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RAM SINGH v. DEPUTY COMMISSIONER OF BARA BANKI.

Then the plaintiffs claim that, if they are not proprietors, they have at all events a sub-proprietary right; and there are cases in which it would be quite just and proper to allow one who comes to claim recovery of villages, or the right to a settlement in villages, on the ground of a proprietary right, to maintain upon the same facts that he is in effect a sub-proprietor; but this is not such a case. The question of sub-proprietary right is entirely irrelevant to the relief claimed in this suit, which is for a declaration of right on which to found a mutation of names in order that effect may be given to the dealing with the estate by the plaintiffs.

Their Lordships, thinking that the suit fails upon the main point, hold that it also fails upon the other points; and the result will be that they will humbly advise Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitor for the respondents: *The Solicitor, India Office.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Pigot.

GUBBOY (PLAINTIFF) *v.* AVETOOM (DEFENDANT).*

1890 *January* 15.

Principal and agent—Contract Act (IX of 1872), s. 230—Undisclosed principal.

A broker gave to one Gubboy the following sold note:—"Sold this day by order and for account of E. E. Gubboy, to my principal, G. P. Notes for Rs. 2,00,000 (two lacs) at Rs. 98-11.

"(Sd.) A. T. A.
Broker."

This note was endorsed—"A. T. A., for principal."

In a suit by Gubboy against the broker for failure to take delivery: *Held*, that there was nothing in this contract to rebut the personal liability of the broker.

* Small Cause Court Reference No. 7 of 1889, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 8th July 1889.

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GUBBOY v. AVETOOM.

REFERENCE from the Calcutta Court of Small Causes.

The suit was originally brought in the Court of Small Causes, by one E. E. Gubboy to recover from the defendant one A. T., Avetoom, a broker, Rs. 2,000 as damages for refusing to take delivery of Government 4 per cent. Paper of the value Rs. 2,00,000.

The contract in the case was dated the 4th October 1888 and ran as follows:—

"Sold this day by order and for account of Elias E. Gubboy, Esq., to my principal, Government of India 4 per cent. *Promissory* Notes for Rs. 2,00,000 (two lacs only), at the rate of Rs. *98-11*, clear of brokerage.

A. T. AVETOOM,
Broker.

Endorsed,
A. T. AVETOOM,
4-10-88. *for principal.*

"Delivery and cash on the 3rd and 4th January 1889."

On the 8th November A. T. Avetoom wrote to E. E. Gubboy stating that he had accepted the contract for his principal adding, "Please note that principal is Babu Tincowrie Dass, to whom please deliver the paper on due date."

To this letter the attorney of E. E. Gubboy replied, "My client cannot accept any principal in the transaction whatsoever, you having declared to him at the time of entering into the contract that it was a mere matter of form your entering the words 'my principal' in the contract, and that when asked you declined to disclose the name of your principal." The facts stated in this letter were denied by A. T. Avetoom in a letter in reply.

The plaintiff tendered the paper on due date, but the defendant, believing himself not to be liable, had made no arrangements to take up the paper.

At the hearing the plaintiff's own evidence failed to establish the facts stated in his attorney's letter to A. T. Avetoom, *viz.*, that the defendant had told the plaintiff that he himself was really the buyer; and the evidence of the defendant as to what passed was considered by the Court to be the most reliable; that evidence was "I am sorry I cannot tell you the name of my principal. If you won't accept the contract, you are at liberty to do so, I cannot force your signature. Tincowrie Dass was present,

and, after some talk between plaintiff and Tincowrie Dass which I did not hear, plaintiff said he would accept the contract."

Tincowrie Dass was not called by either party; but it was proved that he had failed in business before the 2nd November 1838.

On these facts the learned Chief Judge of the Small Cause Court, in delivering judgment, said:—"The case turns on the construction of s. 230 of the Indian Contract Act (here followed the section) . . . It is for the defendant to rebut the presumption that a contract exists by which he is personally bound. I do not think he has done so. Among other cases *Southwell* v. *Bowditch* (1) was especially relied upon by Mr. Avetoom for the defendant. It was said by Couch, C.J., in *Greenwood* v. *Holquette* (2), 'we must not adopt as a rule of construction that it was intended to make the Contract Law of India the same as the law of England . . . . . and therefore we cannot refer to any English case as a guide. We must look at the words of the law and gather from them as well as we can what was the intention of the legislative authority.'

"According to *Southwell* v. *Bowditch* (1), in England, the plaintiff in a case such as this must prove positively that, by some usage of trade, a contract exists which makes the broker personally liable, or fail in the suit. In India, under s. 230 of the Contract Act, the burden of proof is thrown on the defendant to prove the negative, that no contract exists making him personally liable. He must rebut the presumption that a contract does exist by which he is personally bound. This point was clearly shown by Wilson, J., in *Soopromonian Setty* v. *Heilgers* (3). The other Indian cases are *Mackinnon Mackenzie & Co.* v. *Lang Moir & Co.* (4), *Hasonbhoy Visram* v. *Clapham* (5). All these Indian cases were actions on charter-parties, and are in many ways distinguishable from the present case. It might not unreasonably have been contended that when the defendants in these cases stated themselves to be agents of the owners of the ships, they disclosed the names of these principals within the meaning of

(1) L. R., 1 C. P. D., 374.
(2) 12 B. L. R., 42 (46).
(3) I. L. R., 5 Calc., 71.
(4) I. L. R., 5 Bom., 584.
(5) I. L. R., 7 Bom., 51.

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the Contract Act. The name of the ship being given, and the other party knowing the agents were not owners, it would not have been difficult to find out who the owners were (see *per* West, J., I. L. R., 7 Bom., 589).

"In *Soopromonian Selty* v. *Heilgers* (1), Mr. Hill, for the plaintiff, contended that a contract, that the agent shall be personally liable is to be presumed when the agent does not disclose the name of the principal; that means, in the case of a contract in writing, when the name of the principal is not disclosed on the face of the instrument. Mr. Phillips contended that any disclosure is sufficient; Wilson, J., said, 'I am inclined to think Mr. Hill's view is right,' but he did not decide the point.

"Section 231 of the Contract Act treats of the case of a person who neither knows nor has reason to believe he is dealing with an agent; but s. 230, if I understand it aright, assumes full knowledge on both sides that the agent is entering into a contract only as agent for some principal whose name he does not disclose. Such knowledge may be conveyed to the plaintiffs verbally or in writing, or, as in the present case, in both ways.

"It is enacted that under these circumstances a contract (a supplementary contract, if I may say so) shall be presumed to exist by which the agent (the broker) is personally bound. In the present case there was no disclosure of the principal's name, written or verbal, at the time the contract was made; there was a positive refusal to disclose the principal's name; and I do not think that a subsequent disclosure of the principal's name by the broker is sufficient to rebut the presumption against him. I can see no difference whatever in substance between the contract in *Southwell* v. *Bowditch* (2) and the contract in the present case."

This judgment the learned Judge made contingent on the opinion of the High Court as to "whether or not upon the terms of the contract as they appear on the face of the sold note, and on the terms of s. 230 of the Indian Contract Act the judgment is correct?"

Mr. *Sale* for the plaintiff.—The defendant is personally liable. He has not disclosed his principal. I distinguish the case of

(1) I. L. R., 5 Calc., 71. (2) L. R., 1 C. P. D., 374.

Soopromonian Setty v. *Heilgers* (1) from this case, as there is nothing in the contract here disclosing the principal. In England evidence of usage is admissible to make the agent liable; here the Contract Act presumes that he is liable when he does not disclose. The case of *Fleet* v. *Murton* (2) is on all fours with this case as far as the terms of the contract is concerned. [The Court here called upon the defendant.]

Mr. *Avetoom* for the defendant.—The personal liability of the defendant is here rebutted by the words "for my principal;" but further, on the 8th November, the defendant disclosed the name of his principal. It is not necessary that the disclosure should be on the face of the contract. [PETHERAM, C.J.—I am not by any means prepared to say that the disclosure must be on the face of the contract.] The intention of the parties to the contract must be looked at to determine the liability; the words "sold by order and for account of" mean that the broker was selling for a principal. In *Gadd* v. *Houghton* (3), the words "on account of the principal" were held to be sufficient to save the agent from liability; see also *Pike* v. *Ongley* (4), where the words were "for and on account of owner."

Mr. *Sale* in reply.—The words "sold by your order and for your account to my principals," in *Southwell* v *Bowditch* (5), were held to be, in the absence of evidence of custom, sufficient to free the broker from liability.

The opinion of the Court (PETHERAM, C.J., and PIGOT, J.) was delivered by

PETHERAM, C.J.—The facts of this case sufficiently appear from the judgment of the learned Judge of the Small Cause Court in the reference which has been sent up to us, and it is not necessary to re-state them here, and the argument on the law is also very fully dealt with, so it is not necessary for us to say very much. The point which was most pressed before us by the learned Counsel for the defendant was that this contract on the face of it shows that the presumption which

(1) I. L. R., 5 Calc., 71.
(2) L. R., 7 Q. B., 126.
(3) L. R., 1 Exch. D., 357.
(4) L. R., 18 Q. B. D., 708.
(5) L. R., 1 C. P. D., 374.

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arises under the Contract Act is rebutted in this case, because it is said that from the words of the contract itself it was not intended that the broker should himself be liable. The case of *Soopromonian Setty* v. *Heilgers* (1), decided by Mr. Justice Wilson, shows that the presumption which arises under s. 230 of the Indian Contract Act may be rebutted, and with that view we entirely agree; but the question here is whether that presumption has been rebutted in this case. It is not contended that there is any evidence outside the contract to rebut it, but it is contended that certain words in the contract itself do so. Now the words which are relied on are those at the top of the contract, which are "A. T. Avetoom, for principal." These words show that A. T. Avetoom was acting as agent for a real principal; but the presumption which arises under s. 230 only arises when an agent is acting for a principal, so that those words cannot be said to rebut the presumption. In addition to this the case of *Fleet* v. *Murton* (2) is sufficient to show that the agent may be liable notwithstanding words of this kind in the contract. In the result, therefore, we think that the Chief Judge of the Small Cause Court was right in his view of this case, and we answer the question referred to us in the affirmative. With this expression of our opinion the case will be returned to him.

Attorney for the plaintiff: Mr. *Moses*.

Attorney for the defendant: Mr. *Sowton*.

T. A. P.

(1) I. L. R., 5 Calc. 71. (2) L. R., 7 Q. B., 126.