

CALCUTTA HIGH COURT

Patiram Bankerjee

Vs.

Kanknarrah Co. Ltd

(Jenkins, C.J. and Woodroffe, J.)

26.02.1915

JUDGMENT

Jenkins, C.J.

1. Does the "disclosure" contemplated by Section 230 mean disclosure at the time the contract is made, or before enforcement ?

Woodroffef, J.

2. If this was not a case of undisclosed principal on June 2nd, could it become a case of a disclosed principal in September ?]

3. Both Sub-clauses (2) and (3) of Section 230 contemplate that the principal should be disclosed before the completion of the contract: *Lakshmandas v. Anna*¹ The presumption does not arise, if disclosed is made subsequent to the contract.

Jenkins, C.J.

4. It would appear this is not a case of undisclosed principal, but the case of a contract of employment.

5. Yes: the plaintiff did not enter into the contract as an agent. The contract was between the buyer and seller.

6. Section 230 reproduces the English Law and is not in variance with, it: *Hasonbhoy Visram v. Clapham*² On the English authorities the plum tiff is not liable. *Fleet v. Murton*³ which is cited in *Gubboy v. Avetoom*⁴ turned on a quest ion of usage, and was wrongly applied in that case. The present case is governed, by *Southwell v. Bowditch*⁵ see *Mackin-non Mackenzie & Co. v. Lang. Moir & Co*⁶.

7. If it be held that the plaintiff was liable under the contract, it is submitted, in any event, he would not be bound by the arbitration Clause, and hence the award must be set aside: *Piercy v. Young*⁷ If the broker is to be held to come within the

¹(1904) I.L.R. 17 Calc. 449, 454

³(1871) I. R. 7 Q. B. 126

⁵(1875) I. C.P.D. 374

²(1890) I. L. R. 17 Calc. 449, 454

⁴(1890) I.L.R. 17 Calc. 449

⁶(1881) I. L. R. 5. Bom. 584

⁷(1879) L.R 14 Ch. D 200

expression "both parties" in the arbitration Clause, the effect would be that there may result three independent arbitrations. Lastly, if the plaintiff is held to be bound by the award, K. D. Shaha should be ordered to indemnify him: see Section 222, Contract Act, and *Lacey v. Hill*⁸

8. Mr. Avetoom (with him Mr. McNair), for the Kanknarrah Co., Ltd., the respondents. This is a case of undisclosed principal within the meaning of Section 230(2) of the Contract Act and the plaintiff is liable under the contract and bound by the award. The test is to whom was credit given? It cannot be contended the Kanknarrah Co., gave credit to an unknown party. Who is to give the company delivery? If no disclosure at all had been made, it is submitted that both on the English and Indian authorities, the plaintiff would have been liable on the contract. By the letter of the 17th September the Company made it clear that they looked to the plaintiff to perform the contract. Patiram on his side made claims on Shaha equivalent to those made on him. The whole English Law on the point is set out in Benjamin on Sale 5th edition page 256: see *Hutcheson v. Eaton*⁹ The present case is covered by the ruling in *Gubboy v. Avetoom*¹⁰ see also *Soopromonian Setty v. Heilgers*¹¹

Jenkins, C.J.

9. In the present case the broker was not an agent to sell but merely an intermediary. The ruling in *Gubboy v. Avetoom*¹² turned on the construction put on the words "A. T. Avetoom for principal."

10. By not disclosing the name of the principal, the broker increased his liability and incurred that of a principal: *Parker v. Winlow*¹³ The principal must be disclosed at the time the contract is made: Section 92 of Evidence Act would prevent subsequent disclosure: *Soopromonian Setty v. Heilgers*¹⁴ In *Ramji Das v. Janki Das*¹⁵ it was held that if in fact there was a principal though undisclosed, Section 230 (2) would apply.

Jenkins, C.J.

11. That case does not throw any light on the question whether Patiram was a mere negotiator or an agent to sell. If he was an agent, Section 230 would apply, if only a negotiator, it would not. Refers to *Paul Beier v. Chotalal Javerdas*¹⁶

12. If the plaintiff is deemed to be a party to the contract, the arbitration Clause must apply to

him.

13. Mr. Sircar, in reply. In *Gadd v. Houghton*¹⁷ where *Parker v. Winlow*¹⁸ was cited, it was held that the broker was not liable. In *Gubboy v. Avetoom*¹⁹ there was nothing to show that at the date of the contract there was in fact a principal: see also *Keighly Ma(sic)sted & Co. v. Durant*²⁰ A distinction is to be drawn between the position of broker and that of an agent: *Adams v. Hall*²¹

⁸(1879) L.R. 18 E(sic). 182, 191

¹⁰(1890) I.L.R. 17 Calc. 449

¹²(1890) I.L.R. 17 Calc. 449

⁹(1884) I. R. 13 Q.B.D. 861

¹¹(1879) I.L.R. 5 Calc. 71

¹³(1857) 7 E. & B. 942

¹⁴(1879) I.L.R. 5 Calc. 71

¹⁶(1904) I.L.R. 30 Bom. 1

¹⁸(1857) 7 E. & B. 942

¹⁵(1912) I.L.R. 39 Calc. 802

¹⁷(1876) I.L.R. 5 Calc. 71

¹⁹(1890) I. L. H. 17 Calc. 449

²⁰[1901] A. C. 240, 244

²¹(1877) 37 I. T. R. 70

14. The terms of the contract as a whole must be considered: *Glover v. Langford*²² The terms of each contract must be considered on their own merits and not with reference to similar contracts: *Bristol Water Works Co. v. Wren*²³ amplifying the ruling of Jessel M.R. in *Southwell v. Bowditch*²⁴

15. Mr. S.R. Das (with him Mr. P. R. Das), for K. D. Shaha, the respondent. The plaintiff was not my agent to sell: if he has acted as principal, it was not my contract and I am not liable. If even he was my agent to sell, I am not liable to indemnify him for all consequences--there was no default on my part: *Halbronn v. International Horse Agency and Exchange Ld.* (sic). Lastly the plaintiff did not take the necessary steps to protect my interests.

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16. The plaintiff carries on business as a jute-broker under the name of S. N. Banerjee and Co. He has brought this suit for a declaration that an award dated the 14th February 1914 is invalid and inoperative, and for consequential relief. In the alternative he seeks a decree for indemnity.

17. This award professes to have been made on a dispute between Messrs. Jardine Skinner and Co., Managing Agents Kanknarrah Co., Ltd. and Messrs. S. N. Banerjee and Co., with reference to a claim for damages for non-delivery of 250 bales jute bought and sold under contract No. D/2382 of 2nd June 1913.

18. The bought note was in these terms:

"No, D/2382.

Indian Jute Manufacturers' Association

Jute Contract.

Calcutta, 2nd June 1913.

Messrs, Jardine Skinner & Co.,

Agents, Kanknarrah Jute Mills Co., Ltd.

Dear Sirs,

19. We have this day brought by your order and for your account from our Principals.

20. (Hero follows a description of the jute and provisions not material at this stage.)

21. Arbitration--Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chambers of Commerce, whose decision shall be accepted as final and binding on both parties to this contract.

Your faithfully,

(Sd.) S. N. Banerjee & Co.

²²(1892) 8 T.L.R. 628

²⁴(1876) L.R. 1 C.P.D. 374, 378

²³(1885) 15 Q. B. D. 637, 645

Brokers."

22. A corresponding sold note was sent to Babu K. D. Shaha on the same date.

23. On the 16th September 1913, S. N. Banerjee & Co., by letter declared Messrs. Jardine Skinner & Co., Agents, Kanknarrah Co., Ltd. on the one hand, and Babu K. D. Shaha on the other, their principal.

24. On the 17th September Messrs. Jardine Skinner & Co., replied to Messrs, S.N. Banerjee & Co.

25. We do not agree to accept your principal's name under this contract. The contract must, therefore, stand as originally made out." On the 29th September Messrs. Jardine Skinner called on Messrs. Banerjee & Co., to hand them documents for 250 bales, and on the 30th, Banerjee & Co., replied requesting them to ask the seller direct for the jute due under the contract. There was further correspondence but no delivery or payment was made, and ultimately Messrs. Banerjee & Co., received notice from the Registrar, Bengal Chamber of Commerce, that Messrs. Jardine Skinner & Co., had applied for arbitration. Messrs Banerjee & Co., repudiated the jurisdiction of the Chamber of Commerce and the arbitrators appointed by it. The arbitrators, however, proceeded with the arbitration and made their award directing Messrs. Banerjee & Co., to pay Messrs. Jardine Skinner & Co., the sum of ₹ 4,593-12/-.

26. This is the award now impugned. Chitty, J. has dismissed the plaintiff's suit and from this judgment the present appeal has been preferred.

27. It is contended by the appellant that there was no contract between Messrs. S. N. Banerjee & Co. and Messrs Jardine Skinner & Co., or the Kanknarrah Co., Ld. that authorized the reference to arbitration.

28. The Kanknarrah Co., Ld. on the other hand maintain that the reference is justified by the clause providing for arbitration in the bought note. The arbitration clause contemplates two parties, each a party to the contract, and there can, I think, be no doubt those two parties are the sellers and the buyers.

29. Was then the plaintiff a party to the contract so as to be bound by the arbitration clause, was he a seller or buyer ?

30. This question is not to be solved by describing the plaintiff as an agent with an undisclosed principal, and finding what the Contract Act says about a person in that predicament; that would, be a superficial mode of investigation. We must find out what was the contract between the plaintiff on the one hand, and Messrs. Jardine Skinner & Co., as representing the Kanknarrah Co., Ld. on the other. For this purpose we must examine the bought note and also the surrounding circumstances, among them being the fact that a corresponding note was sent to Babu K. D. Shaha. The bought note is no doubt signed by the plaintiff, and *prima facie* that would bind him, but it would only bind him to that which is expressed in the document.

31. If the document be examined, it does not purport to be a sale by the plaintiff even as an agent: it is an intimation that Messrs. Jardine Skinner & Co.'s order has been carried out by a purchase made by the plaintiff on their account, not from himself but from someone else.

32. The note may be an admission of the plaintiff's employment by Messrs. Jardine Skinner & Co. to buy on their behalf, but the contract (if any) as between the plaintiff and them, which it evidences, is a contract not of sale but of employment.

33. This employment was to negotiate a sale and to be an intermediary, not to sell on behalf of another. The position is described by Teasel, M. R. in *Southwell v. Bowditch*²⁵ where he says, "Blackburn J. in a remarkably clear Judgment says: 'there is no doubt at all in principle that a broker as such, merely dealing as broker and not as purchaser, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller (the phrase 'the very nature of things' putting the fallacy of the court below in this case), and that consequently where the contract says 'sold to A B' or 'sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods.'"

34. That a person signs simply as broker may be clear from the terms of the contract as well as from any statement to that effect appended to his signature, and this is illustrated by Mellish L. J.,

in the same case, where he says:

Now there is, I think, a material difference between the words 'sold for you to my principals' and 'bought of you for my principals.' The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying 'bought of you for my principals' is liable; but this contract says 'sold, for you to my principals,' i.e., I, your broker, have made a contract for my principals, the buyers.

35. I have already pointed out that the note in this case is in the second of these two forms, and on its true construction I hold that the plaintiff was no more than an intermediary, and was not an agent for sale, to whom the provisions of Section 230 of the Contract Act applies, so as to make him liable as an agent who has not disclosed his principal's name.

36. It has been contended before as that the present case is governed by *Gubboy v. Avetoom*²⁶ It is true that it was there held that the defendant in that case was an agent for an undisclosed principal within the meaning and operation of Section 230. But to treat the construction placed on the document and circumstances under consideration in that case, as a decision binding us in this case, is to fly in the teeth of the doctrine propounded by Jessel M. R. in *Southwell v. Bowditch*²⁷ where he says: "There is no more vicious line of argument, if I may say so, with deference to the Court below, than that which was adopted by the Court below in this case of comparing one contract with another and

²⁵(1876) L.R. 1 C.P. 374, 378, 379

²⁷(1876) L.R. 1 C.P. 374, 377

²⁶(1890) I.L.R. 17 Calc. 449

saying it differs very little; you arrive ultimately at identifying wholly different contracts." And yet this is the way Mr. Avetoom would have us go. In a word, the Court there on the construction of the document before them came to the conclusion that a particular relation was established; this cannot bind us in our construction of a different document written under wholly different circumstances. I do not propose to discuss the competence of a suit like the present, for no objection on this score has been raised. Nor is it necessary to consider the plaintiff's claim to indemnity against K. D. Shaha. In my opinion the judgment, of Chitty J. must be modified and a decree passed in the plaintiff's favour setting aside the award. The respondent Company must pay the plaintiff's costs of the suit and appeal, and the plaintiff must pay K. D. Shaha's costs of the suit and appeal.

Woodroffe J.

37. We must look at the terms of Section 230 of the Contract Act. The first question is whether the appellant, who is a broker, is as such an agent. I think a broker is an agent. For what purpose he is an agent is another question. Primarily and for some purposes he is the agent of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this

difference, that the broker being employed by persons who have opposite interests, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a copy of the entry or a note or memorandum of the transaction which as given to the seller is the sold note, and as given to the buyer is the bought-note. Prima facie a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may however make himself a party to the contract of sale or purchase for he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. The Section therefore refers to contracts "entered into by him on behalf of his principal." The next question is therefore, did the appellant enter into the contract in suit on behalf of his principal, that is, was he an agent to sell to the respondent or was he a mere negotiator to bring the parties together, but otherwise not concerned. If in this case the broker did enter into a contract, then I think on the facts he would be liable. For his principal was undisclosed at the date of the contract and the effect of the subsequent disclosure some three months later would not in itself affect the right of the respondents to proceed against the appellant though they might, if they chose, elect to proceed against the principal where disclosed. Whilst, however, I am of opinion that the appellant would be liable to the buyers if the case falls within Section 230, the question is whether that Section applies.

38. Prima facie a broker does not make himself liable and upon, the question whether he has entered into a contract or not we must look at the terms of the contract itself. Reference has been made to the fact that the appellant did not disclose his principal until three months later, and did not when Messrs. Jardine Skinner & Co. attempted to make him personally liable repudiate the liability then sought to be put upon him. He also appears to have billed the seller for the difference. There is however a letter in which he refers Messrs. Jardine Skinner & Co. to the sellers, and the difference bill is headed "Kanknarrah Account." Subsequently personal liability was denied. It is not contended that these facts amount to acquiescence, estoppel, or constitute a new contract. So far as the contract in suit is concerned, we must look to the terms of the contract itself. I should have had no difficulty as to this had it not been for the case of *Gubboy v. Avetoom*²⁸ on which the respondent relies and which is very similar to the case before us, and which, (whether it has been rightly or wrongly decided) is, it is contended, binding on us. I felt some difficulty on this point during the hearing, but as the learned Chief Justice is of opinion that this case does not stand in our way and his decision is in accord with the natural justice of the case, I do not dissent from the order he would pass. I wish to note with reference to the observation that in Calcutta this would be regarded as a principal contract that there is no evidence of such usage before us.

