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guardian *ad litem*. This was the view taken by this Court in *Sham Lal* v. *Ghasita* (1) and this case is followed in an unreported case, S. A. No. 1234 of 1905, decided on the 1st of February 1907. On behalf of the respondents an attempt was made to distinguish this case from those cases on the ground that in neither of them was a married woman a guardian appointed by an authority competent to appoint a guardian. Musammat Jamna Kunwar is a guardian appointed by competent authority to Kundan Lal and Balbhadra Prasad while they were minors. Our attention is called to the provisions of section 443 of the Code of Civil Procedure, also to the ruling in *Kachayi Kuttiali Haji* v. *Udumpumthalu Kunhi Puttra* (2). Looking, however, to the plain words of section 457 we hold that in no case can a married woman be appointed as guardian *ad litem*. Inasmuch as she is so disqualified, any apparent appointment of her as guardian is not a mere irregularity.

We decree the appeal, set aside the decree of the Court below and grant the plaintiffs a declaration to the effect that decree No. 77, passed by the Subordinate Judge on the 16th of November 1900, and the decree in appeal be discharged. The plaintiffs will get their costs in both Courts.

Appeal decreed.

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July 9.

Before Mr. Justice Richards and Mr. Justice Griffin.

DAMODAR DAS (PLAINTIFF) *v.* SHEORAM DAS AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 (*Indian Contract Act*), *sections* 198, 211 *and* 216—*Principal and agent—Ratification—Suit for adjustment of accounts—Two appellate decrees in similar terms—Appeal from one of such decrees only—Res judicata.*

From the decree in a suit for adjustment of accounts both parties appealed. Both appeals were decided by one and the same judgment. Two decrees were framed; but these were in substance identical. The plaintiff appealed from the decree in one appeal only. *Held* that his appeal was not barred by reason of his not having appealed also from the decree in the other appeal. *Mariam-nissa Bibi* v. *Joynab Bibi* (3) and *Panchanadu Velan* v. *Vaithinatha Sastrial* (4) followed.

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* Second appeal No. 980 of 1906, from a decree of E. O. E. Leggatt, Esq., District Judge of Bareilly, dated the 2nd of June 1906, modifying a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 30th of September 1904.

(1) (1901) I. L. R., 23 All., 459.
(2) (1905) I. L. R., 29 Mad., 58.
(3) (1906) I. L. R., 33 Calc., 1101.
(4) (1905) I. L. R., 29 Mad., 333.

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The defendants as agents for the plaintiff entered into certain contracts for the sale of grain for future delivery. The defendants discharged these contracts by means of goods of their own, and when subsequently the plaintiff sent on grain to the defendants to meet these contracts the defendants sold the plaintiff's grain at a profit. The defendants did not inform the plaintiff either that they had fulfilled the contracts with their own grain or that they had resold the plaintiff's grain at a profit.

Held that the plaintiff was entitled to whatever profit was realized by the defendants on this latter transaction.

Held also that where on a direction by the principal to his agents to purchase grain for him, the agent sold to him their own grain at a price higher than the prevailing market rate, the principal was entitled to repudiate the transaction and could not be alleged to have ratified it in the absence of knowledge that the agents were selling their own property and were charging him in excess of the market rate.

THIS appeal arose out of a suit for an adjustment of accounts between the plaintiff and the defendants. The defendants were commission agents carrying on business at Calcutta, and they had acted as agents for the plaintiff in a considerable number of transactions. The Court of first instance (Subordinate Judge of Bareilly) made a decree against which both parties appealed. The lower appellate Court (District Judge of Bareilly) disposed of both appeals by one judgment and found in favour of the defendants for a sum of Rs. 1,401-4-0 principal, and Rs. 232-5-6 interest from the institution of the suit to the date of the decree at 6 per cent. per annum. The decrees in both appeals were, *mutatis mutandis*, exactly similar. The plaintiff appealed from one only, and it was objected *in limine* that the appeal was barred by the principle of *res judicata*. The appeal further questioned the decision of the District Judge as to a variety of specific items upon various grounds, which are dealt with in the judgment of the Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pândit *Sundar Lal* and Mr. *M. L. Agarwala*, for the respondents.

RICHARDS and GRIFFIN, JJ.—This was a suit for an adjustment of accounts between the plaintiff and the defendants. The defendants are commission agents, carrying on business in Calcutta, and they have acted as agents for the plaintiff in a considerable number of transactions. On the 2nd of March 1902, accounts were settled between the parties, and a sum of

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Rs. 684-5-6 was found due to the plaintiff. The case was originally tried before the Subordinate Judge of Bareilly, and the result of his decree was an appeal by the plaintiff and also an appeal by the defendants. The lower appellate Court disposed of both appeals in one judgment and found in favour of the defendants for a sum of Rs. 1,401-4-0 principal, and Rs. 232-5-6 interest from the institution of the suit to the date of the decree at 6 per cent. per annum. He made a similar order in the plaintiff's appeal which was No. 411. The plaintiff has brought this second appeal without instituting a second appeal against the decree in appeal No. 411. As a preliminary objection, it was urged before us that the present appeal could not be sustained on the ground that the decree in No. 411 had become final and operated as *res judicata*. In our judgment there is no force whatever in this objection. There was in fact but one decree settling the accounts between the parties. No doubt this decree was written out in duplicate in both the appeals to the lower appellate Court. We overrule this preliminary objection, and in doing so we may refer to the case of *Mariam-nissa Bibi* v. *Joynab Bibi* (1) and also to the case of *Panchanada Velan* v. *Vaithinatha Sastrial* (2).

To go to the merits. It must be remembered that throughout there existed between the parties the relation of principal and agent. The several items in dispute require separate consideration. The first item is a sum of Rs. 1,452-15-9. This sum represents a profit made by the defendants under the following circumstances. The defendants as agents for the plaintiff entered into certain contracts for the sale of certain grain for future delivery. The defendants by means of goods of their own discharged these contracts, and when plaintiff sent on goods to the defendants, the contracts being already fulfilled, the latter resold the goods and realized the substantial profit of Rs. 1,452-15-9. The defendants did not inform the plaintiff that they had by means of their own goods fulfilled the contracts made on his behalf, nor did they inform him that they were reselling the goods forwarded by the plaintiff. The plaintiff claims that in the adjustment of the accounts between himself and the defendants he is entitled

(1) (1906) I. L. R., 33 Calc., 1101. (2) (1905) I. L. R., 29 Mad., 333.

to have this sum of Rs. 1,452-15-9 put to his credit. The defendants, on the other hand, contend that inasmuch as the plaintiff was bound to discharge the contracts that had been entered into on his behalf, it made no difference to the plaintiff that the defendants resold the plaintiff's goods and made a profit, that the plaintiff lost nothing, and the sum of Rs. 1,452-15-9 should not be brought into the accounts at all. The learned District Judge in dealing with this matter (at page 18 of the paper-book) says :— "It seems to me that in all three cases the Court below has been under a misapprehension as to the nature of the transactions in question. In each case the defendants' duty, when they got instructions from the plaintiff to make a forward contract for the sale of goods, was simply to make the contract as soon as possible at the market rate prevailing at the time for the delivery desired. That being done, the plaintiff was bound to deliver at the rate contracted for at the time agreed on, whether the result was a loss or gain to him, and it follows that the defendants were not bound to credit him with more than the price contracted for. It was not the defendants' duty (and indeed this has never been contended) to hold on behalf of the plaintiff until they thought a favourable opportunity had arrived for selling. In fact, the plaintiff had a sort of representative in Calcutta, Durga Prasad, who used to advise him as to when he should sell or buy. The defendants had simply to obey orders. When the contract had been completed on behalf of the plaintiff the matter passed out of his hands and the goods, which he was bound by the contract to deliver, ceased for all intents and purposes to be his own, and it mattered nothing to him who actually took delivery of his particular consignment, and indeed it may well be asked why the plaintiff selling on a particular date at the market rate then prevailing should expect to receive payment at a higher rate than he had contracted for." We do not at all agree with the view taken by the learned Judge as to the result of the dealing by the defendants in the plaintiff's goods. Notwithstanding his reference to Durga Prasad it cannot be for a moment disputed that the defendants were the agents for the plaintiff. So long as the relation of principal and agent continued between the plaintiff and defendants, the plaintiff was entitled to the exercise of the

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disinterested skill, diligence and zeal of the defendants for his exclusive benefit.

It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the agency on his own account. Section 216 of Act No. IX of 1872 expressly provides that where an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. Section 211 provides that the agent is bound to conduct the business of his principal according to the directions given by the principal. If he does otherwise and a loss is sustained, he must make good the loss; if profit accrues, he must account for it. An agent must never place himself in a position in which it is possible that his duty to his principal and his own interests would stand in opposition to each other, and on this principle it has been held that an agent employed to settle a debt cannot purchase it upon his own account. So long as the relation of principal and agent continues, the agent is only entitled to his ordinary compensation for his services; all other profits and advantages made by him in the business belong to his employers. The law is well put in Story on Agency, para. 207:—"It may also be stated as generally true that all profits which are made by the agent in the course of the business of the principal belong to the latter. Indeed, this doctrine is so firmly established upon principles of public policy that no agent will be permitted to take beyond a reasonable compensation for his services or any profit incidentally obtained in the execution of his duty, even if sanctioned by usage. Such a usage has been severely stigmatized as a usage of fraud and plunder. When the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct, and when the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof." It seems to us perfectly clear that the defendants are bound to account for the profit which they made by the resale of the plaintiff's goods, and it is no answer to the plaintiff's claim to say that the plaintiff lost nothing by the transaction.

Accordingly we hold that the plaintiff is entitled in the settlement of the accounts between him and the defendants to take credit for this sum of Rs. 1,452-15-9.

The next disputed item is a sum of Rs. 264-13-0. This sum represents a loss incurred under the following circumstances. The plaintiff directed the defendants to purchase on his behalf certain grain. Without informing the plaintiff the defendants sold to the plaintiff their own goods, the price being slightly in excess of the market rate, and they charged commission and brokerage. The plaintiff claims to be entitled to repudiate this transaction altogether. It resulted in a loss to the plaintiff of Rs. 264-13-0. It is alleged that the plaintiff ratified this transaction. It, however, appears that he was not aware until after the institution of the suit that the defendants had charged him in excess of the market rate, nor did he know until November 1902, that the defendants were selling their own goods. Section 198 of Act No. IX of 1872 provides that there can be no valid ratification until after knowledge of all material facts. We hold that there could be no ratification under the circumstances by the plaintiff, and that he is, therefore, entitled to repudiate the whole transaction. We hold, therefore, that the plaintiff is not to be debited in the adjustment of the accounts with any part of this sum.

The third item in dispute is a sum of Rs. 107-5-0. The plaintiff had instructed the defendants to buy certain wheat for him. The defendants in pursuance of these instructions sold to the plaintiff their own wheat. The market fell and they resold at a loss, charging the plaintiff commission and brokerage on both the purchase for the plaintiff and the resale afterwards. The plaintiff contends that the defendants are not entitled to charge the brokerage and commission upon the sale to him without his knowledge of their own goods. We hold this contention to be well founded. The defendants have got credit for their brokerage and commission upon the resale.

The fourth item is a sum of Rs. 173-10-6. This item was another transaction of an exactly similar nature to the one last mentioned. The brokerage and commission on the sale to the plaintiff of the defendants' own goods amounts to the sum of

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Rs. 173-10-6. It is true that the learned District Judge allowed the plaintiff's contention as to 25 tons, but the sum which we have mentioned is brokerage and commission upon the balance. We hold, as in the case of last item, that under no circumstances could the defendants claim brokerage and commission upon a sale of their own property to their principal without his knowledge and consent.

The only remaining item is a sum of Rs. 83-11-6. It appears that by a mistake the defendants sent a number of gunny bags to the plaintiff. The plaintiff informed the defendants of the mistake. The defendants gave no instructions to the plaintiff as to what should be done with the gunny bags, and they remained for a considerable period with the plaintiff. The learned Judge has charged the plaintiff with the full price of the gunny bags in the first instance, allowing him a similar sum on their return. The plaintiff has also been charged with the freight both ways. These are admitted facts. It seems to us that the plaintiff should not be charged with the defendants' mistake. The plaintiff was only to blame in so far as he did not at once return the bags. But, on the other hand, it must be remembered that he informed the defendants that the gunny bags had been sent by mistake and the defendants gave no instructions as to what should be done. This sum we also think must be credited to the plaintiff.

The amounts of the several items we have dealt with are undisputed and have been agreed to by the parties, they amount in all to a sum of Rs. 2,082-7-9. The decree in defendants' favour was for a sum of Rs. 1,633-9-6, which was made up of a sum of Rs. 1,401-4-0 principal, and Rs. 232-5-6 interest up to the date of the institution of the suit. It is quite clear that the defendants were not entitled to interest unless there were some moneys due to them. In the view which we take, there was nothing due by the plaintiff to the defendants. Accordingly the sum of Rs. 1,401-4-0 must be deducted from Rs. 2,082-7-9 to which we hold the plaintiff entitled to credit.

This will leave a balance in favour of the plaintiff of the sum of Rs. 681-3-9.

We accordingly allow the appeal, set aside the decrees of the lower Courts, and we find that on the settlement of the accounts

between the plaintiff and the defendants there is due to the plaintiff the sum of Rs. 681-3-9. In addition to this the plaintiff will get interest from the institution of the suit on the sum of Rs. 681-3-9 at the rate of 6 per cent. per annum, and future interest at the same rate upon this amount until the amount is paid. The objection is not pressed. It is dismissed. The parties will have their proportionate costs in all Courts.

Appeal decreed.

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REVISIONAL CRIMINAL.

1907
July 30.

Before Mr. Justice Richards.

EMPEROR *v.* GOKUL.*

Act (Local) No. I of 1900—*(United Provinces Municipalities Act), sections* 82, 87(3)—*Application for permission to build—Implied permission—Power to erect necessary scaffolding.*

Where application for permission to build has been made to a Municipal Board and the period mentioned in section 87(3) of the Municipalities Act, 1900, has expired, the applicant is in the same position as if the erection of the building specified in his application had been formally sanctioned by the Board. A sanction, express or implied, to the erection of a specified building necessarily carries with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the work.

IN this case one Gokul applied to the Municipal Board of Cawnpore for sanction to erect certain buildings within Municipal limits. For the space of one month the Board took no notice of Gokul's application. Gokul thereupon applied to the Board again for orders on his former application, but the Board took no notice of this either. After the lapse of a further period of one month Gokul commenced to erect the buildings in respect of which he had applied for sanction. In so doing Gokul set up some scaffolding. Thereupon the Board ordered him to take down the scaffolding which he had erected, and, on his failure to do so, prosecuted him. Gokul was convicted under sections 168 and 147 of the Municipalities Act, 1900, and sentenced to pay a fine. He thereupon applied in revision to the High Court to have the conviction and sentence set aside.

* Criminal Revision No. 380 of 1907.