APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

ACHUTHA NAIDU (PLAINTIFF), APPELLANT,

1922, July, 26.

v.

MESSRS. OAKLEY BOWDEN & CO. AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), ss. 215, 17, 19—Principal and agent—Dishonest concealment—Dealing disadvantageous to principal—Repudiation by principal—Difference between English and Indian Law.

By the law of England, if an agent without disclosing that he is the person dealing, himself enters into a contract with his principal the latter on discovering the fact can have the transaction set aside and it is immaterial whether there has been fraud or not or whether the transaction is advantageous or otherwise to the principal. Under section 215 of the Indian Contract Act, to set aside such a transaction the agent should have dishonestly concealed a material fact or the dealing should have been in fact to the disadvantage of the principal.

Per SCHWABE, C. J.—The fact that the plaintiff was a mere dummy is a dishonest concealment of a material fact. The general rules as to fraud which are contained in sections 17 and 19 of the Contract Act are made applicable to principal and agent by section 215 of the Act.

Per WALLACE, J.—Mere concealment of the fact that the agent is dealing in the business of the agency on his own account is not itself dishonest.

ON APPEAL from the judgment of COUTTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 651 of 1919.

The following are material extracts from the judgment of COUTTS TROTTER, J. :—

"Messrs. Oakley Bowden & Co., were the Madras agents of a concern trading as the 'Shoranur Tile Works.' Messrs. Oakley

* Original Side Appeal No. 44 of 1921.

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Bowden had a dubash named Balakrishna Mudaliar and in 1916 Balakrishna Mudaliar introduced one Achuta Naidu, the plaintiff in this case, as a suitable person to act as a contractor in the retail disposal of a very large quantity of tiles, and a contract was entered into between Messrs. Oakley Bowden & Co., on the one hand, and Achuta Naidu on the other, for the delivery by them to him of five lakhs of Mangalore tiles over a period of 14 months. . . .

Now, the first point that was raised was that this was not a contract with the plaintiff at all and that he could not sue on it. I do not propose to go at length through the various pieces of evidence on that point. I think it is abundantly clear from all the documents in the case and the whole history of it and from the extremely unsatisfactory and evasive nature of the evidence given in the box both by the plaintiff and by Balakrishna Mudaliar that the plaintiff was a mere dummy and that the real person who was taking the benefit of the contract was Balakrishna Mudaliar himself. The evidence is that he supervised the whole of the books kept by Achuta Naidu in connexion with the business, that he made entries in his own name, that he actually countersigned delivery orders, that he allowed his clerk Chockalingam, who, I think, was also in the pay of Messrs. Oakley Bowden to assist in the management of the business and in the keeping of accounts, and that he kept the whole of the profits, as they were made, to himself. There is also an entry in one of the books, more than one I think, which contains a record of the plaintiff being paid a month's salary of Rs. 20 by Balakrishna Mudaliar. To my mind, the whole business of Achuta Naidu was a fraud and a sham and the real person behind it and the real person who ran it was Balakrishna Mudaliar, the dubash. I may just finish the history of the case. Subsequently it was discovered by Messrs. Oakley Bowden that the person who was really trading with them was the dubash. Thereupon they instantly dismissed him and put an end to this contract. Out of that arises this suit, which is a suit for damages by the plaintiff for non-delivery of the tiles due under the contract. . . .

Achuta Naidu was, a man of straw. He had some small business at Tiruttani where he apparently met Balakrishna

Mudaliar. The latter brought him up to Madras and got him a job in Messrs. Hoe & Co., at Rs. 15 a month and then from this job in Messrs Hoe & Co., at Rs. 15 a month he suddenly appears as a contractor for the disposal of large quantites of tiles without a shred of capital behind him. At first blush it is very plausible to say, as Mr. Grant did say, that had Messrs. Oakley Bowden known that this man had no capital and was a man of no substance at all, they would not have entered into this contract with him. But when one went into it and saw the way in which the business was transacted, I think there is absolutely nothing in that. It is obvious that these tiles had been sold out in very small quantities, that they were sold retail in smaller quantities and that the money so paid was handed back to Messrs. Oakley Bowden with the exception of the margin of profit which the contractor got for himself. He was really more a disposing channel than anything else and that part of the case. I think, is completely gone when one knows that the previous contractor was a person very much of the same type as Achuta Naidu.

There is however, a much more serious contention which I have to deal with on the part of the defendants and it is this. They say here is a contract which purports to be with a stranger, but which, in reality, was, had they known it, with their own dubash, and they ask me to say that, in law, it vitiates the contract."

His Lordship referred to the English Law and to section 215 of the Contract Act. Referring to illustration (*a*) to the section his Lordship continued :

* * * *

"Now, it is perfectly obvious from that illustration that what was contemplated as a material fact must be a material fact other than the mere fact that the real contracting party was the agent of the principal and, therefore, so far as the section goes, I must hold that there are cases in India where the fact that the agent is the real contracting party, the real undisclosed principal, does not, of itself, entitle the principal to repudiate. If the matter ended there, that would completely establish the plaintiff's case, because it is not suggested here, as I understand, that the defendants are in a position to prove the concealment of any material fact other than the personality of the undisclosed

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principal, nor are they able to say that they have been in any particular way damnified by reason of the true facts of the case.

But the matter is put in another way. It is quite clear from Messrs. Oakley Bowden's subsequent conduct that had they known that Achuta Naidu was a mere mask for their own dubash Balakrishna Mudaliar, they would not have touched this contract. They dismissed him not merely from this particular business in connexion with the Shoranur Tile Works, but they dismissed him out and out at a moment's notice as their dubash for all purposes, and also put an end to this contract. That seems to me to show conclusively that they regarded this as a matter of gravity and as one which they would not tolerate. It is clear that difficulties might arise in connexion with the contract where it would be essential that their own dubash would be able to serve them with an undivided mind and an undivided allegiance. Moreover, that that was necessary in this case is shown by the fact that, when the defendants, rightly or wrongly, justifiably or unjustifiably, tried to get out of this contract if they could, Balakrishna Mudaliar was reduced to such a desperate expedient as sending a lying telegram by a clerk and posting it to him to say that Achuta Naidu, the plaintiff, could not be found or that he was at some place where he was not. What does all that point to? It obviously points to this that it was thought essential by the persons concerned to keep from Messrs. Oakley Bowden the knowledge of who the real principal was and it also shows, to my mind, conclusively the mischief of the thing and the sanity of the English rule which has been tampered with in the Indian Contract Act, section 215, that such a state of things is obviously intolerable unless it is done with the permission of the principal.

His Lordship cited *Smith* v. *Wheatcroft*(1), *Boulton* v. *Jones*(2), *Gordon* v. *Street*(3), *Said* v. *Butt*(4) and continued :—

"The principle of those cases is that, where the personality of the contracting party is material and can be supposed to have been an element weighing in the mind of the person with whom the contract was made, the deceit or fraud as to the true identity of the undisclosed principal vitiates the contract and

(1) (1878) 9 Ch. D., 223.
(2) (1857) 2 H. & N., 564.
(3) [1899] 2 Q.B., 641.
(4) [1920] 3 K.B., 497.

entitles the other party to it to repudiate it, within a reasonable time, of knowing the true facts. This rule is entirely independent of the relation of principal and Agent; it is a general principle of the law of contract. Of course, whether or no the personality of the contracting party in the given case would weigh is a question of fact which I have to determine, and, for the reasons I have given, I have no doubt whatever that, had Messrs. Oakley Bowden known that the undisclosed principal was Balakrishna Mudaliar himself, they would not have entered into this contract, and that would entitle them to repudiate it. I cannot put it better than by quoting the questions and answers put to the jury in *Gordon* v. *Street*(1) :—

'*Q.*—(1) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money of him as if from another, and, if so was the defendant so induced?

A.—Yes.

Q.—(2) Did he—i.e., Isaac Gordon—do so fraudulently?

A.—Yes.

Q.—(3) Did the defendant contract with Addison believing him to be a money-lender of that name?

A.—Yes.

Q.—(4) Did the defendant repudiate the contract so soon as, or within a reasonable time after, he discovered that Addison was really Gordon?

A.—The defendant repudiated the contract within a reasonable time after he knew he could do so.'

Mutatis Mutandis all these questions may be put in this case and, in my opinion, they may, and must, be answered in exactly the same way. I, therefore, hold that the fraud of representing Achutha Naidu to be the real contracting party here, when, in truth, and in fact, the contract was with the dubash, was a fraudulent representation which vitiated the contract, and entitled the defendants to set it aside."

Advocate-General and *O. T. Govindan Nambiyar* for appellants.

C. Sydney Smith for the first Respondent and *V. Radhakrishnayya* for second respondent.

(1) [1899] 2 Q.B., 641.

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The Court delivered the following JUDGMENT:—

SCHWABE, C.J.—This is an appeal from the judgment of Mr. Justice COUTTS TROTTER in which he found that a certain contract for the purchase of tiles could be repudiated by the defendants. The facts appear fully from his judgment and may be stated shortly thus:—The plaintiff entered into a contract with the first defendants who were themselves agents for the second defendants for the supply over a period of a large number of tiles at a fixed price. Plaintiff in fact was a man of straw and was a mere alias of or dummy contractor for Balakrishna Mudaliar, the dubash of the first defendants. It was well known to that dubash and it must be taken to have been within the knowledge of the plaintiff that no such contract would have been entered into by the first defendants if they had known the true facts. The first defendant has sworn that he would not have made such a contract and the reasons are obvious. It is difficult to imagine anything more undesirable for persons handling the whole output of tiles of a certain manufacture than that their dubash and local agent should have a large running contract for these tiles, the effect of which would make him a competitor with his own principals in the market which it was his duty to exploit for the benefit of his principals and not for the benefit of himself. The act of this dubash and the plaintiff was on the facts found, in my judgment, a fraudulent conspiracy. On discovery of this fraud the defendants refused to carry out the contract any further, the contract having been partly performed; and an action was brought by the plaintiff for damages for loss. He alleges that he suffered by reason of this repudiation. The defence to that action is fraud. Defendants say they were induced by the fraud mentioned above to enter into the contract.

Having been induced to enter into the contract by fraud, they can, according to law, repudiate the contract on discovering the fraud. The learned Judge has held that that contract was induced by fraud and has given judgment for the defendants on that ground alone, pointing out and giving English authority for the proposition that a fraud as to the identity of the contracting party is as much a fraud as any other fraud; and with that part of his judgment I entirely agree. And it would be unnecessary to say anything further but for the fact that points were argued under the Indian Contract Act and decided in favour of the plaintiff by the learned Judge and that I do not agree with his finding on that part of the case. The point shortly taken is that section 215 protects this particular fraudulent agent. Section 215 is in the following words :—

"If an agent deals 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 own knowledge on the subject, 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 argued that that section contains the whole law in this country in relation to dealings between agents and their principals and that the law there stated is different to the law of England. I agree that the law as there stated is different to the law of England. By the law of England, if an agent, without disclosing the fact, that he is the person dealing, himself deals with his principal, the principal on discovering that fact can have the transaction set aside, and it is wholly immaterial whether the transaction is advantageous or disadvantageous to the principal and it is wholly immaterial whether there has been fraud or not. The law on the subject in England is very strict indeed,

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the view being that the Court will not allow a man in a fiduciary capacity to put himself in a position in which his interest might be adverse to the interest of his principal. He may have the best intentions in the world but the law of England requires more, requires that a man in a fiduciary capacity should not be subject even to the temptation of taking advantage of his position. The law here as stated in section 215, in order to set aside such a transaction, does require either that the agent should have concealed a material fact dishonestly or that the dealing should have been in fact to the disadvantage of the principal. In my judgment—and here is where I differ from the trial Judge—in this case both these conditions were fulfilled. A fact was dishonestly concealed by the agent and that fact was the fact that the plaintiff was a mere dummy for the first defendant and I am unable to accede to the very able argument of the Advocate-General that that is not the sort of dishonesty contemplated by this section. On the contrary, in my judgment those words in section 215 are put there expressly to keep applicable to the case of principal and agent the general rules as to fraud which appear in sections 17 and 19 of the Act. Further, in my judgment this action of the plaintiff and of the dubash must necessarily have been disadvantageous to the principal. The dubash had many duties to perform for his principals and to have such a running contract for a period of time between himself and his principals without their knowing that it was their dubash's contract must inevitably and constantly put the dubash into a position where his duty and his interest must conflict. Further, the mere fact that there was this large quantity of tiles to be given to the dubash under the contract which he was not going to use for building but was going to retail must have an effect on the market. It may and indeed must be to the disadvantage

of his principal who wished to handle that market. It follows that this appeal must be dismissed. We allow two sets of costs.

I wish to add that I am not satisfied that, even if section 215 would afford any answer to the dubash if he had brought an action and this plea was put in issue as defence, a similar benefit would accrue to the plaintiff who was not in fact agent for either of the defendants.

WALLACE, J.—I agree. I just wish to give shortly in my own words why I do not agree with the interpretation which the learned Advocate-General wishes us to put on section 215 of the Contract Act. He asks us to say that the "material fact" the dishonest concealment of which by the agent enables the principal to repudiate, is a fact other than the agent's dealing in the business of the agency on his own account. This implies that the agent would be entitled not only to conceal, but also to dishonestly conceal, that fact. I am confident that the section cannot be so interpreted. It no doubt differs from the English law in that under section 215 mere concealment of the fact that the agent is dealing in the business of the agency on his own account is not in itself dishonest, and will not of itself enable the principal to repudiate; and that position in my opinion is indicated by illustration (*a*) to the section. But, where the concealment has been dishonest I am confident that such dishonesty is not rendered lawful by this section, but carries with it the usual effect of dishonesty or fraud upon the contract and renders it voidable. I am clear that the section cannot be used to render lawful actual dishonesty on the part of an agent. Whether in any particular case the concealment of this material fact was dishonest of course has to be decided on the facts of the case itself. So that the sole question in this appeal, I think, is whether the concealment by

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Balakrishna Mudaliar that he and the plaintiff Achutha Naidu were the same person was dishonest. I think that the action of Balakrishna Mudaliar (which has not been defended by the learned Advocate-General before us), as set forth by the learned Judge in his judgment, and the evidence and the subsequent conduct of Oakley Bowden show that the concealment in this case was dishonest. The agent concealed from his principal the fact that he was dealing himself in the business of the agency, in order to obtain for himself a wrongful gain, that is to say, a gain which he knew he would not have got had he disclosed the fact honestly to his principal. I agree therefore that the appeal should be dismissed with two sets of costs.

SHORT BEWES & Co., solicitors for appellant.

GRANT & GREATOREX, solicitors for 1st respondent.

M.H.H.

APPELLATE—CIVIL.

Before Sir Walter Salis Schwabe, K.C., Chief Justice, and Mr. Justice Wallace.

1922, August 24.

P. R. SREENIVASA AYYANGAR (JUDGMENT-DEBTOR), APPELLANT

v.

S. L. NARAYANA RAO (ASSIGNEE-DECREE-HOLDER), RESPONDENT.*

Limitation Act (IX of 1908), art. 182, cl. 5—Step in aid of execution—Execution of decree—Decree of Mysore District Court—Transmission of decree to Madras High Court—Application for transmission, ordered by Mysore Chief Court after contest as to limitation—Execution petition filed in Madras High Court after records, etc., received—Plea of limitation, again raised by judgment-debtor—Res judicata—Foreign judgment—Civil Procedure Code (V of 1908), s. 13—Judgment of Mysore Chief Court as to step in aid, whether conclusive—Bar of limitation—Order, whether a judicial or ministerial act.

* Original Side Appeal No. 40 of 1921.