

# ALLAHABAD HIGH COURT

Munshi Lal Hari Om Raj Nandi

Vs

Bankey Lal Hira Lal

(R Gulati, J.)

21.09.1972

## JUDGMENT

**R.L. Gulati, J.**

1. This is a plaintiffs second appeal.
2. The plaintiffs are commission agents. The defendants had placed an order with the plaintiffs for the supply of Arhar after purchasing it from the open market at the prevailing market rate. The plaintiffs were to get a fixed commission. The plaintiffs purchased Arhar, a part of which was sent to the defendants by Rail and was accepted but the remaining stock was refused by the defendants. The plaintiffs re-sold that and claimed from the defendants a sum of Rs. 1649.77 P. on account of loss suffered on re-sale of Arhar.
3. The suit was resisted on a number of grounds, one of the grounds being that the plaintiffs had purchased Arhar at a rate higher than the rate at which they were authorised to purchase. The trial Court dismissed the suit. On appeal the lower appellate Court has decided the appeal only on one point, namely, that before the resale, the plaintiffs ought to have given a notice to the defendants and for that purpose has relied upon Section 211 of the Contract Act.
4. Now if the defendants failed to take the delivery of consignment of Arhar sent to them by Rail, there was no option left with the plaintiffs except to dispose of the goods in the market to avoid further loss. No provision has been brought to my notice which requires a notice to be given of the re-sale of the goods in such a case. From the record of the case it appears that the son of the plaintiff No. 1 went to the defendants and asked them to take delivery. The delivery was refused and the son was told that he could do whatever he liked with the consignment. In such a situation it is not clear as to how a further notice was required to be given to the defendants before the goods were sold. Section 211 of the Contract Act, upon which the lower appellate Court has relied does not have any bearing on the question involved. It only says that an agent is bound to conduct the business of his principal according to the directions of the latter, or in the absence of

any such direction, according to the customs which prevail in doing business of the same kind. It does not speak of any notice at all.

5. That apart, in the written statement want of notice has not been pleaded as a defense with the result that no issue had been framed on that point. The lower appellate court has raised a new point, which does not arise out of the pleadings of the parties. A notice, even if necessary, could have been waived, because such a notice would obviously have been for the benefit of the defendants. The fact that the want of such a notice was not pleaded at any stage shows that the notice was waived by the defendants. The judgment of the lower appellate Court cannot, therefore, be sustained and must be set aside.

6. The appeal is accordingly allowed. The judgment and decree of the lower appellate Court are set aside and the case is remanded to him to decide the appeal afresh according to law and in the light of the observations made above. The cost would abide the result of the appeal when finally disposed by the lower appellate Court.