APPELLATE CIVIL.

Before M. C. Ghose and R. C. Mitter JJ.

KISHORI PRASAD BHAKAT

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

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July 29, 30; Aug. 2.

Contract—Indemnity-bond to induce authorities to give advantages of public utility services, if opposed to public policy—Nature of evidence against agent acting without authority—Measure of damages—Indian Contract Act (IX of 1872), ss. 23, 235.

An agreement between a subject and the State, which requires payment from the subject for the discharge of public duties relating to a matter of amenity which a State generally provides for advancing the material welfare of its subject, but which it is not bound to do as part of its fundamental constitutional obligations, *e.g.*, an indemnity bond to make good the loss of working a telegraph office, is not opposed to public policy.

In re *Capital Fire Insurance Association* (1) relied on.

Glasbrook Brothers, Limited v. Glamorgan County Council (2) referred to.

Glamorgan Coal Company, Limited v. Glamorganshire Standing Joint Committee (3) referred to and explained.

A person untruly representing that he had authority to act as agent of another and inducing a third person to enter into a contract cannot be sued on the contract.

Collen v. Wright (4) relied on.

The action against such a person is as on the implied warranty that he had the authority, and the measure of damages in such cases is the benefit that the other party would have had from the contract if the representation had been true.

In re *National Coffee Palace Company*, Ex parte *Panmure* (5) referred to.

APPEAL FROM APPELLATE DECREE preferred by some of the defendants.

The facts of the case and the arguments in the appeal are fully stated in the judgment.

Atul Chandra Gupta and *Nirmal Kumar Sen* for the appellant.

*Appeal from Appellate Decree, No. 667 of 1936, against the decree of Nikunja Bihari Banerji, Additional Subordinate Judge of Dinajpur, dated Jan. 4, 1936, reversing the decree of Jnanendra Mohan Chatterji, Second Munsif of Dinajpur, dated Oct. 4, 1934.

(1) (1883) 24 Ch. D. 408.
(2) [1925] A. C. 270.
(3) [1916] 2 K. B. 206.
(4) (1857) 8 El. & Bl. 647; 120 E. R. 241.
(5) (1883) 24 Ch. D. 367.

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The Senior Government Pleader, Sarat Chandra Basak and the *Assistant Government Pleader, Rama Prasad Mookerjee*, for the respondents.

Cur. adv. vult.

M. C. GHOSE J. This is an appeal by the defendants in a suit for Rs. 1,117 odd as compensation on an indemnity-bond. The facts which are not disputed were that, at a place named Nithpur within the district of Dinajpur, there was a post office. In May, 1927, the defendants or their predecessors agreed to apply to the Telegraph Department that a telegraph office should be opened at Nithpur. The department were not willing to open a telegraph office at the place unless local merchants would guarantee against loss. Thereupon, six merchants, who were predecessors of the appellants here, executed an indemnity-bond, dated May 26, 1927, agreeing each to pay a certain indemnity if the Accountant-General of the Telegraphs certified the loss and that his certificate would be final on the matter. Upon this, the Accountant-General certified a loss of working for the first year up to the end of March and again for the second year to the end of March and the loss of those two years amounted to the sum claimed which was amounting to Rs. 1,100 odd which was demanded from the defendants and they did not pay and hence the suit was instituted in May, 1933. The trial Court dismissed the suit. In appeal, the learned Subordinate Judge has decreed the suit.

The first point taken in appeal by the learned advocate for the appellants is that the Court of appeal below misapplied s. 235 of the Indian Contract Act in holding defendant No. 2 liable for the sum claimed. It appears that defendant No. 2 signed the bond on behalf of his father, but the father afterwards repudiated the bond, whereupon, under s. 235, defendant No. 2 has been made liable by the Court of appeal below. Section 235 runs thus:—

A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent,

is liable, if his alleged employer does not ratify his acts to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

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Now, there is no doubt that defendant No. 2 represented himself to be the authorised agent of his father and, as such, he made a contract with the telegraph office, but his father did not ratify his acts. Defendant No. 2 is, therefore, liable to make compensation to the plaintiffs in respect of any loss or damage which the plaintiff had incurred by dealing with him. It was urged by Mr. Gupta that the losses suffered by the plaintiff from the action of the defendant No. 2 cannot be ascertained until action has been taken by the plaintiff against the other five persons who contracted with the plaintiff. In my opinion, that argument is not correct. The plaintiff along with five other persons signed a bond demanded by the Telegraph Department and he is liable for the loss caused to the defendant by professing to act for his father when his father did not ratify his act. He is not liable on the contract itself. He is only liable to the extent of the warrant. In the case In re *Capital Fire Insurance Association* (1), it was held by their Lordships that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority which he professed to have. In other words, what the plaintiff would have gained by the contract which the defendant warranted should be the measure of the damages. Taking this view as to the measure of the damages, the decree of the Court of appeal below in respect of defendant No. 2 appears to be right.

The next point taken by the learned advocate is that the contract of indemnity made in this case was against public policy, having a tendency to induce the telegraph authorities to give the advantage of a public utility service not in accordance with the requirement of the general public, but in accordance with the

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requirements of private individuals, who may have been in a position to pay for such service. After hearing Mr. Gupta in full, I fail to see the force of the argument. Postal and Telegraph Departments are run by the Government on a mercantile basis, that is to say, they open post office at places where they believe the post office will pay for itself. They open a telegraph office where they have reasonable ground for believing that there would be a sufficient custom for the telegraph office to pay for itself. It cannot be said that they go against public policy in deciding this upon grounds of self-support wherever in a place they open post office or telegraph office. There is no doubt that wherever a general public require a post office or a telegraph office, that is to say, where they will sufficiently support the same by their custom, the authorities are always ready to comply with their demands. It is only in cases where there is some doubt whether, in a particular place, a post or telegraph office will pay for itself or whether it will run at a loss, that, if leading merchants or other people who will extend their custom to the office make their promises that the office will pay, the authorities ask them to make good their word by executing an indemnity-bond, that is to say, in the event of losses those men will be asked to make good the loss. On a plain view of the matter, there does not seem to be any objection to this course on the ground of public policy. The only case that the learned advocate quoted in support of his proposition was the case of *Glasbrook Brothers, Limited* v. *Glamorgan County Council* (1). That case arose out of the coal strike of 1921. In certain mines the circumstances brought about a call for police protection. There was partly danger to the safety men and there was danger of property. The Police Superintendent, Colonel Smitt, had an interview with Mr. James, mine owner on the spot. The Police Superintendent was prepared to provide what in his opinion was adequate protection by means of a mobile force but Mr. James was not satisfied

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with the protection proposed by the Police Superintendent and requested him to billet certain police officers at the colliery. The Police Superintendent refused to comply with this request except on the terms that the manager would agree to pay for the force so provided at a specified rate. The manager agreed to pay at a specified rate for the police officers stationed at the colliery. After the strike was over, the County Council demanded the money for the service of the police which the manager had agreed to pay. The manager declined to pay on the ground that the police were bound to protect life and property and they were not entitled to any payment. The suit by the County Council was decreed by the trial Judge. The appellate Court decided in favour of the County Council by 2 to 1. The House of Lords decided in favour of the County Council by 3 to 2 and the opinion of the majority is that, although police authority are bound to provide sufficient protection to life and property without payment, if, in particular circumstances, at the request of any individual, they provide special form of protection outside the scope of their public utility, they might demand payment for it.

The case, in my opinion, does not support the argument on behalf of the appellants. It rather supports the decision of the learned Subordinate Judge.

The appeal is dismissed with costs.

R. C. MITTER J. This appeal, preferred by defendants Nos. 2 to 6, arises out of a suit instituted against them and another by the Secretary of State for India in Council for recovery of Rs. 1,177-12 on the basis of a bond executed by them on May 26, 1927 (Exhibit 3). The suit was dismissed by the first Court, but the lower appellate Court has decreed it against all the defendants except defendant No. 1.

There was a post office at Nithpur in the district of Dinajpur, but there was no telegraph office there. In 1925, the local *zemindârs* and merchants moved the

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authorities for establishing a telegraph office in the said village. The postal authorities eventually agreed to open a telegraph office, provided the working loss, if any, was guaranteed. The bond in suit was, accordingly, executed by defendants Nos. 2 to 5 and the deceased father of defendant No. 6. Defendant No. 2 did not execute it in his personal capacity, but he signed as agent of his father, defendant No. 1. Both the Courts below have held that he had no authority from his father to act as his agent in the matter. The terms of the bond were that each of the executants would be liable jointly and severally for the working loss of each year for a period of ten years and that the certificate in this respect of the Deputy Accountant-General, Posts and Telegraphs, would be final. The telegraph office was opened on May 14, 1930. According to the certificate of the Deputy Accountant-General, Posts and Telegraphs, the working loss of the first year was Rs. 529-4 and of the second year Rs. 648-8. The total, Rs. 1,177-12, is the claim in suit.

The common defence was that the bond was taken by undue influence and misrepresentation and that the terms thereof, which was written in English language, had not been explained to the executants, all of whom, except defendant No. 2, did not know English, and defendant No. 2 had only a smattering knowledge of the language.

Both the Courts below have negatived the case of misrepresentation and undue influence. The learned Munsif, however, held that material terms of the bond, and in particular the clause about the finality of the Deputy Accountant-General's certificate, had not been explained to the executants by the post master of the place. He, accordingly, held that there was not *consensus ad idem*, and as the said clause about the finality of the Deputy Accountant-General's certificate was binding on the executants and as there was no other evidence save the said certificate to prove the working loss, the plaintiff was not entitled to succeed.

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The learned Subordinate Judge, on appeal, has come to the conclusion that all the terms of the bond were known by the executants before they signed it. He, accordingly, made defendants Nos. 3 to 6 liable on the bond, and defendant No. 2 on the basis of s. 235 of the Contract Act. Defendants Nos. 2 to 6 have preferred this Second Appeal.

Mr. Gupta raises two points, one affecting the whole case and the other a special one affecting defendant No. 2 only. The first point raised by him is that the bond in suit is void, being against public policy, and the second is that the decree passed against defendant No. 2 cannot be supported, as the plaintiff has not proved such damage as he is required to do in a case falling within s. 235 of the Contract Act.

The first point is urged in the following manner by Mr. Gupta. He says that a subject has certain constitutional rights with corresponding constitutional duties imposed on the State. For the discharge of those duties the State cannot bargain with the subject through contract. A contract between the subject and the State, by which the State is to get money from the subject for the discharge of any of its constitutional obligations, is against public policy. In support of his contention Mr. Gupta urges that the subject has the constitutional right that his person should be protected by the State from violence from persons living within the State and that his property should be also protected from criminal attacks. The State is under the constitutional obligation to afford protection to the person and property of its subjects. Any *contract*, therefore, by which the subject has to pay the State for the State affording him such protection, is against public policy. The subject is not bound to pay anything over and above general rates and taxes which afford the State the means to discharge its duties towards the subject and to carry on the functions of Government and administration. A contract with the State, by which a subject agrees to pay for police protection, would, he says, be void and says

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that the same principle would apply to other contracts between the State and the subject relating to the discharge by the State of other public duties. In support of his contention, he relies upon the judgment of the House of Lords in the case of *Glasbrook Brothers, Limited* v. *Glamorgan County Council* (1). It is necessary to examine that case in some detail and to see whether the principles laid down here has any application to the contract we have before us.

In the said case, all their Lordships, who delivered separate judgments, proceeded upon the principle formulated by Pickford L. J. in *Glamorgan Coal Company, Limited* v. *Glamorganshire Standing Joint Committee* (2). There was not much difference in enunciating the principles, but, on the facts, Lords Carson and Blanesburgh took one view and Viscount Cave L. C. and Lords Finlay and Shaw took another. The question in *Glamorgan Coal Company's* case arose in the following circumstances. In a colliery district, there was a labour strike and serious riots followed. The ordinary police force of the place was not able to cope with the situation. The Chief Constable appointed by the Glamorganshire Standing Joint Committee, which exercised the police functions, asked for police aid from adjoining *counties*, and such aid was sent under agreements with the Chief Constable that the aided county should pay for the board and lodging of the police men so sent. It is not necessary for me to advert to that part of the case which related to the metropolitan police force sent by Home Office in lieu of the military and cavalry asked for. The police force was located at vantage points of the locality, one of which was plaintiff's colliery. The plaintiff, who was a colliery proprietor, housed and fed at the request of the Chief Constable the additional police force so requisitioned by the Chief Constable from surrounding counties and also the metropolitan police force sent by the Home Office. The suit was brought to recover the costs of feeding

(1) [1925] A.C. 270. (2) [1916] 2 K.B. 206, 229.

and housing (i) the police force sent from the surrounding counties and (ii) the metropolitan force sent by the Home Office. So far as the claim in respect of the expenses incurred for the metropolitan police force was concerned the Court held that the Standing Joint Committee was not liable to pay, as the Home Office had sent the said force on its own initiation and not at its request. It, however, decreed the claim so far as it related to the expenses of the police force sent from the counties.

In a letter in which the Standing Joint Committee was repudiating liability it took up the position that it was incumbent on the colliery owners to take at all times reasonable protection of their property, but more especially when disturbance of the peace was anticipated as a result of ill-feeling between them and the labourers; that the colliery proprietors could only expect protection of their properties by the police force of the county, but if they expected more than the ordinary protection which such force could afford they must bear the burden of the imported police brought for the protection of their property and cannot throw the extra costs on the rate-payer. The position taken in the latter case was not pressed before the Court, but Lord Pickford strongly repudiated the position so taken by the Joint Committee in the latter and stated that it was indefensible on principle. He stated thus :—

> If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police force is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly.

I fail to see how this head of public policy formulated in the principle stated in the above words can be invoked in aid where the contract in question is for meeting the deficit in the working expenses of a telegraph office establised at the request of a number of subjects, a contract relating to a matter of amenity,

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which a modern State generally provides for, for advancing the material welfare of its subject, but which it is not bound to do as a part of its fundamental constitutional obligations.

In *Glasbrook Brothers'* case (1) there was a strike in a colliery district. To protect the property the police authorities had arranged for flying squads of police, a mobile force. The coal company, which was the defendant in the action, had, when the strike was on, safetymen (men who worked the pumps to keep the colliery dry) still working. The strikers wanted to withdraw these men and if necessary to compel them to cease work by threats of violence. The company asked for a police force to be billeted on its colliery to prevent this and agreed to pay the Glamorgan Constabulary for the police force so to be stationed on its premises. This was done, but, when the time for payment under the agreement came, the company refused to pay on the ground that the agreement was void as being against public policy.

Sir John Simon, who appeared for the company, put his case thus:—

> Where there is a duty on the police authority to provide adequate police protection and there is a discretion as to the way in which that shall be done the law will not support a claim for payment by the police authority because the protection is afforded in one way rather than in another. The discretion vested in the police authority is not to be bought and sold .....as the receipt of payment would tend to bias the authority in the exercise of their discretion.

Viscount Cave L. C. said that—

> No doubt there is an *absolute* and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right.....But.....where individuals desire that services of a special kind, which, though not within the obligations of a police authority, can most effectively be rendered by them, should be performed by members of the police force, the police authorities may "lend" the services of constables for that purpose in consideration of payment.

The majority of their Lordships held that the agreement in question related to special police service and was binding.

(1) [1925] A. C. 270, 271, 277.

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Mr. Gupta argues that the general principle laid down by the House of Lords in this case is that a contract, which requires payment from the subject for the discharge of the public duties, whatever the nature of those duties may be, of the State, is void. In my judgment all depends upon the nature of what duty is alleged to be. It cannot apply to all and every thing which a modern State undertakes to do and cannot apply to each and every undertaking. The matter was not put in such wide form by Sir John Simon, nor do the observations of their Lordships support it. A modern State does employ the revenues of the State, the fund raised from rates and taxes direct and indirect, in many undertakings. Some are employed in devising and maintaining the machineries for the protection of life and property of its subjects from external and internal attacks. Some are employed for promoting the intellectual, moral and material welfare of the subjects, and, amenities of life. Schools and colleges and museums are maintained by all modern States and even churches and places of worship. The extension of commerce is and must be the anxious concern of all modern States. Rapid transit of men and goods and of messages must be provided for. Hence the necessity of railways, post and telegraph offices. But it is not the absolute duty, as in the case of police protection, that the State should provide for all these means of communication to and from every part of its territory. There is no absolute duty that it must be discharged in any case but with a discretion only, in the words of Sir John Simon, as to how it should be discharged. The State, although it may by statute or custom enjoy monopoly, as in the case before us, is not bound to open a post or telegraph office at a particular place at the demand of a group of its subjects. The subject has to pay for the transmission of his messages by stamps and it cannot be said that the general rates and taxes he pays include these matters. These are in the nature of commercial undertakings

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of the State, carried and controlled by it for the benefit of the subject and for its own benefit, and to special agreements between the subject and the State in respect to them the observations of their Lordships in *Glasbrook Brothers'* case cannot be extended. If the argument of Mr. Gupta be sound an agreement with the State by a group of subject to supplement the funds of a college or school started and controlled by the State would be also void. I, accordingly, overrule the first point raised by Mr. Gupta.

Regarding the second point I am of opinion that defendant No. 2 cannot be sued on the contract. He represented that he had authority to act as agent of his father but in fact he had none. He does not thereby become the principal nor can he be regarded as principal on any principle of law. This has been established in a series of cases in England beginning from *Collen* v. *Wright* (1) and other cases noted at p. 106 of Sir Frederick Pollock's book (10th Ed.). The action against such a person is as on the implied warranty that he had the authority. This appears also from the language of s. 235. The representation that he has authority to act as agent may not be fraudulent, all that is required is that it was untrue. So fraud cannot be a necessary element in an action against him. The measure of damages must, accordingly, in substance be what benefit the other party would have had from the contract if the representation that he was the authorised agent had been true. This is the principle formulated in the case of *In re National Coffee Palace Company*. Ex parte *Panmure* (2) and in my judgment the principle applies in India for as I have held above that the basis of the action under s. 235 of the Contract Act as it is in England is the implied warranty by the professing agent. Applying these principles, the position is this; that if defendant No. 2 was in fact the agent of defendant No. 1, the plaintiff would have the

(1) (1857) 8 El. & Bl. 647; 120 E.R. 241.

(2) (1883) 24 Ch. D. 367.

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security of each of the executants for the full amount of the working loss, for the liability of each of them was by the contract joint and several. He could have recovered the whole of the amount from defendant No. 1. This is the benefit which the plaintiff would have had from the contract, if defendant No. 2's representation that he was the agent of defendant No. 1 was true. This benefit the plaintiff must have when that representation has been found to be untrue. Defendant No. 2 is, therefore, jointly and severally liable for the sum claimed. In this case, no doubt there is the same result, as would have followed if he had been sued upon the contract as principal, but that cannot be helped. I, accordingly, overrule this point also, and agree with my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

A. A.