

Before Mr. Justice Loch and Mr. Justice Macpherson.

RAM BAKS LAL (PLAINTIFFS.) v. KISHORI MOHAN
SHAHA AND OTHERS (DEFENDANTS.)*

1868
July 7.

Principal and Agent—General or Special Power of Agent—Evidence of Agency—Witnesses.

Where the evidence goes to show that a particular person said to be the agent of the defendant was really his general agent, and did transact business of various kinds for his principal, it is unnecessary to prove any special power enabling him to enter into a particular contract of bargain and sale.

Per MACPHERSON, J.—The extent and nature of the powers vested in an agent are not so much matter of law as matter of fact. If it be proved that a person acted ordinarily as an agent for the defendant in buying and selling articles of merchandise, the fact of his not being proved to have previously purchased a particular kind of article would not necessarily operate against the plaintiff's case. The Court in deciding the question of agency must look to the general evidence on the record.

A Court of first instance decreed a case *ex parte* in favor of the plaintiff, and at a rehearing, did not recall the plaintiff's witnesses, whom therefore the defendant had no opportunity to cross-examine, and again gave a decree for the plaintiff. The lower Appellate Court rejected the evidence of plaintiff's witnesses, and reversed the decree.

Held, that the Court of first instance should have recalled the plaintiff's witnesses and given the defendant an opportunity of cross-examination. Case remanded accordingly.

THE facts of this case, so far as it is necessary for the present purpose to detail them, are as follows :

The plaintiff sued as mokhtar gomasta of Megraj and Harbilas, who carried on business together as merchants : he claimed rupees 1,091-13, the balance of money due for cotton sold to the defendants through one Gyanath Shaha, who, as was alleged by the plaintiff, acted as their general agent. The defendants denied their liability, on the ground that Gyanath Shaha had never been authorized by them to make the purchases of the cotton for part value of which the suit was instituted.

The Subordinate Judge of Moorshedabad at first decreed the suit *ex parte* in favor of the plaintiff, the defendants having

* Special Appeal, No. 392 of 1869, from a decree of the Officiating Judge of Moorshedabad, dated the 18th December 1868, reversing a decree of the Subordinate Judge of that district, dated the 30th June 1868.

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failed to appear ; but he afterwards granted a re-hearing. On this second occasion he relied on the evidence of certain witnesses who had been called by the plaintiff in the first hearing of the suit, and whose evidence had been then taken in the absence of the defendants ; but these witnesses were not examined on the re-hearing of the case. He also relied on certain khatta books, and remarked : “ it appeared that the defendants had received from the firm belonging to the plaintiff’s master, on the date specified in the plaint, a certain quantity of cotton, and paid the value thereof, save sicca rupees 1,091-13.” He considered it proved that Gyanath Shaha was the mokhtar gomasta of the defendants’ firm, and gave a decree for the plaintiff.

The Judge on appeal reversed the above decision, on the ground that the general agency of Gyanath Shaha had not been proved. He said, “ the evidence on behalf of the plaintiff heard at first was not adduced at the re-hearing of the suit by the Court of first instance. There was nothing before the Court but the evidence of several witnesses and entries in khatta books which showed that Gyanath Shaha had acted as agent for the defendants in certain transactions connected with the negotiation of hundis. The mere fact of Gyanath Shaha being proved to be mokhtar gomasta of the firm would not be sufficient to establish the liability of the firm in the present case, unless it be also proved that he was authorised to make contracts of bargain and sale.” The plaintiff’s suit was therefore dismissed.

The plaintiff then appealed to the High Court.

Baboo *Ashutash Chatterjee*, for appellants, contended, that by the special custom of mahajans, the act of the agent or gomasta was recognized as the act of the mahajan or principal himself ; and that when the lower Appellate Court found that Gyanath Shaha was the mokhtar gomasta of the defendant’s firm, it was not necessary to prove special powers.

Baboo *Bhagabati Charan Ghose* for respondents.

LOCH, J.—I think this case must go back to the first Court. It appears that when the case was first tried, the defendants, the

respondents before us, were not present, and the case was decided *ex parte*. The respondents subsequently prayed for a re-hearing. Their prayer was granted, and the Subordinate Judge, after taking evidence, found that Gyanath was the gomasta of the defendants, respondents; that the cotton had been made over to them through Gyanath; and that part payments had been made by defendants by means of hundis, and therefore the plaintiff was entitled to receive the balance from the defendants, respondents.

On appeal the Judge rejected, and very properly, the evidence taken in the absence of the defendants, respondents; and with regard to Gyanath, he held that even if the evidence were sufficient to prove that Gyanath was the mokhtar gomasta of the defendants, yet it would be necessary for him to have a special power from his principals to enable him to purchase goods such as cotton, etc., on their account; that there was no proof taken after the order for re-hearing, as to the delivery of the cotton and part payment by the defendants, respondents; and that the most of the evidence on which the lower Court rested its judgment went to prove was, that Gyanath acted as agent for the defendants for the transaction of a business in hundis, and that the plaintiff failed to make out that Gyanath had general power to act for the defendants.

I think the case must go back, because, when it was re-tried, the evidence which was taken in the absence of the defendants should not have been used against them, but the Court should have allowed the plaintiff an opportunity to produce those or other witnesses, and have permitted the defendants to cross-examine them.

With regard to the position of the gomasta, I think the Judge has taken a wrong view, in considering that it was necessary for the agent to have special powers from his principals to purchase certain kinds of goods; and the view he has taken appears to have had some effect on his judgment. If the evidence goes to show that the party said to be the agent was really a general agent, and did transact business of various kinds for his principal, no special power was required for him to transact this particular business.

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This case will go back to the first Court, who will send for the witnesses who were first examined, and allow the respondents to cross-examine them; and the Court will allow both parties to adduce further evidence if they think proper to do so; and the Judge, after hearing the evidence, will dispose of the case.

By consent of the plaintiffs pleader the suit remains dismissed as against Gyanath, and the suit will be proceeded with only against the other defendants, respondents.

The costs of this appeal will follow the final result of the case.

MACPHERSON, J.—I concur. I wish to add that even if the Courts shall be of opinion that Gyanath Shaha was, as he was found to be by the Subordinate Judge, a mokhtar gomasta of the defendants, still there will remain to be decided upon the evidence the question what his powers as such mokhtar gomasta were. Whether he was mokhtar gomasta or not, it must be proved as a fact that he had authority to bind the defendants so as to make them liable for contracts entered into by him. The extent and nature of the powers vested in an agent are not so much matter of law as matter of fact to be decided in each case in which a question of agency arises. In the present instance, supposing that Gyanath had no written power of attorney or mokhtarnama under which he was carrying on the defendants' business, if it shall be proved that he acted ordinarily as the agent to the defendants in buying and selling other articles of merchandize, the fact of his not being proved to have previously purchased cotton, will not necessarily operate against the plaintiffs case that he purchased the cotton on account of the defendants. If, on the other hand, there is no evidence of Gyanath Shaha having bought and sold goods on account of the defendants, and of his acts having been recognized and adopted by the defendants, or by those who, for the time being, were the members of the firm at Mirzapore, now represented by the defendants; and if this purchase of cotton was the first transaction in the buying of merchandize that was entered into by him, then, in the absence of evidence that the defendants actually received or paid for the cotton, it may be difficult to hold it proved that Gyanath acted as the defendants' agent, so as to bind them by

what he did. But the Courts in deciding the question of agency must look to the general evidence on the record as to the mode of dealing pursued by Gyanath and by those whom he alleged to be his principals.

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The Subordinate Judge says that it is proved that certain part payments, on account of this cotton, were made by the defendants. It seems doubtful whether the Subordinate Judge intended to say more than that payments on account were made for the defendants by Gyanath. How this may really be, I cannot say : but it is evidently most important that it should be ascertained with the utmost accuracy and distinctness, how and by whom and when those payments on account of the cotton purchased by Gyanath, were made. If payments were made by the defendants direct, as if they sent hundis to the sellers of the cotton, it would go far to prove their liability. If, on the other hand, the payments were merely made by Gyanath, and it is not proved that they were made with the defendants' cognizance or by their order, it would prove nothing as against them. The case is one of some nicety and importance in itself, and the Court must try it with care and accuracy. The parties should be allowed to adduce further evidence, if they desire to do so.

Before Mr. Justice Kemp, and Mr. Justice Glover.

RADHA KRISHNA (DEFENDANT) v. W. C. O'FLAHERTY
(PLAINTIFF).*

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July 9

Landlord and Tenant—Damage by Fire—Negligence—Notice by Landlord of a Defect in the Building.

The plaintiff hired a thatched bungalow of the defendant, entered into possession and after living in the house sometime, lit a fire in the fire-place in one of the rooms. The chimney took fire, and the plaintiff's furniture was destroyed. He subsequently ascertained that the chimney had been thatched over, of which fact he had been all along ignorant.

Held, the landlord defendant was liable in damages for the loss sustained by him.

* Special Appeal, No. 920 of 1869, from a decree of the Judge of Patna, dated the 19th January 1869, reversing a decree of the Officiating Subordinate Judge, dated the 21st May 1868.