ANDHRA PRADESH HIGH COURT

Purushotham Haridas

Vs.

Amruth Ghee Co., Ltd

Appeals Nos. 118, 119, 173 and 485 of 1951 and Civil Revn. Petn. No. 1312 of 1951, Guntur in O.S. No. 45 of 1947

(Chandra Reddy and Umamaheswaram, JJ.)

16.08.1956

JUDGMENT

Chandra Reddy, J.

1. These appeals arise out of O. S. No. 45 of 1947 on the file of the Addl. Subordinate Judge, Guntur and the parties are the same. A. S. No. 118 and 173 of 1951 are by the 1st defendant and the third defendant, who is the proprietor of the 4th defendant firm, while A. S. No. 485 of 1951 is by the plaintiff. The material facts may be briefly set out.

2. In 1946, nine merchants trading in ghee formed themselves into a private limited company called Amrut Ghee and Co., Guntur, the present plaintiff, for trading in ghee. They obtained a permit to export 330 tons of ghee to Calcutta, Kharagpur and Midnapur, on the 14th of October, 1946. As they were not acquainted with the market conditions of Calcutta etc., they sought the assistance of the 1st defendant, one Pumshottam Hari Das also a ghee merchant of Guntur, who has two brothers at Calcutta, defendants 2 and 3, the 3rd defendant being the sole proprietor of the 4th defendant firm. It was agreed between the parties that the 1st defendant should arrange for sale of the ghee to be exported to the above mentioned place on commission basis at Rs. 2/- per tin and also secure a financier who could make advances on the security of the stock sent to them, effect sales thereof on commission basis, and appropriate the sate proceeds towards their advances and take interest, commission and incidental charges etc. In accordance with these terms, the 1st defendant arranged with his brother, the 3rd defendant, who was trading in Calcutta in the name of the 4th defendant firm for advancing money with interest at 9 % per annum on the security of the ghee tins sent to the latter. The 3rd defendant could sell the tins for which he would be paid a commission of 1-1/2 per cent and he could apply the sale-proceeds in discharge of the amounts paid by him. As the duration of the permit originally granted was to expire on the 10th of November, 1946, the plaintiff had it extended up to 15th of December 1946. Between 14th October, 1946 and 15th December, 5604 tins of ghee were exported to Shalimar, Calcutta by the plaintiff and they were taken delivery of by the 4th defendant firm whereof the 3rd defendant was the sole proprietor as mentioned supra.
There is dispute between the plaintiff and the 1st defendant regarding the ownership of 779 tins

out of these and that forms the subject-matter of A. Section 119/1951. The first consignment of these tins arrived at Shalimar on the 28th of October. Most of the ghee tins received by the 3rd defendant in the name of the 4th defendant were sold through P.Ws. 1 to 5 who were themselves commission agents between the dates of arrival and the 31st of March, 1947. It appears they sold 3167 tins of new ghee and 1258 1/2 tins of deteriorated ghee. The 3rd defendant was sending reports of sales of the ghee periodically. On several occasions, the plaintiff protested against the low prices at which their ghee was being disposed of by the 3rd defendant and demanded that it should be sold at not less than a particular figure mentioned by them. But the 3rd defendant did not pay any heed to the remonstrances of the plaintiff and continued to sell at prices which, according to the plaintiff, were far below the market rate.
There was voluminous correspondence between the parties and as they could not settle the matter amicably, the plaintiff laid this action for rendition of accounts and for payment of the amounts ascertained to be due to them, and for a direction to deliver up all the unsold tins of ghee to them, on the allegations that defendants 1 to 3 who constituted members of a joint family and for whose benefit the 1st defendant took up the agency colluded with a view to make wrongful gain and to defraud the plaintiff, and the 4th defendant sent false reports about the market rates and the price for which plaintiffs ghee was sold and also made several fictitious transactions. It was also the plaintiff's case that the 1st defendant, their authorised agent mainly responsible for accounting to the plaintiff and therefore to maintain accounts, instead of protecting their interests, conspired with his brothers and they jointly put forth sales at very low rates, while much higher price was obtained thereof, and thereby made large secret profits.

3. The 1st defendant contested the suit by filing a written statement. His answer was that at the request of the plaintiff he found a financier who was to be paid interest and commission at the rates mentioned in the plaint, that the plaintiff's partners themselves had to deal directly with the 4th defendant through their representatives stationed on the spot and that he should be paid a commission of Rs. 2/- per tin extending the same to the entire quantity of 330 tins, that he should have no liability whatsoever for any profit or loss that the plaintiff might sustain.
It was added that he was to keep in touch thereafter by way of general guidance and superintendence and by way of pushing up sales when it became necessary. He was merely kept informed of the various details and sales thereof by the 4th defendant and he was also in touch with the same on occasions when he had to go to Calcutta. The allegations of collusion and conspiracy or of making secret profits were denied by him. It was contended by him that he was not liable to account to the plaintiff's firm.

4. The 2nd defendant contested his liability to the plaintiff. According to him, he had no concern with the plaintiff's transactions either with the first or 3rd defendant nor had he even knowledge thereof.

5. The defense of the 3rd defendant was that he sold the ghee tins of the plaintiff for proper price and at the rates then prevailing in the market with the knowledge of the plaintiff's representatives and under the directions and advice of the 1st defendant, their selling agent, that he acted in the best interests of the plaintiff and that neither he nor the other defendants made any profit at the expense of the plaintiff. It was also pleaded that there being no direct relations between him and the plaintiff he was not answerable to it and hence he was under no obligation to render it any account. All the three defendants were agreed that they were not members of a joint family and that the agency taken up by the 1st defendant and 3rd defendant was for their individual benefit.

6. During the trial, there was a change of front by defendants 1 and 3 and they adopted the attitude in the witness-box as D.Ws. 1 and 4 respectively that the several ghee tins were purchased by the 3rd defendant for his firm. Some of them were sold to him by the plaintiff and some by the 1st defendant.

7. Pending the suit, a Commissioner was appointed for the purpose of seizing the ghee tins not disposed of. He proceeded to Calcutta in May, 1947 and in spite of the opposition and obstruction caused by the 3rd defendant he could seize 786 tins of ghee, sold it for Rs. 57,801-3-6 and after deducting the poundage and other charges deposited Rs. 56,464-5-0, the balance of sale proceeds into Court.

8. The Subordinate Judge, who tried the suit, granted a decree against defendants 1, 3 and 4 jointly and severally for Rs. 1,20,218-1-6 together with interest thereon at 9 per cent per annum from 1-10-1947 which had accumulated to Rs. 36,756-10-10 up to the date of decree. Out of this decretal amount was to be deducted a sum of Rs. 60,001-2-0 made up of Rs. 56,464-5-0 deposited by the Commissioner to the credit of the suit in the circumstances mentioned above and Rs. 3,536-13-0 interest earned thereon by investment. The plaintiff could withdraw this amount and the balance of the decree money was to carry interest at 6 p.c. per annum. No decree was passed against the 2nd defendant as the trial Court found that the 2nd defendant was in no way concerned with the suit transactions. The Subordinate Judge found that defendants 1 to 3 were not members of a joint family and even if there could be such there was no joint business and that their trades were separate, unconnected with each other and that the agency of the 1st defendant was not a joint family concern. In his view, the 1st defendant was to arrange for a financier, give general directions and exercise general supervision etc., and receive commission of Rs. 2/- on the tins sold, that the defendants 3 and 4 were to render account to the plaintiff, they being the substituted agents of the plaintiff and that the liability of the 1st defendant arose by reason of his conspiracy with defendants 3 and 4 in bringing about fraudulent transactions and causing loss to the plaintiff and that he was entitled to a commission at Rs. 2/- per tin on the sale of 2,539 tins. Defendants 1 and 4 filed two separate appeals against the judgment disputing their liability to render account to the plaintiff.

9. The plaintiff by his appeals A. Section 485/1951 assails the judgment in so far as the 2nd defendant was absolved from all liability end in so far as it allowed commission to the 1st defendant on some of the tins of ghee sold and did not allow a higher price in respect of some tins remained unsold either through P.Ws. 1 to 5 or by the Commissioner.

10. We will first take up A. Section 118 of 1951 which covers the issue relating to the liability of the 1st defendant to account to the plaintiff. In support of this appeal, it is contended for the appellant that he was only a broker who was requested to arrange a financier and a commission agent in consideration of which he would be paid a commission of Rs. 2/- per tin and the moment he had brought the plaintiff and the 3rd defendant together, he had no more obligations to the plaintiff. He had only to receive commission from the plaintiff on the basis mentioned above not only in regard to the ghee tins sold but it had to extend to the 330 tins covered by the permit. It was also submitted that having found that the appellant was not liable to account and that he could be made liable for the losses sustained by the plaintiff as a result of his fraudulent conduct in regard to the sale of certain number of tins, a decree should not have been passed

against him for all the losses said to have been sustained by the plaintiff. The learned counsel also maintained that if as found by the trial Court the 3rd and 4th defendants were substituted agents no liability could attach to the 1st defendant assuming he joined the 3rd defendant in defrauding the plaintiff of his dues.

11. On the other hand, the stand taken by the plaintiff is that the appellant was the chief agent, the 3rd and 4th defendants being his sub-agents and that he was primarily responsible to the principal, namely, the plaintiff for all acts of commission and omission by the sub-agents and that the sub-agents' liability arose only by reason of their fraud and willful wrong. Counsel for the respondents has also attacked the finding of the Subordinate Judge that the 3rd and 4th defendants were substituted agents.

12. The problem thus posed has to be solved with reference to the voluminous correspondence that passed between the parties, the oral evidence and the surrounding circumstances. Before we launch on a discussion of the evidence and the legal position of the parties, it is useful to refer to the attitude adopted by the defendants in their written statements. While in one breath it is asserted by the 1st defendant in his statement that it was specifically agreed between him and the plaintiff in the beginning that the appellant should put the plaintiff in contact with the 4th defendant and that the former should station their own representatives to effect and supervise sales and, should deal directly with the 4th defendant through his representatives stationed on the spot, the appellant beyond receiving a commission of Rs. 2/- per tin not having any more liability in the matter, it was stated in the next breath that he had to give general guidance and supervise the sales and push up the sales when it became necessary. It was also admitted in the answer that he was the authorized agent for the sale of the plaintiff's ghee on the terms of his being paid a commission of Rs. 2/- per tin. There is the further recital in the written statement that he was kept informed of the various sales and details thereof by copies of letters of the 4th defendant to the plaintiff and he was also in touch with the same on occasions when he had to go to Calcutta. It is difficult to reconcile the two positions taken by him. Further, the case of the 3rd defendant and the 4th defendant as disclosed in the written statement is inconsistent with the 1st defendant being a mere broker. The contents of paragraphs 7 and 21 of 4th defendant's written statement amply bear out the plaintiff's case that the 1st defendant was his commission agent and that defendants 3 and 4 were only sub-agents. It is stated inter alia in paragraph 7 that the goods were sold under the general guidance, advice and instructions of the 1st defendant or of some directors of the company and that they were corresponding with the plaintiff about the sales and market rates only to help the plaintiff and his direct representatives on the spot to obtain quick sales. The last sentence occurring in paragraph 21 is thus :

> "But one thing is definite that the plaintiff represented and held out the 1st defendant as the representative under whose advice and instructions his goods sent to Calcutta may be sold."

13. These passages leave little room for the contention of the 1st defendant that he was no more than a broker entitled to receive the commission at Rs. 2/- per tin.

14. We shall next trace the facts bearing on this issue. At the outset, it may be remembered that the case for the appellant is that it was only on the 27th or 28th of October 1946 that the main

terms and conditions of the contract between the parties were settled at Calcutta after P.W. 8 and other representatives of the plaintiff went to Calcutta whereas the case for the plaintiff is that the terms of agency of the 1st defendant as well as those relating to the 3rd defendant were agreed upon at Guntur, the 1st defendant having fixed up with his brother probably by talking to the latter over the trunk-phone (as suggested by the plaintiff to the 1st defendant in his cross-examination) and it is only subsequently that the ghee tins were despatched to Calcutta. P.W. 8 testified to the main terms of agency having been settled at Guntur on or about the 16th of October. This version is confirmed by other witnesses for the plaintiff. It appears from the material on record that the first two consignments were sent on the 21st and 22nd of April, 611 and 772 tins respectively and they were received at Calcutta only on the 28th. It is also evident from the testimony of P.Ws. 2 to 4 that arrangements for the sale of ghee to be exported by the plaintiff were made even about ten days before the arrival of the plaintiff's goods at Calcutta. This is not in consonance with the appellant's case, but is explicable only on the hypothesis that they had already reached an understanding in respect of these sales. It is unlikely that the plaintiff would have dispatched the goods to the 3rd defendant without there being any prior engagement especially when the 3rd defendant was not acquainted with any of the directors of the plaintiff-company. It is significant that the appellant was in Calcutta by the time the goods reached the place to make arrangements for the sale of the ghee and immediately he arrived at Calcutta a telegram was sent on his behalf that money was being remitted. In this connection P.W. 8 deposed that 1st defendant was there because he had to take delivery and have the goods sold. It is unlikely that these tins would have been despatched without fixing the terms and conditions upon which entrustment was to be made to the parties and the sales to be effected.

15. We shall now turn to the correspondence that passed between the parties. The earliest letter which throws light on the jural relations between the plaintiff and defendants 3 and 4 is Ex. A-111, a letter written by the plaintiff to the 3rd defendant on 26-10-1946. It says that after the tins are taken delivery of they should be credited to the plaintiff's account and the addressee should consult the 1st defendant on his arrival at Calcutta. It is clear from this that from the inception the 1st defendant was regarded as the person responsible for the sale of the goods. Another letter which points to the same inference is Ex. A-113. This is by the 4th defendant to the plaintiff informing the latter inter alia that a sum of Rs. 20,000/- was being sent with P.W. 8 and the balance shortly thereafter and they would try their best to sell the ghee at a high rate. A copy of this was sent to the 1st defendant, an indication that the 3rd and 4th defendants were only the sub-agents and the 3rd defendant was conscious of his duty to keep his principal, namely, the appellant informed of the particulars of the transactions.

16. By Ex. B-195 written on 8-11-1946 the third defendant was directed inter alia by the plaintiff to consult Sri Purushottam Babu. That letter also recited that specimens were sent through Purushottam Babu. Another letter written by the plaintiff to the 3rd defendant on 13-12-1946, Ex. B-24 has the same effect. One of the recitals there was : 'We have consulted with our Purushottam Babu here about the selling of our old and new stocks with you'.

17. Copies of letters written by the 3rd defendant to the plaintiff intimating either about the sales or about the steps being taken by them in regard to the disposal of the goods or other matters touching the plaintiff's ghee tins were almost invariably sent to the 1st defendant. (See Exs. A-113, A-251, A-252, A-284, A-250, A-248, A-374, A-114, A-249, A-124, B-229, A-253, A-258, A-254, B-246, B-306, A-255, A-256, A-118, A-119, B-247, A-153, B-309, B-370 and B-311). In

all these letters the 3rd defendant assures the plaintiff that they would do their best for sale of the letter's goods at a high price. Though the fact that the. 3rd defendant furnished copies of these letters to the appellant by itself may not establish conclusively that the 1st defendant was the agent of the plaintiff and that the 4th defendant was only a sub-agent, it probablises the cases of the plaintiff. There are some letters written by the 4th defendant company which afford clinching material as regards the relations between the plaintiff and the 1st defendant on the one hand, the plaintiff and defendants 3 and 4 on the other. The correspondence was occasioned by the plaintiff remonstrating with the fourth defendant for selling the ghee tins at a very low price even as against their specific requests to sell them for reasonable prices.

18. As early as 8-11-1946, the 4th defendant by letter Ex. A-252 informs the plaintiff that they were trying to act according to the instructions left by Purushottam Babu. That the 3rd defendant was looking to 1st defendant for guidance is apparent from the conversation reported to have taken place between P.W. 7 and the 3rd defendant as embodied in Ex. B-223 dated 10-1-1947. That letter refers to the statement of the 3rd defendant that it was advisable for the 1st defendant to release stocks for sale but that so far the 1st defendant had not written to him about it. Ex. A-143 a letter dated 6th January, 1947 by the 4th defendant to the plaintiff is also useful in that it shows that it is on the advice of the 1st defendant that the third and 4th defendants were acting in regard to the sales in question. The relevant contents of this document are :

> "But, by pursuance and advice of Mr. Purushottam Babu we have given you the above rate, i.e., Rs. 110/-."

19. In reply to a telegram sent by the plaintiff to the 4th defendant requesting him not to sell the stocks without reference to them and calling upon him to explain why he sold 250 old tins without a letter, this is what the 3rd defendant writes (Ex. A-153) :

> "On the arrival of your Mr. Purushottam Haridas we wired you on the first instant which runs as follows : 'Amruth, Guntur :- Arrived safely, Dont draw hundi. Market very dull, 165 old. 110', to which you are up to date, silent. Then we sold 100 tins old under instructions from your Purushottam Babu. Your Mr. Subbarao did not leave instructions to us while leaving Calcutta and since he left that we received your wire yesterday and the letter under reply today. We are concerned with your selling agent here only and we are not at all concerned with your purchase price and moreover admittedly your old stock is of far inferior quality. We have, every apprehension about our money lying in block after returning your hundi and as a businessman, you should not stop our hands to sell the goods at imaginary higher rates for which there might be no market hereafter. When your selling agent is here we fail to understand why your are apprehending the loss to the company."

20. On the same day a telegram was sent by the 3rd defendant to the plaintiff saying that they were selling under the instructions of the 1st defendant. The contents of Ex. A-153 are consistent only with the plaintiff's case that the 1st defendant was their agent and that 3rd and 4th defendants were his sub-agents. Another significant feature of this letter is that the 1st defendant was described as the selling agent of the plaintiff which lends considerable support to the

plaintiff's case. It is not as if the 1st defendant was unaware of it, because a copy of it was communicated to the 1st defendant. It is admitted by the 1st defendant as D.W. 1 that he had received it. The 1st defendant did not repudiate the part attributed to him in Ex. A-153. On the other hand, he admitted in the witness-box in his cross-examination that he did give the instructions as alleged in that document.

21. The same position is established by Ex. A-250. (It may be mentioned here that a statement was made at the Bar by Mr. Sambasiva Sastry who appeared for the plaintiff in the lower Court that all the documents exhibited for the defendants were marked at the instance of the 1st defendant and this is not contradicted by the counsel who appeared for the 1st defendant in the trial Court and who is also present here). This letter was written by one of the directors of the company, Gangadhara Rao, to P.W. 11 in which the contents of a letter written from the 3rd defendant were set out, and they are as follows :-

> "At first we sent a telegram to you that the market was dull and the rate for the new stock was rupees one hundred and sixty five and for the old stock rupees one hundred and ten. But, there was no reply from you. So, as directed by your selling agent Purushotham Babu Garu, we sold the old stock at rupees one hundred and ten. Then as your man Subba Rao Garu gave us information we fixed up as high a rate as possible in the market, and after informing Purushotham Babu Garu also, sold two hundred and fifty tins of old stock at rupees one hundred and twelve after Babu Garu consented."

22. There is another document which has the same significance. This is a letter written by P.W. 1 to the plaintiff company on 30-11-1946 (Ex B-212). It conveys to the addressee the conversation that took place between P.W. 8 and the 1st defendant.

"Viswanadham Garu?s questions. Purushotham Garu?s answers.

We said ??we have sent our 2,497 tins of ghee. Have all tins been sold or not ?

You have nothing to do with our 779 tins. Your 1,112 tins excluding 271 tins sold as well as the waggon of 335 tins which arrived yesterday in all 1,447 tins remain.

I said that the goods remaining should be sold quickly. We sent superior goods You should immediately sell them. He said that old stock could not be disposed of so quickly. We are not persons who throw dust in the eyes. You do not know what goods were put. One of your directors told us that your directors themselves weigh all and filled. If old stock is not sold quickly we will sustain loss. It is not possible for me. I did not give guarantee to you that I would sell."

23. The talk between P.W. 8 and D.W. 1 as reported in that letter clearly indicates that it was the 1st defendant that was chiefly responsible for the sale of the goods.

24. We may now turn to some correspondence that passed between the plaintiff's clerk P.W. 7 and plaintiff bearing on the attitude of the 1st defendant which furnishes positive evidence that the 1st defendant was directing the sales of the goods and also that he was acting in unison with the 3rd defendant in perpetrating fraud upon the plaintiff. P.W. 7 was a clerk of the plaintiff stationed at Calcutta to report to the plaintiff about the market conditions and also about the sale of the plaint ghee tins. The letters written by him disclose that he was absolutely kept in the dark, of the

transactions relating to the ghee tins in question or about the persons through whom sales were being effected and that he was never informed of any of the transactions and much less consulted. Reference may be made in this context to Ex. A-144 written by him on 6-1-1947.

25. This document was proved by P.W. 7 and the truth of the contents thereof testified to by him. There does not seem to have been any cross-examination in regard to it. It contains the following conversation purported to have taken place between the writer and the 1st defendant.

> "I told Purushotham Babu Garu that if it was sold at that rate the company would fall down and that therefore he should not sell it at that rate. Purushotham Babu said that we should repay the advance paid by them and then we might sell as we liked. He further said if tomorrow we keep it without selling and thereby loss is sustained, and if after excluding the advance given by us, there should be still loss, show me the man who will pay. What does it matter to you ? There is no use if you speak as you like."

26. It was also mentioned in that letter that the 1st defendant told him that the plaintiff sent the 1st defendant a telegram questioning him as to why he sold at Rs. 110/- and that after receiving a reply from him etc., 1st defendant said "let them come. I shall talk to any one who comes." The author of the letter also complained that his words carried no weight and no useful purpose would be served by his remaining at Calcutta.

27. Ex. B-308 another letter written by the some person three days earlier which also reports the talk between him and the 1st defendant is on the same lines. Ex. B-235 dated 30-10-1946 written by the plaintiff to P.W. 8 one of the directors and Ex. B-200 dated 8-11-1946 written by P.W. 14 to the plaintiff indicate that even the financial transactions which the plaintiff had with the defendants went through the 1st defendant whenever he was in Calcutta.

28. In the face of this documentary evidence, it is futile for the 1st defendant to contend that he was not the agent of the plaintiff and was therefore not liable to account to them. The several documents referred to above clearly prove that the position occupied by him in relation to these goods was that of an agent and that he cannot absolve himself of all responsibility.

29. The oral evidence adduced by both the sides does not in any way conflict with the plaintiff's case. P.W. 6 the managing director of the company during the relevant period, deposed among other things that by the terms of the contract entered into between the 1st defendant and the plaintiff at Guntur the former was to go to Calcutta, Kharagpur and Midnapur, to sell ghee and was to be paid a commission of Rs. 2/- per tin of ghee, sold through him, and that the goods were sent in the name of the 4th defendant as per the directions of the 1st defendant and that the 1st defendant was responsible for all the goods the plaintiff parted with and also for the money advanced. In this respect, he is supported by P.W. 8 Chairman of the Board of Directors of the plaintiff company who testified to 1st defendant stating to them that he would get the goods sold through his brother at Calcutta. This version was confirmed by P.W. 11 another member of the plaintiff company. He stated that the 1st defendant was to be paid Rs. 2/- per tin which he sold at Calcutta. He also added that he asked defendants 1 and 3 in January 1947 as to why they had stated that the price of the stock was Rs. 155/- or two rupees more than that while in fact their inquiries showed that the price was Rs. 172/- and that 1st defendant was very angry with him and

stated to him "why do you talk that we are committing fraud in season and out of season." He at once replied and asked him to state if this was not fraud, what else was fraud. D-1 then became angry and they then left the place. The witness also said that when Raghavayya asked defendant 1 to render an account, to state how many tins have still to be sold and what the sum was with them, 1st defendant became angry and said "Shut up. Do not talk nonsense". It also appears from his evidence that the 3rd defendant tried to explain away the outburst of temper of the 1st defendant as due to the contents of the letter written by Gangadhara Rao. The evidence of P.W. 7 who was sent to Calcutta by the plaintiff to keep a watch over the transactions is in consonance with the version of the plaintiff. In the course of his deposition he said that he along with some others went to the 1st defendant and the 1st defendant said that he would sell plaintiffs goods properly, that on another occasion he stated that Calcutta was not Guntur for selling away rotten goods for good prices and that in Calcutta no one could be imposed, that on 6-1-1947 when he asked 1st and 3rd defendants to tell him how much stock was sold and how much money was due they did not give any reply. He also stated that defendants 1 and 3 were selling the suit stock.

30. The oral evidence let in by the defendants does not very much advance their case. On the other hand, the admissions contained in their evidence lend support to the plaintiff's case. D.W. 1 stated that he was no more than a broker, that direct relations were established between the plaintiff and the 3rd and 4th defendants, that he had no responsibility in the matter, but had a right to receive commission but also denied the conversation between himself and P.W. 7 and P.W. 1 as stated by the latter two. But the case of his being a broker is not consistent with portions of his deposition. He said that by December 1946 price of ghee was going down, further, that he went to Calcutta then, that 3rd defendant told him that other kinds of ghee better than plaintiff's ghee were being sold in the market and that he would see that his stock was sold and so he went on 31-12-1946. He admitted that he must have given the instructions to the 3rd defendant in respect of 100 tins on behalf of plaintiff, that the 3rd defendant described him, as selling agent and that he did not repudiate this. It was further stated by him in cross-examination that he was at Calcutta on behalf of the plaintiff to give advice to plaintiff or his representatives in respect of sale of their ghee. The same result is reached by his statement that he told the plaintiff that the 3rd defendant was purchasing all these stocks.

31. Another act of the 1st defendant which also makes the case of the plaintiff probable is the transaction relating to the sale of 1500 tins by him to the 3rd defendant. It is true that he tried to justify this alleged sale pleading that he was authorized by P.W. 11 to effect a sale of these tins to the 3rd defendant who was pressing for the repayment of the money and who was apprehensive of his reimbursing himself the advances made by him to the plaintiff. The case of the 1st defendant in this behalf is that on 3-3-1947 he had a letter from the 3rd defendant complaining of the delay in the plaintiff repaying the 3rd defendant large sums of money still due to him, that he showed this letter Ex. B-311 to P.W. 11 on that very day and that thereupon P.W. 11 requested him to sell away 1500 tins to the 4th defendant and thus got the plaintiffs liability reduced and it was thereafter he sent a telegram to the 3rd defendant offering 1500 tins for sale and that this offer was accepted by the 3rd defendant. This story of the 1st defendant has to be rejected for various reasons. For one thing, there is no material to substantiate this case of his. If there is any truth in it, the plaintiffs themselves would have made the offer; secondly, the story of the 3rd defendant feeling apprehensive of repayment of the money is a very unconvincing one for the reason that there was ample security for any small sum of money that might be due to them from the plaintiff. Again, it appears from the evidence that the 3rd defendant was not advancing any

money of his, but that he was merely passing on a substantial portion of the sums which he got from P.Ws. 1 to 3 through whom the goods of the plaintiffs were sold. The appellant's story also is belied by the fact that the envelope which is supposed to contain the letter alleged to have been received by him and showed to P.W. 11 is stamped 4-3-1947. If that is so, it is useless to pretend that he had received a letter on the 3rd and that was responsible for the transaction relating to 1500 tins of ghee. It this case of his is rejected, the inference is that the 1st defendant acted on his own authority in offering to sell 1500 tins which means he proceeded on the assumption that it was within his competence to sell the goods of the plaintiff which can only be on the basis of his being a commission agent.

32. Now, the evidence of D.W. 4 his brother completely destroys the case of the 1st defendant in this behalf. He stated among other things that the plaintiff gave a telegram on 31st December 1946 of which Ex. A-8 is a copy intimating that the 1st defendant would be coming and that the 1st defendant was sent by the plaintiff to sell the old stock of ghee, and that 250 old tins were sold by the 1st defendant on behalf of the plaintiff. He also deposed that the 1st defendant was the selling agent of the plaintiff and that he had every right to sell the goods as plaintiff's representative.
It was in the capacity that 1500 tins of the plaintiff were sold by the 1st defendant to him. The evidence of this witness was also to the effect that some of the tins were sold to him by the 1st defendant after consulting Subbarao. The witness also added that the 1st defendant was the representative of the plaintiff and he had the right to sell the goods of the plaintiff. He further said that he was not acquainted with the plaintiff and that it was the 1st defendant that introduced the plaintiff to him. Thus, there is satisfactory evidence on the side of the plaintiff that the 1st defendant was employed by the plaintiff as their agent, that the former had appointed as his sub-agents defendants 3 and 4 and that the latter always looked to him for all the details as to their disposal, that they were taking orders from him and that the 1st defendant had not ceased to occupy the position of an agent at any time during the relevant period and therefore rendered himself liable for the acts and defaults committed by the 3rd and 4th defendants. The evidence also discloses that not only he was aware of the fraudulent conduct of the 3rd defendant in reporting fictitious sales but even encouraged him to do so. In his deposition as D.W. 1, D-1 said that except 786 tins delivered him to the commission, (sic) the 3rd defendant purchased all other tins. This statement discloses an anxiety on the part of the 1st defendant to enable the 3rd defendant to make as much illegal gain as possible. The material on record establishes beyond doubt that the 1st defendant was acting in concert with the 3rd defendant and both of them were parties to several make-believe transactions which were calculated to deprive the plaintiff of their legitimate dues. There can therefore be little doubt that the 1st defendant was guilty of fraud as much as the 3rd defendant.

33. This position is controverted by the counsel for the 1st defendant. It is argued that the direct correspondence between the plaintiff and the 1st defendant could only be consistent with the plaintiff treating the 3rd and 4th defendants as his agents, and this correspondence justifies the finding of the Judge that the 3rd and 4th defendants were constituted substituted agents of the plaintiff, that he was merely a broker whose only duty was to supervise and superintend the sale of the plaintiff's stock and had the right to receive remuneration at Rs. 2/- per tin. We do not think that this contention is substantial. The mere fact that the 3rd defendant was writing directly to the plaintiff and that the latter was requesting the 3rd defendant to sell the goods at a profitable rate and not to dispose of at a low price does not create the relationship of principal and agent

between the 3rd and 4th defendants and the plaintiff. As the 1st defendant was also a resident of Guntur like the members of the plaintiff's concern and for the sake of convenience and quicker despatch, this procedure must have been adopted between the parties. But the 1st defendant was appraised of all the transactions and copies of letters were sent to him of almost all the letters. The reason for the direct correspondence is also given in the written statement of the 4th defendant. The relevant passage occurring in paragraph 7 is as follows :

> "This defendant was corresponding with the plaintiff about the sales and market rates only with a view to help the plaintiff and his direct representatives on the spot to obtain quick sales and with a view to repay himself as early as possible."

34. This factor does not in any way alter the position of the parties and the subordinate agency which the 3rd and 4th defendants held would not be converted into that of the agent and principal. The exchange of letters directly between the plaintiff and the 3rd defendant does not operate to discharge the 1st defendant from his liability to his principal. If a person is initially appointed as agent and if the latter engages his own sub-agent, for carrying through certain transactions, the mere, circumstance that the sub-agent corresponded not with his employer but with the main principal, does not divest the main agent of his character as such.

35. There is clear authority for this position. In *Lockwood v. Abdy*[1], the plaintiff who had real estates in the county of Essex appointed one Abdy as his agent with full power to manage his estates and with express authority to appoint proper person to act as agent under him. A solicitor by name Andrews was employed by Abdy to receive the plaintiff's rents and be in the management of the estates. A bill was filed by the principal against Abdy and also Andrews who was charged with various acts of misconduct in the management of the estate. The answer of Abdy was that it was not sustainable against him. It was laid down by the Vice-Chancellor Sir L. Shadwell that Andrews was responsible to Abdy and that the bill was to be dismissed as it was unsustainable against Andrews in spite of the fact that in Andrew's books items were entered and charged as against the plaintiff and that the evidence showed that Andrews had prepared the power-of-attorney and had various interviews with the plaintiff and advised him as to the management of the affairs, that the accounts between the plaintiff and Abdy had never been settled, but they had been made out and rendered by Andrews and were intituled as accounts between Abdy and Andrews as the agents by power-of-attorney of the plaintiff Mr. Lockwood.

36. *Hugh Francis Hoole v. Royal Trust Co*[2]*.,* also illustrates this principle. This was an appeal from a judgment of the Supreme Court of Newfoundland. A firm R entered into an arrangement with H that the latter was to act as agent to R for sale of their fish in South European countries. The remuneration payable for their services consisted of a commission of 2 per centum and a discount of one and one-fourth per centum on the proceeds of sales. By a cable and letter posted the same day the firm H negotiated with R for a consignment of fish for Genoa per S. S. "Kriton" saying :

> "We have cabled you this morning that if you would consign 500 casks of Labrador to Genoa, our agents will guarantee a minimum price of 38s. c.i.f., Genoa ..... with an advance of 20s. on document. We await your reply and hope we may be able to arrange this business with you."

R accepted the offer by a letter dated 21st October 1921 and sent the consignment per S. S. "Kriton" on 7th November 1921.

[1](1845) 60 ER 428

[2] AIR 1930 PC 274

On 15th November the firm H wrote guaranteeing a minimum of 38s. c.i.f., with an advance of 15s. against documents. This was approved by the consignors as follows : Labrador minimum guarantee approved, have drawn 20s. suppose accounts food for difference". M/s. Zurlo and Co., were the agents at Genoa referred to by the H firm. Subsequently, the firm H tried to repudiate its liability by pleading that the responsibility was that of M/s. Zurlo and Co. In an action by R against H the defence was that the firm H merely negotiated between the R firm and Zurlo and Co., direct and that therefore they were not liable for any receipts by M/s. Zurlo and Co., which had not in fact reached their hands. This defence was negatived and the claim of R was allowed by the Judicial Committee of the Privy Council in the view that the firm H was liable to account to the R firm for the balance of the proceeds of the God-fish consigned to Genoa. In the opinion of their Lordships the fact that some correspondence passed directly between the plaintiff and Zurlo and Co., or that the plaintiff asked Zurlo and Co., if the latter would guarantee a minimum price minus 1 1/4 per cent discount only and would advance 30s. cash on documents and the Zurlo and Co., replied by letter that they would guarantee 38s. minimum price, could not advance the plaintiff 30s. per hundredweight asked for, but assured them that the account sale would be remitted to them promptly did not make any difference for the determination of the jural relations between the parties.

37. The principle underlying these decisions is that if a person is employed as the agent for sale of some goods and the agent engages a third party to carry out the instructions of the principal, the mere fact that the sub-agent corresponds not with the agent but with the principal does not create any change in the relations of the parties and privity of contract does not arise between him and the principal. Therefore, the appointment of a sub-agent to put through some sales would not indicate that ipso facto privity of contract was created between the principal and the sub-agent. A passage from Bowstead's Law of Agency (11th Ed.) p. 71 is in favour of the view indicated above.

> "There is no privity of contract between a principal and sub-agent as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto. Provided, that the relation of principal and agent may be established by an agent between his principal and a third person if the agent be expressly or impliedly authorized to constitute such relation and it is the intention of the agent and of such third person that such relation should be constituted".

38. It is illustration 3 at p. 72 that bears out the proposition stated above :

> "An agent appointed a sub-agent to manage the principal's affairs. The sub-agent took over the entire management thereof, and communicated with the principal direct. Held that the sub-agent was not liable to render an account of his agency to the principal."

39. The authority relied on in support of this (sic) (1845) 60 ER 428 cited supra.
40. When once the position is established that a particular individual was appointed as commission agent for sale of goods and the latter arranged with a third party for carrying through the sale transaction, the agent is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of employment. See *Peacock v. Baijnath*[3], *Purkhit Panda v. Ananda Gaontia*[4], and *Nensukhdas v. Birdichand*[5].

41. The rule mentioned above is stated in Section 192 of the Contract Act which enacts :

> "Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

The sub-agent is responsible for his acts to the agent and the agent is responsible to the principal for the acts of the sub-agent."

42. Another argument put forward by the counsel for the 1st defendant was that as the goods were not consigned to him but sent direct to the 4th defendant and were endorsed by the plaintiff's representatives to the 4th defendant direct and not to him he never had the custody of the goods. Therefore, there could be no scope for describing him as the agent. His position was only that of a broker.

43. For this proposition, support is sought in the judgment of a Full Bench of the Madras High Court in *Radhakrishna v. Province of Madras*[6], The passage on which reliance is placed by the learned counsel for the 1st defendant is found at p. 500 (of Mad LJ) .

> "A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody, nor the possession of the goods. It is the broker's duty to establish, privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent, on the other hand, of the class to which the plaintiffs belong, is not like a broker. He has almost invariably custody or possession of the goods, actually or constructively."

44. The doctrine of the case cited above does not govern the present case, for, the 1st defendant's position cannot be equated to that of a broker for the various reasons mentioned above. A broker, when once he brings two parties together and receives his remuneration for it, (sic) nothing more to do with the transactions between the parties. That is not the case here. Even, according to the 1st defendant he "had to keep in touch by way of general guidance and supervision." He had also to push up sales whenever it became necessary and he was kept informed of the various sales and the details thereof by copies of letters. It is also admitted that he had also to go to Calcutta on some occasions in connection with the sales of the plaintiff's goods. Thus, he had

[3] ILR 18 Cal 573
[4] 12 Cal WN 1036
[5] 43 Ind Cas 699
[6] 1952-1 Mad LJ 494 (FB)

not ceased his connections with the principal after putting the 3rd defendant in touch with the plaintiff. The agent's custody also can be constructive. When under his instructions, the goods are dispatched to his sub-agent and the latter is having custody thereof that would be deemed to be the custody of the principal. AIR 1930 PC 274 shows it is not necessary that the goods should be placed in the physical possession of the agent. In the nature of things, the ghee tins could not be consigned to the 1st defendant because he was himself residing at Guntur and he had no office at Calcutta. It is under his instructions and as desired by him, as per the case of the plaintiff and accepted by us, that the goods were sent to Calcutta, that the sub-agent, his brother, was always looking to him for instructions in regard to sales and that the latter refused to recognise the plaintiff as his principal. It may not be out of place to mention here that in his letter dated 30th November, 1946 to plaintiff P.W. 8 writes that he gave the passes to D-1.

45. An attempt was made by the counsel for the 1st defendant to bring the case within the purview of Section 194 of the Indian Contract Act which is in the following words:

> "Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him."

46. This section embodies the theory of what is generally known as substituted agency. What this section envisages is an agent nominating another person to act for the principal in the business of the agency with the knowledge and consent of the principal. It is applicable only where the agent names another and when that is accepted the agent has no concern thereafter with the business transactions between the principal and the person named; in other words, he walks out of the scene. The naming of the person does not amount to delegation of the duties of the principal.
In such a case, direct relations are established between the principal and the person nominated and the latter becomes an agent substituted for the person who was authorized to nominate another. But, that is not the situation in this case. As already stated the 1st defendant had not severed his connections with these transactions as indicated above in several places. Therefore, he cannot disown his responsibility to render an account to his principal, the plaintiff. To quote the words of Thesiger, L.sJ., in *De Bussche v. Alt*[7]*,*

> "As a general rule, no doubt, the maxim 'delegatus non potest delegare' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person but this maxim when analysed merely imports that an agent cannot, without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract."

[7](1878) 8 Ch. D. 286 at p. 310

47. The conduct of the parties to the original contract of agency throughout the relevant period can only lead to one inference namely that the original agent, namely, the 1st defendant in order to fulfil his obligations to his principal, had to appoint a sub-agent to sell the goods of his

principal at Calcutta and there was no direct privity of contract between the plaintiff and the 3rd defendant. Nor does the mere fact that the plaintiff had accepted the terms on which the sub-agent would sell the goods and advance money against goods would ipso facto put an end to the relations between the plaintiff and the 1st defendant. Hence the 1st defendant cannot escape liability by pleading that the plaintiff had to look to the sub-agents as substituted agents.

48. The opinion of the lower court that the 3rd and 4th defendants were substituted agents of the plaintiff is erroneous and unsustainable. The trial court held that the 1st defendant could be made liable for the sale-proceeds of the 1500 tins of ghee since he had sold them to the 4th defendant and latter had not accounted to the plaintiff for the same. Our foregoing discussion shows that this view is erroneous and unsustainable.
According to the learned Judge, by reason of the theory of substituted agency and also because fraud could not be attributed to the 1st defendant except in regard to certain transactions, his liability could not be made co-extensive with that of the 3rd and 4th defendants and he would be only responsible for the sale-price of 1500 tins and for the difference in price in regard to fictitious sales of which he had knowledge and was privy to it. He, however, thought that a decree could be passed against the 1st defendant also for a sum which represents the loss sustained by the plaintiff as a result of the fraudulent conduct of the defendants, that amount being less than what the 1st defendant would have to make good to the plaintiff on the basis indicated above.

49. Lastly, it was submitted by Mr. Rajeswararao that no liability could be fastened on his client with regard to the sale of 1500 tins in the suit which is for a rendition of accounts on the footing of his being an agent of the plaintiff. What is urged by him is this. The plaintiff's case is that by a resolution dated 4-3-1947 the 1st defendant was removed from the agency and this was communicated both to the 1st defendant and the 3rd defendant. Feeling that they have no further chance of making secret profit by indulging in fictitious sales, the 3rd and 4th defendants brought about this fraudulent transaction. If the 1st defendant had lost the character of an agent and thereafter sold the goods to the 3rd defendant, he had only committed a tort and there would be misjoinder of causes of action to claim this amount in a suit for accounts as between an agent and a principal.

50. Firstly, this is not the case of the 1st defendant either in his written statement or in his evidence. The attitude adopted by him throughout was that there was in fact no resolution to remove him from the agency, nor was any such communication sent to him. It is not necessary for us to decide whether really the resolution was passed by the directors of the plaintiff company removing him from the agency and whether copies of the resolution were sent to the 1st and 3rd defendants. If the agent purports to act as such and in that capacity enters into a transaction on behalf of the plaintiff his liability to account does not cease and he will have to render an account to the principal if the latter chooses to require him to give an account on the footing of his being an agent. This legal position cannot be disputed. For these reasons we hold that despite the appointment of the 4th defendant for the actual sale of the goods on the terms and conditions set out above, the primary liability to the plaintiff was that of the 1st defendant and his liability is co-extensive with that of the 3rd and 4th defendants. Consequently, A. S. No. 118 of 1951 is dismissed with half costs. A. S. No. 173 of 1951.

51. In this appeal, the conclusions of the trial court are challenged on behalf of the 3rd and 4th

defendants on various grounds : (1) No decree can he granted as the plaintiff has not set out in the plaint the exact relationship that subsisted between them and the plaintiff; (2) there being no direct relations between them and the plaintiff they were not accountable to the plaintiff; (3) the stock of the plaintiff was purchased by them with the consent and approval of the plaintiffs representatives and this they were entitled to do as financiers; (4) they were not liable to pay interest on the sums realized by the Commissioner by sale of 786 tins of ghee and invested in Government securities; and lastly, there should have been a preliminary decree instead of for a definite sum a decree straightway. We shall now dispose of these points seriatum.

52. It is true that the plaint does not describe the relations that subsisted between the plaintiff and defendants 3 and 4 in legal terms. But the plaint throughout proceeds on the assumption that defendants 3 and 4 were the, sub-agents of the 1st defendant. It is recited in the plaint that under the instructions of the 1st defendant, the ghee was dispatched to Calcutta and delivered to the 4th defendant for being sold and the averments in the plaint are explicable only on this basis. The plaint has only to state facts which constitute the cause of action against a particular defendant. It is not necessary that the legal effect thereof should be mentioned in the plaint. The plaint should only contain the recitals that would form the basis of the claim. The legal position created thereby need not be described. This contention is therefore overruled.

53. Coming to the second objection, it is incontrovertible that a sub-agent is responsible only to his principal, namely, the agent but not to the principal. But the position is different if he is guilty of fraud or willful wrong. This is not only on the general principles but by reason of third paragraph of Section 192 of the Indian Contract Act. The responsibility of the sub-agent to the principal to account to the latter arises only in cases where fraud or willful wrong is attributed to him. In this case, the various acts of commission and omission committed by the 3rd defendant have given rise to this liability. Though it was pretended in the correspondence that passed between the 1st defendant on behalf of the 4th defendant and the plaintiff that the goods were being sold at a particular price, the 3rd defendant had to admit in the witness-box that all these goods were sold through P.Ws. 1 to 5, having regard to the overwhelming evidence furnished by these five witnesses of Calcutta, who, it appears, were originally unwilling to disclose the real state of affairs to the plaintiff or to court.

Their evidence and the account book filed into court reveal that the ghee tins of the plaintiff fetched a much higher price than those quoted in the letters written by the 3rd defendant. In fact, it is the accounts of P.Ws. 1 to 5 in relation to the plaintiff's goods that formed the basis of a decree against these defendants. With this background, if we consider the conduct of the defendants as disclosed in the correspondence and the attitude adopted by them in the witness-box, there can be little doubt that these defendants were guilty of fraud and willful wrong and consequently come within the scope of paragraph 3 of Section 192 of the Contract Act.

54. In view of the evidence of P.Ws. 1 to 5 and their account books which could not be impeached by the defendants and which have completely proved the fraudulent conduct of the defendants, the latter fell back upon the theory of purchase of the whole goods in question. Here again, they have miserably failed to make out their case. Excepting the interested testimony of the 1st defendant and the 3rd defendant which is completely at variance with the correspondence, there is not a tittle of evidence that the 3rd defendant had purchased these goods. No doubt, on the 6th of August, defendants 1 and 3 sought to lay claim to 1500 tins by exchange of telegrams between 1st and 3rd defendants. That this again is not a genuine transaction appears from the account books of P.Ws. 1 to 5 and the admissions of defendants 1 and 3. As admitted by both of them, the 3rd defendant could not purchase for the 4th defendant the goods of their principal

without their consent. There is absolutely nothing to show that such consent or even ratification of the principal was given. Nor could they sell the goods to themselves at a price much lower than that prevailing in the market and to the disadvantage of the principal. It is no doubt true that a sub-agent who is also a financier or even an agent who advances money against goods could purchase the goods with the consent and approval of the principal and there is no impediment in the way of their doing it, but it is essential that either they should be offered for sale by the principal to the agent or the offer made by the agent for purchasing the goods should be accepted by the principal. Without either of the two conditions, the agent or the sub-agent could not acquire any title to the goods. The 1st defendant admitted that without an offer from the plaintiff's representatives the 3rd defendant cannot purchase on his own accord.

55. The question now is whether any such offer was made by the plaintiff or their representatives or whether the 3rd defendant on behalf of the 4th defendant ever offered to purchase these goods from the plaintiff and the latter agreed to the proposal. Our attention was not drawn to any piece of evidence in proof of either sale of the tins to the 4th defendant or even an offer by the plaintiff to sell them to that defendant. Nor is there any evidence of subsequent acquiescence to it. Far from there being any material to prove this claim of the 3rd defendant, the letters written by the 3rd defendant to the plaintiff clearly indicate that they sold the ghee tins of plaintiff in the market and not that they purchased them. This is the purport of the letters. In Ex. A-113, the 4th defendant assured the plaintiff that they would do their best to sell the ghee at a high rate. See also Exs. A-114 dated 23-11-1946, B-229 dated 28-11-1946, A-145, a telegram on 15-1-1947, B-258 dated 9th December 1946, A-255, dated 21st December 1946. A-118 dated 27th December 1946, B-247 dated 31st December 1946, A-151, a telegram by the plaintiff to the 4th defendant sent 18th January, 1947, A-152 and A-153 dated 18th January 1947 a telegram and a letter respectively, B-309 and B-310 dated 25-1-1947; B-369 dated 31st January 1947, B-730 dated 3rd February 1947 and B-311 dated 1st March 1947. In all these letters, it was categorically stated by the 4th defendant that the 4th defendant had either sold or that they were trying their best to sell the plaintiff's goods at particular rates. Throughout, the expressions used were either "sell or sold" or 'dispose or disposed of'. In fact, in Ex. A-165 dated 6-2-1947, the plaintiff asked the 3rd defendant to sell the goods at a particular rate. Ex. A-143 written by the 4th defendant on 6-1-1947 completely disproves the present case of the defendants. It was recited inter alia therein :

> "Every buyer is expecting that Guntur ghee will be sold at Rs. 150/-. At present, there is no price and no sale. So we do not advise you to sell at Rs. 150/- until you can keep that ghee for some time more but you will not keep your old stock very longer which please note."

There is not a whisper in the documents referred to above that the 3rd defendant himself was the purchaser of the goods. The various letters written by the representatives of the plaintiff at Calcutta to the plaintiff or by the plaintiff to its representatives at Calcutta are not in tune with the 3rd defendant being a purchaser. The story that either P.W. 7 or P.W. 11 sold the ghee tins to them does not merit any consideration. In one of the letters by the 3rd defendant to the plaintiff, it was specifically stated that P.W. 7 left the place without giving any instructions with regard to the sales. Both P.Ws. 7 and 11 deny having sold any ghee tins to the 4th defendant. D.W. 4 asserted in the witness-box that after the departure of Panakalu, P.W. 11 he purchased in small quantities and intimated the same to the plaintiff, but no evidence in support of this assertion of the

intimation to the plaintiff was presented to us.

56. It was argued by Mr. Chandrasekhara Sastry for the 3rd defendant that his client used the word "sale" indiscriminately and much significance could not be attached to that expression and that it should be understood as purchase. We do not think we can give effect to this argument. The language used by him with reference to the purchase of 779 tins in Ex. A-124 in reply to. Ex. A-123 wherein it was stated that 779 tins were sold to the 4th defendant does not convey any such impression. It is also noteworthy that when these 779 tins were sold to the 4th defendant an invoice was sent by the plaintiff to the 3rd defendant and the same procedure would have been adopted if really there were sales in regard to other tins. Even the telegram sent by the 4th defendant in regard to the alleged sale of 1500 tins by the 1st defendant does not give any support to this contention (Ex. B-352 dated 6-3-1947 which says : "accepted 1500 rate 152").

57. In this context, another significant circumstance is the failure of the 3rd defendant to produce the account books maintained by them. Nothing would have been easier for them to file the account books in support of their case. It was in evidence that they have been maintaining account books and if so what is the reason for the non-production of these account books if there is an iota of truth in his claim in this behalf ? The inference is irresistible that the 3rd defendant did not want to bring his accounts to the court as they would not lend any colour to his theory of purchase. There is also another flaw in their case. The written statement of the 4th defendant which was also adopted by the 3rd defendant proceeds on the assumption that the ghee tins of the plaintiff were sold through third parties. It is stated in para 7 which has also been referred to above that the 3rd defendant was corresponding with the plaintiff about the sales etc., to obtain quick sales with a view to repay himself as early as possible. The language used in the written statement in this regard in paragraphs 8, 9 and 15 only connotes that that they were sold to third parties in the market. In paragraph 13, with reference to ghee tins shown in D schedule annexed to the plaint, it is stated :

> "This defendant was accordingly obliged to purchase the same from time to time when other prospective purchasers at Calcutta on inspection would not offer proper prices" etc.

These allegations contrasted with those relating to other tins make it abundantly clear that even at the time of the written statement the case of purchase by 3rd defendant was not conceived and the one set up in the witness-box was an after-thought. Surely, the advocates who drafted the written statement could not be said to have missed the distinction between sale and purchase. Whatever might be said of the powers of the comprehension of the 3rd defendant in these respects, if really the case of purchase of all the tins was put before him, he would have certainly given effect to it by employing proper language. We are inclined to agree with the suggestion of the plaintiff that when the fraud committed by them was discovered by the plaintiff and was exposed by the evidence of P.Ws. 1 to 5 who were examined on commission and had to disgorge the illegal gains, the defendants were hard put to the necessity of coming forward with some story to escape from the situation thus created. In these circumstances, we have little hesitation in rejecting the defendants' case on this aspect of the matter.

58. The fourth contention relates to the payment of interest on the proceeds of sales of 786 tins effected by the Commissioner and brought into court. It is maintained by Mr. Chandrasekhara Sastry that the direction in this regard is invalid since his client did not have the use of this

money. We are unable to agree with this contention. It is conceded by him that his client put forward a claim to this money on the ground that these tins belong to him and that the plaintiff had no manner of right thereto and insisted that the money should be in court pending the determination of the rights of the parties to this amount. For this reason, the court invested it in Government securities which earned an amount of Rs. 3000/- and odd and which went in reduction of the liability of the defendants. In such a setting, it is useless to contend that the 4th defendant could not be made liable for interest that accrued on the sums in court till the date of the decree. When a person prevents another from having use of some money and is instrumental in keeping it idle in court, he is liable to pay interest on such money by way of damages.

59. Mr. Chandrasekhara Sastry pressed upon us the argument that it was not competent to the lower court to grant interest as his case does not fall within the ambit of the Interest Act. The instant case does not fall under any of the categories enumerated in Section 1 of the Act, continues the learned counsel. That being the case, there is no discretion vested in the court below to allow interest at 9 per cent on the amount deposited by the Commissioner.

60. This argument overlooks the proviso to that section. That proviso saves cases in which interest was payable before the passing of the Act. This is made clear by Section 34, C.P.C. There is ample discretion inhering in a court to award interest by way of damages in cases where the plaintiff has to be compensated for any loss sustained by him consequent on the conduct of the defendant. The counsel for the appellants contends that the defendant could not be directed to pay interest by way of damages when he had not retained money in his hands and made a profit out of it. In our opinion there is no difference between a case of that type and where by his acts he had deprived the plaintiff of the use of the money, which amounts to the defendant wrongfully withholding the money. If the plaintiff was not prevented from drawing out the money he could have put it to use. As it is, the plaintiff had suffered loss by being denied the use of money for a considerable time and has therefore to be compensated in the shape of interest. Nor could any exception be taken to the award of interest at 9 p.c. because the plaintiff had to pay interest to the appellants at 9 p.c. per annum for his advances. After all, the rate of interest as damages varies with the value of money to the parties. That being the case, he cannot make a grievance in regard to this part of the decree.

61. Coming now to the last contention, there is no rule or principle of law which requires a court to pass a preliminary decree invariably in every suit for accounts. Normally, a preliminary decree is granted in such suits because it would be necessary to go into the accounts and a court may think it advisable to appoint a Commissioner to ascertain the state of account between the parties. But that is not a rigid rule which should be followed in every case irrespective of its circumstances. In simple cases which do not involve much scrutiny of accounts, a court is not bound to pass a preliminary decree but could straightway give a decree for a certain amount if the material on record enables it to do so. The present case falls under this category. The statement of accounts prepared by the plaintiff with reference to the account books of P.Ws. 1 to 5 which could not be impugned clearly showed what sums were paid to the 4th defendant in regard to the ghee tins entrusted to the latter by the plaintiff and sold by P.Ws. 1 to 5 as commission agents. The defendants are made liable only for the sums which were actually paid by P.Ws. 1 to 5 to them after deducting the commission payable to them and other incidental charges out of the sale-price of the ghee tins. The defendants have not produced their own accounts presenting a conflicting version in regard to the sale-prices. They have no case as to the

rates at which ghee tins in question were disposed of, different from that revealed in the evidence of the witnesses and their account books. So, it was not a case where different versions had to be considered with different sets of account books, but a case which could be easily decided in the light of the material placed in the shape of the account books and the oral evidence of disinterested witnesses like P.Ws. 1 to 5. When the accounts could be ascertained and settled without passing a preliminary decree and resorting to the procedure necessitated thereby, a court is at liberty and also well advised in giving a decree to the plaintiff. Even before us, the defendants could not show in what respects the judgment is wrong or what allowable items were disallowed or what was the defect in the statements furnished by the plaintiff prepared in the light of accounts of P.Ws. 1 to 5 or in what respects the account books were unacceptable. To repeat it, the defendants have not chosen to file their account books and could not also repudiate the various payments made to the 4th defendant in the account books of P.Ws. 1 to 5.

62. The trial court remarked that there was no need to pass a preliminary decree and that no purpose will be served by passing a preliminary decree by referring the matter to the Commissioner for ascertainment of the amount due to the plaintiff as it was not the case of defendants 3 and 4 that they had got any account books which will show the amounts actually realized by them.

63. It was faintly argued that certain deductions have to be made by way of transport charges, from 3rd defendant's godowns of P.Ws. 1 to 5, godown charges and cooly paid at the railway station etc. There is no substance in this submission either for the reason that the 4th defendant had not placed any evidence before court as to the charges incurred under any of these heads. Nor are they able to tell us now what expenditure was incurred in that respect. The trial court allowed a lump sum of Rs. 1,000/- by way of estimated unloading and transport charges. It does not appear that anything more was claimed. This contention also fails. In the result, this appeal is dismissed with half costs.

64. There remains the appeal A. S. No. 485/1951 filed by the plaintiff contesting the validity of the judgment in certain respects. Two grounds of attack are put forward by the plaintiff against the judgment : firstly, that the trial court ought to have allowed a higher rate in regard to 178 tins of new ghee which were not disposed of by the 4th defendant by the time the Commissioner disposed of the 786 tins. The contention urged in this behalf was that at the time the Commissioner went, there was a large number of tins of ghee with the 4th defendant not yet sold and with great difficulty the Commissioner could seize only 786 tins and the rest of the tins amounting to 393 tins remained with the 4th defendant and which were sold subsequently for a higher price. The plaintiff-appellant restricts his claim only to 178 new tins out of the lot of 364 tins. In support of this claim, reliance is placed by the plaintiff on abstract No. 2 filed on his behalf, on the basis of actual realizations from P.Ws. 1 to 5. What is maintained is that while an average rate of Rs. 81-4-4 for tins of new ghee was got by P.Ws. 1 to 3 in the sales effected by them up to the end of March 1947, the average price which was realized by the Commissioner in regard to the 786 tins made by him subsequently was much higher and the plaintiff should have had the benefit of at least that rate because the 4th defendant would have sold these tins later and got a much better rate.

65. This is sound logic and the argument has to be accepted if the position was as envisaged in the argument of the counsel for the plaintiff. But this is contested by the defendants who pointed out with reference to statement No. 18 filed on behalf of the plaintiff. This statement shows that

in all 5910 tins were dispatched to Calcutta out of which the plaintiff sold to one Chokmal Tez Raj and Co., 306 tins. These 306 tins were subsequently obtained by the 3rd defendant and he sold 670 tins including the 306 tins to the 2nd defendant. In regard to the tins given to the 2nd defendant out of the stocks of the plaintiff the plaintiff was allowed a rate at which P.Ws. 1 to 5 sold the goods to the plaintiff. The statement No. 8 makes it abundantly clear that 364 tins were already disposed of before the Commissioner went to Calcutta. Therefore, there is no force in the statement that 393 1/4 tins remained unsold. If 364 tins are thus accounted for, there remains only 29 1/4 tins. There is no clear evidence with regard to these tins as to when exactly they are sold and it is profitless to pursue this matter having regard to the trivial nature of the difference in price with regard to these 29 1/4 tins the trial court having given for these tins also the same rate as in regard to the others.

66. The second complaint is that the trial court allowed commission to the 1st defendant on the tins sold by the 4th defendant through P.Ws. 1 to 5 except in regard to 1500 tins alleged to have been sold by the 1st defendant to the 4th defendant and 779 tins sold to the 4th defendant. The learned Subordinate Judge thought that the 1st defendant was disentitled to commission, on the sale of the first item, because the 1st defendant had colluded and conspired with the 3rd defendant and on the second because it was not a sale in the agency. In his opinion, the case of the 1st defendant stood on a different footing in respect of the other tins inasmuch as there was no evidence to indicate that he had neither knowledge of nor was privy to the fraud committed by the 3rd defendant.

67. We are in disagreement with this conclusion of the learned Judge. On the foregoing discussion, there is no ground for any differentiation between one transaction and another so far as the participation of the 1st defendant in the fraudulent design of the 3rd defendant is concerned. His dealings even in regard to the other set of sales also resemble those relating to the sales in regard to which commission was disallowed by the trial court. If in fact the 1st defendant acted to the detriment of his principal, the plaintiff, throughout the transactions he is not entitled to any remuneration for the business which was conducted through him. Apart from the long chain of authority which has established this position, there is the statutory disability attaching to an agent who misconducts himself in the business of his principal and this is enacted in Section 220 of the Indian Contract Act. The section says :

> "An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted."

68. The only thing that has to be established before the agent could be put out of court in regard to the commission is that he has been guilty of misconduct in the business of the agency. The principle underlying this section is that a principal is entitled to have an honest person as his agent and not a person whose actions are calculated to prejudice his interest and it is only an honest agent who is entitled to commission.

69. In this context, a passage in Story's Law of Agency which was extracted with approval in the judgment of Varadachari, J., who gave the opinion of the Bench in *Sirdhar Vasanta Rao v. Gopala Rao*[8], is pertinent :

> "It is a condition precedent to the title of the commission, that the contemplated services should be fully and faithfully performed. If therefore the agent does not perform his appropriate duties, or if he is guilty of gross negligence or gross misconduct, or gross unskilfulness, in the business of his agency, he will not only become liable to his principal for any damages, which he may sustain thereby, but be will also forfeit all his commissions. Slight negligence, or slight omission of duty will not indeed, ordinarily, be visited with such serious consequences; although if any loss has occurred thereby to the principal, it will be followed by a proportionate diminution of the commission."

[8] AIR 1940 Mad 299

It is to this doctrine that statutory recognition is given in Section 220. On the material on record, no doubt could be entertained as regards the misconduct of the 1st defendant who throughout acted in league with is brother the 3rd defendant. Such being the case, Section 220 could be properly invoked in this case and all commission disallowed to the 1st defendant. In other words, the 1st defendant will not get any commission on the sales effected by the 3rd defendant through P.Ws. 1 to 5. To that extent, A. Section 485 is allowed.

70. Mr. Krishnaswami Iyer has not pressed his appeal as against the 2nd defendant as the plaintiff has no direct evidence to prove either that the 2nd defendant was also guilty of fraudulent conduct in regard to the sales or that even knowledge of the fraud of the 3rd defendant could be attributed to him. The decree of the trial court in O. S. No. 485/1947 is accordingly modified. (The rest of the judgment is not material to the report).

Order accordingly.