. I intend to direct an enquiry to ascertain in how many of these contracts there was an independent buyer to whom the plaintiffs sold the goods.

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There remain, however, a number of contracts in the form "to our principals" or "to our principals "(not to be declared)" where the plaintiffs admit that there was in fact no principal, and where the plaintiffs were in fact the buyers. In the additional written statement filed by the plaintiffs on August 15, 1936, the following allegations are made :—

> With regard to contracts entered into by the plaintiff firm for " our principals " or " our principals (not to be declared)" as regards such of them in which the plaintiff firm were in fact principals, the defendant firm, at the time of performance, knew that the plaintiff firm were in fact the principals, and the plaintiff firm submit that as the defendant elected to perform the said contracts with such knowledge as aforesaid, they cannot, after performance, refuse to pay the plaintiff firm the brokerage stipulated.

For all purposes, as far as this case is concerned, counsel for the defendants states that he is prepared to admit the truth of the allegations in the plaintiffs' additional written statement which I have just read.

The question, therefore, as to the defendant's liabilty with regard to contracts of the last mentioned class, is a question of law. I think it cannot be gainsaid that it is misconduct on an agent's part to deal on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his knowledge on the subject. Under English law it appears that the principal has the absolute right, when he ascertains that the agent has been clandestinely acting as principal in a contract connected with the business of the agency, to repudiate the contract. This right, however, in India is qualified by s. 215 of the Indian Contract Act which provides that—

> The principal may repudiate the transaction if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

It is admitted that neither of these conditions was fulfilled in the circumstances of the present case.

It, therefore, follows that the defendants were never in a position to repudiate the contracts although they knew before performance that the plaintiffs were in fact the buyers. In such circumstances the statement in the plaintiffs' written statement that "the "defendants elected to perform the said contracts" does not perhaps give an entirely accurate picture of the situation.

Prima facie under s. 220 of the Indian Contract Act the plaintiffs are not entitled to any remuneration in respect of the contracts in which they were the undisclosed principals although purporting to act as agents. This seems to me to be perfectly clear under the terms of the Indian Contract Act, and it also appears to me beyond argument, that under English law where an agent acts as principal in a contract without the knowledge of the party whose agent he is, he forfeits his right to remuneration from that party under the agency agreement. The leading case on the point is *Salomons* v. *Pender* (1). In that case the defendant sold landed property through the plaintiff to a limited company in which the plaintiff was a shareholder. The plaintiff sued to recover brokerage, and the Court of Exchequer held that his claim was unenforceable.

With regard to the argument that the plaintiff had not repudiated the contract with the purchasing company, Pollock C. B. observed :—

> I cannot agree that, because the seller has chosen to abide by the sale, he is therefore to be held to have acknowledged the claims of the plaintiff both as agent and purchaser.

Bramwell B. later observed :—

> There is another way of putting the case. The plaintiff, by offering to sell the property, undertook that a third party should be the buyer, and not himself. Whichever way the case is put, I think there should be no rule.

(1) (1865) 3 H. & C. 639 (641, 642, 643); 159 E. R. 682 (683, 684.)

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Martin B. said—

Mr. Bovill has contended, that as the sale was not rescinded there is a subsisting contract to pay the commission. But that seems to me to be a fallacy. The engagement to pay commission to the plaintiff is quite distinct from the acceptance of an offer to buy the land.

Observations of a similar character were made in *Andrews* v. *Ramsay & Co.* (1). In that case the agents had deducted their commission from the deposit on account of the purchase money and were defendants in the case. Wills J. observed :—

If the money had all been paid over, and the defendants had had to sue the plaintiff for commission, it seems to me perfectly clear that they could not recover it. They would have no chance whatever of succeeding in such an action, and I think that they ought not to stand in any better position because the plaintiff, believing that they acted properly, had allowed them to retain the 50*l*. The case ought to be the same whether the commission had already been paid or whether the agent has to sue for it.

Both these cases have been recognised as having application in India: *Joachinson* v. *Meghjee Vallabhdas* (2) where Chandravarkar J. observes :—

The rule of law, then, is this. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in s. 215 of the Contract Act or to affirm it. If he elects to affirm, the prin ipal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

The only matter that has caused me any hesitation is s. 63 of the Indian Contract Act. It appeared to me at first that, having regard to the language of that section, which has always been recognised as

(1) [1903] 2 K. B. 635, 638. (2) (1909) I. L. R. 34 Bom. 292, 307.

differentiating Indian law from English law, it might reasonably be argued that by going on with the contracts the plaintiffs had accepted a satisfaction other than the performance of the promise. In other words, it might be argued that, although the promise was to obtain a buyer who was not the plaintiffs but a third party, yet the defendants by going on with the contract after discovering the position which the plaintiffs occupied with regard to it, elected to treat a contract of sale, in which the plaintiffs were the buyers, as satisfaction of the promise to obtain a contract in which the buyer were to be a third party. On broad grounds, I should be disposed to hold that if there is any conflict between the general provisions as to performance generally, contained in ch. IV of the Contract Act of which s. 63 is a part, and the special provisions as to the contract of agency which are the subject-matter of ch. X of the same Act, the special provisions of ch. X should prevail. However, with regard to this particular case, I think that the point can be disposed of more directly. Before a party can be said to accept something other than the performance stipulated for in satisfaction of the contract, it must, I think, be open to him to refuse to accept such satisfaction and to insist on performance of the contract in accordance with its terms. Having regard to the fact that, on account of the limitations imposed by s. 215 on the principal's right to repudiate, the defendants were never in a position to refuse to accept the plaintiffs as buyers, there could, in my opinion, be no question of their electing to accept a satisfaction other than the performance of the contract according to its terms.

For these reasons, I hold that the plaintiffs are not entitled to brokerage in respect of contracts of sale to "our principals" and to "our principals (not to be "declared)" except in cases where there were in fact principals other than the plaintiffs. To ascertain the extent of the defendants' liability in respect of

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contracts of this class, I direct the Official Referee to enquire and report in how many contracts of sale to "our principals" and to "our principals (not to be "declared)" there were principals other than the plaintiffs, and to what sum the plaintiffs are entitled on that basis. Costs will be reserved.

Suit decreed in part.

Attorneys for plaintiffs: *Khaitan & Co.*

Attorneys for defendants: *Leslie & Hinds.*

P. K. D.