

Before Mr. Justice Harington.

SEWDUTT ROY MASKARA

v.

NAHAPIET.\*

1907

April 3.

*Principal and Agent—Contract—Contract with Broker acting as Principal—  
Specific Performance—Contract Act (IX of 1872) s. 236.*

Where the plaintiffs purported to act under contract with the defendant as brokers for the sale and purchase of jute, but really acted on their own account as principals without the knowledge and consent of the defendant:—

*Held*, that they were not entitled to recover for the latter's breach of contract by reason of s. 236 of the Indian Contract Act.

Section 236 is not restricted to cases where an agent purports to act for a named principal, but follows the rule underlying the cases of *Rothschild v. Brookman* (1) and *Robinson v. Mollett* (2), that an agent cannot recover on a contract if he really acts as a principal.

#### ORIGINAL SUIT.

This was a suit by the plaintiffs, carrying on business both as brokers and dealers in jute, for the recovery of Rs. 5,250 being the difference in price of jute bought and sold by them for the defendant, Mesrope Martyrose Nahapiet, and of Rs. 125 for brokerage. They alleged in the plaint that on the 17th September 1906 they, in their capacity of brokers, received an order from the defendant to purchase on his account 1,000 *pucca* bales of jute for delivery in the following month, that in their capacity of dealers they were prepared to sell the bales ordered and they informed the defendant of this fact, and as such brokers as aforesaid wrote to him advising him of the purchase of the bales in the following terms:—

“ *Calcutta, 17th September 1906.*

“ DEAR SIR,

Please note we have this day bought for you (1,000) one thousand *pucca* bales of jute at Rs. 63-12 *as. per* bale for delivery during October 1906, subject

\* Original Civil suit No. 987 of 1906.

(1) (1831) 2 Dow & Cl. 188.

(2) (1875) L. R. 7. E. & I. App. 802.

to the terms of the Barrabazar Marwari merchants' letter contract. Please confirm and oblige.

Yours faithfully,  
(Sd.) SEWDUTT ROY PREMBOOK."

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The defendant on the same date replied: "Received from Sewdutt Roy Premsook & Co. Contract for jute which I confirm."

The plaintiffs further stated that as such brokers they were, on the 6th October, ordered by the defendant to sell on his account 500 of the said bales, and in their capacity of dealers they informed him of their willingness to purchase the said bales, and as such brokers as aforesaid wrote to the defendant as follows:—

"6th October 1906.

"DEAR SIR,

Please note we have this day sold for you (500) five hundred *pucca* bales of jute at Rs. 53 *per* bale, with brokerage at 4 as. *per* bale, for delivery during October 1906, subject to the terms of the Barrabazar Marwari merchants' letter contract. Please confirm and oblige.

Yours faithfully,  
SEWDUTT ROY PREMBOOK."

The defendant by acknowledgment of even date wrote: "Received from Sewdutt Roy Premsook & Co. Contract for jute."

The plaintiffs next alleged a similar transaction on the 10th October in respect of the remaining bales, but without brokerage, and notified the sale to the defendant in the same terms as their letter of the 6th instant, except that the price *per* bale was stated to be Rs. 59. To this the defendant replied "Received from Sewdutt Roy Premsook & Co. Contract for jute. Free from brokerage as arranged."

The defendant stated in his written statement that one of the conditions of his agreement with the plaintiffs' firm, in respect of the present transactions, was that he would do business with the firm as brokers and not as dealers. He denied that the plaintiffs had in their capacity of dealers informed him of their willingness to purchase or sell for him any jute bales or that he

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consented thereto, but maintained that on the 17th September 1906 he gave the plaintiffs, as brokers, an order for the purchase of 1,000 bales, and on the 6th and 10th October, gave them in the same capacity orders for the sale of the bales. He then alleged that the plaintiffs, instead of acting in these transactions as brokers, had really acted on their own account as principals, and that they were not, therefore, entitled to recover on the contract.

*Mr. Sinha* and *Mr. Mitter*, for the plaintiff.

*Mr. Bagram* and *Mr. Buckland*, for the defendant.

HARINGTON J. The plaintiff claims Rs. 5,250 in respect of three contracts for the purchase and sale of jute. The defendant's case is that the plaintiff, while employed as a broker, really acted as a principal in the transactions, and therefore is debarred from recovering by section 236 of the Indian Contract Act.

The contracts were three in number: one, dated September 17th 1906, contained in a memorandum in the form of a letter addressed by the plaintiff to the defendant in the following terms:—"Please note, we have this day bought for you (1,000) one thousand *pucca* bales of jute at Rs. 63-12 per bale, for delivery during October 1906, subject to the terms of the Barra-bazar Marwari merchants' letter contract. Please confirm and oblige."

This was acknowledged and the contract confirmed in a receipt bearing date September 17th 1906. This document refers to two contracts, but it has not been disputed that one of the contracts referred to is the one for 1,000 bales (miscopied in the plaint as 500).

The next contract is expressed in a letter dated October 6th 1906 in the following terms:—"Please note, we have, this day sold for you (500) five hundred *pucca* bales of jute at Rs. 58 (Rupees fifty-eight only) *per* bale, with brokerage at 4 as. (annas four only) *per* bale, for delivery during October 1906, subject to

the terms of the Barrabazar Marwari merchants' letter contract. Please confirm and oblige."

It was similarly acknowledged by a receipt dated October 6th 1906.

Similar documents were produced to prove the third contract, but it was objected that the stamp had not been cancelled, and that the document was inadmissible. This objection was upheld, and the memorandum rejected.

There was a direct controversy in point of fact as to what took place when the business was first negotiated between the plaintiff and the defendant. Johur Mull, the plaintiff's *gomasta*, swears that the defendant told Lallchand, a member of the plaintiff's firm that the transaction was between himself and Lallchand. Lallchand has not been called: it is stated he is in Bikaner. The other partner Sewdut Roy, who has given evidence, was not present at the negotiations.

The defendant on the other hand says that the plaintiffs told him that they knew the Marwari dealers, and that if he wished to deal with them they would do business as brokers and give undisclosed principal contracts, and that he agreed to do business through the plaintiffs as brokers, and arranged that they should call at his office each day about 11 in the forenoon and between 4 and 5 in the afternoon to advise him how the market was going. Two letters have been put in dated October 16th and 20th respectively, in which the defendant requested the plaintiff to come and see him, and complained of his failure to visit him.

These letters shew that the defendant wished to see the plaintiff between the making of the contracts and the presentation of the bill on November 1st, but they contain no reference to any arrangement by which the plaintiff was to call twice daily, as I should have expected they would have, had such an arrangement been definitely made.

It is contended by the defendant that the documents shew that the plaintiffs acted as brokers. The contract as to one thousand bales is "we have this day bought for you," and that for the 500 bales, "we have this day sold for you," and the latter contract is expressed to be "at Rs. 58 *per* bale with brokerage

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at 4 annas *per* bale." It is stated that the custom of the trade is that the seller shall pay brokerage, and that that explains why there is no charge for brokerage in the first contract. But it is a singular circumstance that in the bill for the difference presented by the plaintiffs to the defendant on November 1st no claim is made for the brokerage in respect of the 500 bales at Rs. 58 a bale, yet in the plaint a claim is made for Rs. 125 as brokerage under this contract.

The plaintiffs say they are dealers in jute in a very large way of business, and that they had purchased large quantities of jute which they could have delivered against the defendant's order to buy, and they say they could have taken delivery on the defendant's order to sell. They say that the contracts in the present suit were in the form always used in their jute transactions, and that the defendant well knew that they were really selling to him their own jute and buying for themselves the jute he wished to sell, and that he assented to that course of dealing.

I have come to the conclusion that the plaintiffs did in fact purport to act as brokers for the defendant.

*First*, they say in the plaint that they took the defendant's order for the purchase and sale of jute in the capacity of brokers, *secondly*, the language of the memoranda, "we have bought for you 1,000 bales," and "we have sold for you 500 bales," implies that the writers were not contracting as principals. These documents cannot be read as "I have sold to you 1,000 bales," and "I have bought from you 500 bales," without entirely altering the language, and lastly the statement of the brokerage on the sale of 500 is only consistent with the sale being by brokers for a principal.

But the plaintiffs say that though they purported to act as brokers, yet the defendant knew that they were really principals and agreed to their so acting, and they proved that the defendant paid one similar transaction for the September delivery. In that case the bill was, except as to amounts and dates, very much the same as the bill in the present case: there was no charge for brokerage on the sales. There was, however, a dispute as to the amount, the defendant considering that the price at which the jute purported to be sold was lower than the market rate.

He accordingly altered the bill, and then lessened the difference by Rs. 500. The plaintiff accepted payment of the smaller amount. As this was done without reference to any principal, the defendant's suspicions, at least so he says, were aroused.

It is quite clear that the plaintiffs did act as principals. It is not their case that they did not. On the contrary they say that no specific purchase or sale was made in respect of these contracts, but that they had purchased 2 lots of 500 bales of jute from two different persons, so they could have delivered to the defendant, if necessary, under the contract of September 17th, and similarly they could have taken delivery of the defendant's jute under the contract of October 6th, had it been tendered.

The question whether the defendant knew of, and assented to, this mode of dealing is not very easy to determine. On the one hand the fact that the defendant altered the amount of the earlier bill and then paid it, looks as though he regarded the plaintiffs as principals in that transaction, and the circumstance that the bill presented for differences on the contracts in suit contains no reference to brokerage supports the plaintiffs' contention. But any inference to be drawn in favour of the plaintiffs from this circumstance is weakened by the fact that in the plaint they do claim brokerage. On the other hand if the defendant had assented to the plaintiffs acting as principals, as alleged in paragraph 3 of the plaint, one would have expected the memoranda to purport to record contracts between principals and not to be in the form in which they appear. Further, one would have expected the defendant to object strongly to the insertion of the 4 as. brokerage in the contract for the sale of 500 bales.

The plaintiffs argue that inasmuch as, on the defendant's own shewing, the principals were undisclosed, the defendant must look to them as responsible on the contract; and indeed the defendant admitted that it was the plaintiffs' concern whether the principal was a man of straw or not, for the plaintiffs had guaranteed the payment of differences. They contend that if they are to be responsible for the contract it does not matter to the defendant whether the unknown principal exists or not. I do not agree with this argument. The defendant is not concerned

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only with the solvency of the person with whom he contracts. He is concerned to get the best price he can when he sells, and to pay the lowest when he buys, and he relies on his broker to get those prices for him. It does make, therefore, a considerable difference whether you employ a broker who will do this for you, or whether you deal directly with a principal who will charge you the highest price he can get when you buy, and pay you the lowest when you sell.

On a consideration of the whole evidence I have come to the conclusion that the plaintiff has failed to establish that the defendant ever consented to deal with him as principal.

On these findings of fact, that is, that the plaintiffs purported to act as brokers for the defendant but really acted as principals, and that this was without the knowledge or consent of the defendant, the question arises, are they, in law, entitled to recover?

In the first place section 236 of the Contract Act is a bar. It has been argued that this section only applies where an agent purports to act for a named principal, but there is no such restriction in the section. On the contrary I think that the section enacts, for this country, what is the law in England.

There the principle that a broker cannot, while purporting to act as agent for his employer, really fill the position of a principal, has been laid down in *Rothschild v. Brookman*(1), which establishes that a man cannot be in the same transaction a seller for his employer and a buyer for himself, and the principle of that case underlies the decision in the important case of *Robinson v. Mollett*(2). That was an action by brokers against their employers for damages for refusing to take delivery of tallow, and in its facts, except that the contracts were for tallow and not jute, it is almost identical with those of the present case. The plaintiffs (tallow brokers) in pursuance of orders from the defendant to buy tallow entered into contracts for the sale of tallow to themselves as purchasers, and sent the defendant bought notes "we have bought on your account" &c. As to the terms of these bought notes the head-note differs from the body of the report: the head-note, giving the terms of the bought note as though for a named principal, appears to be wrong. In that case,

(1) (1831) 2 Dow & Cl. 188.

(2) (1875) L. R. 7 E. & I. App. 802.

as in this, there was no specific contract to cover the defendant's order; but in that case, as in this, the brokers bought as principals intending to meet the different orders they received from their various employers by delivering to them tallow they had themselves bought. The defendant on hearing that the plaintiffs acted as principals refused to take delivery. The plaintiffs contended that this course of dealing was in accordance with the custom of the trade, and that the defendant having given orders for purchase in the tallow market was bound by the custom of the trade. The case caused a great divergence of judicial opinion, the Judges in the Court of Common Pleas being equally divided as also were the Judges in the Exchequer Chamber. Eventually it was held in the House of Lords that a custom by which the broker changed his character and became principal and not agent was not binding on the defendant who did not know or assent to it, and judgment was entered for the defendant. This case, it is to be observed, is rather stronger than the present, for the plaintiff relied on a custom of the tallow trade, and did not go so far as to contend, as the plaintiff has done here, that apart from special custom he was, while purporting to act as broker, entitled to bind his employer by contracts made with himself as principal.

The principle underlying these two cases, that an agent cannot recover if he really acts as principal, is codified in section 236 of the Indian Contract Act, and this forms an answer to the plaintiff's suit.

The result is, the plaintiff is not entitled to recover and the suit must be dismissed with costs on scale No. 2.

*Suit dismissed.*

E. H. M.

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