BOMBAY HIGH COURT

Maneklal Mansukhbhai

Vs.

Jwaladutt Pilani

O.C.J. Suit No. 1576 of 1941

(Chagla, J.)

12.02.1946

JUDGMENT

Chagla, J.

1. This is a suit filed by a constituent against Ms broker. The plaintiff claims in the suit accounts for two vaidas, December 1938 and January 1989. His grievance is that although called upon from time to time to render the accounts, the defendant, his agent, has failed to render those accounts. The substantial defense on this plea is that the accounts with regard to the December 1938 and January 1939 vaidas were settled between the parties and the plaintiff is not entitled to the accounts. The facts which are really not in dispute are as follows.

2. The defendant submitted the ankda for the December 1938 settlement to the plaintiff on December 8, 1938. This ankda showed that a sum of ₹ 204-1-0 was due by the plaintiff to the defendant. The plaintiff did not pay the full amount but paid a sum of ₹ 839-1-0 in respect of this vaida, and the defendant accepted this amount in full and final settlement of what was due by the plaintiff for the December vaida. It is necessary to refer to the entries made in respect of this payment. The plaintiff in his cash book has debited this sum for payment to his broker in respect of the December vahm. The defendant in his cash book has credited this sum and in his journal as a larger amount was due and the amount paid was less to the extent of ₹ 365 he has given credit to the plaintiff in the sum of ₹ 365 and debited that amount to the brokerage account. Therefore it is clear on the books of account both of the plaintiff and of the defendant that the sum of ₹ 839-1-0 was paid and accepted in full settlement of the December 1938 vaida. With regard to the January 1939 vaida, a sum of ₹ 376-4-0 was payable by the defendant to the plaintiff. The defendant paid that amount, and that also is credited by the plaintiff in his cash

book as having been received from his broker in respect of the January valan.

3. In respect of the February 1939 vaida, a large amount was due by the plaintiff to the defendant. The amount claimed by the defendant was ₹ 37,005. As the plaintiff failed to pay the amount, the defendant filed a summary suit in. this Court, being Suit No. 227 of 1939. That suit was confined to the operations of the plaintiff for the February 1939 vaida. A summons was taken out by the defendant for a decree on the summary suit, and in his affidavit in reply which was filed on June 12, 1939, the plaintiff stated that the, accounts for the December and January vaidas had not been settled or adjusted as alleged by the defendant in his plaint in Suit No. 227 of 1939. The defendant filed his affidavit in rejoinder and re-asserted that the accounts had been settled and adjusted for those two vaidas. The plaintiff then filed a written statement in that suit but did not counterclaim for accounts for those two vaidas. Ultimately a decree was passed in favour of the defendant in that suit on February 1, 1940. The plaintiff preferred an appeal from that decree, and that appeal was dismissed on September 30, 1940. On December 19, 1940, the plaintiff filed a petition for leave to appeal to the Privy Council, and that petition was dismissed on March 31, 1941. On February 27, 1941, the plaintiff by his attorneys made a demand upon the defendant for the accounts of the December 1938 and January 1939 vaidas, and finally he filed his suit on December 2, 1941.

4. Now the question I have got to consider and determine is whether on "these facts it can be said that the accounts between the parties were adjusted and settled and the plaintiff is not entitled to claim accounts for these two taidas. Now every principal has a right, which has received statutory recognition in Section 213 of the (Indian Contract Act, to claim accounts from his agent; and Section 213 says that an agent is bound to render proper accounts to his principal on demand. But it is clear that this right to claim accounts is subject to one qualification, and that qualification is that the accounts between the principal and the agent are settled or stated. Just as accounts between a principal and a principal can be stated or settled, equally so they can be stated, or settled between a principal and an agent. In this case it cannot be disputed that if the defendant's plea with regard to stated accounts does not prevail, then the plaintiff as the principal would have a right to claim accounts from the defendant.

5. Now what are stated or settled accounts? If accounts are submitted and if they are accepted as correct by the other side to whom the accounts have been rendered, then in law you have stated or settled accounts. It is not necessary that the settlement of accounts need be in writing nor is it necessary that parties should sit down, compare accounts and call for vouchers, etc. All that the Court has got to ascertain is whether in fact the party to whom accounts were rendered has accepted those accounts as correct. The acceptance need not be express; it can be inferred from conduct. In this case there is no evidence of express acceptance of accounts. What I have to find is whether there is sufficient evidence from which a legal presumption can arise that the accounts between the parties were settled. The principle which I have just enunciated is borne out by a series of authorities dating from the earliest times. I cannot accept Mr. Taraporewalla's contention

that accounts can never be settled unless the party to whom they are rendered has actually seen all the accounts and all the particulars and has satisfied himself as to its correctness. It is true that there can be no acceptance or acquiescence without knowledge. But the knowledge which the law contemplates is not the knowledge of the actual correctness of the accounts but the knowledge of the right to claim particulars and vouchers with regard to the accounts submitted. It is always open to a party to say: I have the right to claim detailed accounts, but I do not want to exercise my right. 1 shall be satisfied with such accounts as were rendered to me and will not claim anything more.
In those circumstances a situation would arise which would result as much in there being stated or settled accounts as if both the parties had sat down and bad carefully gone into all the details of the accounts.

6. In the first place, we have this position set out in two leading text-books, The first is in Daniell's Chancery Practice, eighth edition, Vol. I, p, 4.19, This is how the learned author puts it: The mere delivery of an account will not constitute a stated account without some evidence of acquiescence which may afford sufficient legal presumption of a settlement.
Then you have Bullen and Leake's Precedents of Pleadings, ninth edition, p. 584. Note (h) states as follows: It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party has accepted it as correct. But such acceptance need not be express; contemporaneous or subsequent conduct may amount to a sufficient acquiescence.

7. As far back as 1692, Lord Hutchins in a ease observed that amongst merchants it was looked upon as an allowance of an account current, if the merchant that received it did not object against it, in a second or a third post. This is clearly a case of acceptance by conduct by not objecting to it within a reasonable time.

8. Then in *Wittis v. Jernegan*[1] the Lord Chancellor was dealing with the two objections raised by the plaintiff's counsel to the defendant's plea of a stated account. We are only concerned with one; and with regard to that, he observed that there was no absolute necessity that the account should be signed by the parties who had mutual dealings to make it a stated account, for even where there were transactions, suppose between a merchant in England and a merchant beyond sea, and an account was transmitted to "England from tin-person who was abroad, it was not the signing which would make it a stated account, but the person to whom it was sent, keeping it by him any length of -time, without making any objection which should bind him and prevent hie entering into' an open account afterwards. And in *Tickel v. Short*[2] which was a case of a merchant and a factor, the Lord Chancellor expressed his opinion that it was the rule of the Court that where a merchant kept an account cut-rent by him for about two years without objection, the Court would consider that the accounts were stated or settled. The same principle has been accepted by GUI- High Court also. In *Haji Abdul v. Haji Bibee*[3] Mr. Justice Chandavarkar was dealing with the question whether the account sued upon was a settled account and he observed in his judgment that authorities clearly showed that an account need not be signed to be a settled

account provided it was submitted to the party sought to be made liable on it and he had by words or conduct acquiesced in its correctness. It is true that in that particular case there was an express assent to the account submitted. But in my opinion even conduct would be sufficient to entitle the Court to come to the same con-elusion as an express assent. And in *Premji Virji v. Sir Edward Sassoon*[4] Mr. Justice Madgavkar approved of the dictum of Mr. Justice Chandavarkar. The principle of law in my opinion being clear, it has got to be applied to the facts of this case. Now there can be no doubt that an account was submitter by the defendant to the plaintiff both for the December 1938 vaida and the January 1939 vaida, and the question is whether those two accounts were accepted as correct by the plaintiff. The defendant in his evidence has stated on oath that from December 1938 till February 27, 1941, the plaintiff raised no

[1](1741) 2 Atk. 351
[2](1730-51) 2 Ves. (Sen.) 239
[3](1904) 7 Bom. L.R. 151
[4](1920) 29 Bom. L.R. 375

objection to the accounts submitted to him for the two vaidas nor did he ask for any accounts in respect of these two vaidas. Mr. Taraporewalla has not chosen to put his client in the witness-box to controvert this statement, and I accept the statement of the defendant on oath. It has also got to be remembered that although in his affidavit on June 12, 1939, in suit No. 227 of 1939, the plaintiff did put forward a contention that the accounts were not settled, lie did not choose to follow that up either by making an actual demand for the accounts or counterclaiming in that suit or doing anything at all right till February 27, 1941, and finally filing the suit on December 2, 1941. The defendant's case does not depend merely on the plaintiff not objecting to the accounts submitted to him. His case goes much further than that. "With regard to the December 1938 vaida, it is in. evidence that the defendant actually accepted a smaller amount than what was due to him. The plaintiff paid the smaller amount, made entries in his book showing that that amount was paid in full settlement of the December 1938 vaida, and the defendant in his turn in his books also accepted that position. With regard to the January 1939 .settlement, when the defendant paid the amount which, according to him, was due by him to the plaintiff, the plaintiff again accepted that amount without demur and made the necessary entries in his books accepting that amount in full settlement of the January 1939 vaida. Therefore we have in this case not only no objection on the part of the plaintiff to the accounts submitted to him but actual payment and settlement with regard to both the vaidas. Further tie plaintiff in his plaint has alleged that it was relying upon the representations of the defendant that the contract notes and the ankdas submitted to him were correct that the plaintiff made payments to the defendant mid received payments from the defendant; and he has also stated that the payments made by him were on account of and without prejudice to his right to call upon the defendant to render unto him true and proper accounts and to satisfy him that the. transactions had been entered into in accordance with the rules and regulations of the Native Share and Stock Brokers' Association. A specific issue has been raised on these averments of the plaintiff, and yet the plaintiff has not thought fit to step into the witness-box to support this allegation of his in the plaint.

9. On this evidence, therefore, I feel no hesitation in holding that the plaintiff accepted both the ankdas for the December vaida and the January vaida as correct and that the accounts with regard to these vaidas between the plaintiff and the defendant were settled. These accounts having been

settled, the plaintiff has no longer the right which the statute gives him to claim accounts from his agent.

10. The next question that arises is whether, if the accounts between the parties were settled, the plaintiff has any right to re-open those settled accounts. Now looking to the frame of the suit, it is perfectly clear that the suit was not filed for re-opening a settled account. A settled account can be re-opened on grounds which are well settled by now. It may be fraud or mistake or some ground which the Court would accept as having led one of the parties to accept the account as correct which in equity would be considered unconscionable. Although in para. 7 of the plaint vague allegations are made as to the behavior and conduct of the defendant as an agent in respect of the December 1938 vaida and January 1939 vaida, not only no particulars were given; but when one turns to the reliefs, no relief is based on the allegations contained in that paragraph. It is a simple suit for accounts by a principal against his agent, and the only other relief sought is that if in 'the taking of accounts it is found that certain transactions were appropriated by the agent himself, then the plaintiff should be given the necessary relief. Therefore if the defendant establishes as he has established that the accounts were settled between them, the plaintiff is not entitled to any further relief with regard to the December and the January vaidas.

11. A chamber summons was taken out by the plaintiff for a supplemental affidavit of documents disclosing various documents relating to the transactions of the December 1938 vaida and the January 1939 vaida. Mr. Justice Blagden, before whom the summons came, made an order on April 5, 1943, directing that the chamber summons should stand over till the hearing of the suit. Both parties were agreed that the determination of the summons and also of the question whether the plaintiff was entitled to the discovery sought for in that summons depended upon the trial of certain preliminary issues. I have therefore tried Issues Nos. 1 to 4 as preliminary issues. With regard to Issue No. .1. that the suit is barred by res judicata, Mr. Munshi has not pressed it and has given it up.

12. The result will be that the chamber summons will be discharged with costs, and I shall proceed to deal with the other issues which arise in the suit. -. Whim the defendant sued the plaintiff in. respect of February 1939 vaida in suit No. 227 of 1939, it was discovered that two transactions had been appropriated by the defendant to himself. The particulars with regard to these transactions, which are not in dispute, are as follows. The defendant in that suit inter alia claimed an indemnity in respect of purchase and sale of Tata deferred shares, and a statement was put in showing how the amount of the indemnity was arrived at. Now this statement showed that there were various purchases of Tata deferred shares and also various sales effected on behalf of the plaintiff. Now on January 19, 1939, the plaintiff gave instructions to the defendant to soil fifteen Tata deferred shares and on January 27, 1939, he gave instructions to sell five Tata deferred (shares. The defendant purported to carry out these instructions and in the statement submitted by him he showed these sales at varying rates. It was then found at the hearing of suit No. 227 of 1939 that the defendant had not effected the sales of these twenty Tata deferred shares

in the open market, but had appropriated the sales to himself. Counsel for the defendant in suit No. 227 of 1939 conceded that his client was not entitled to indemnity with regard to these twenty Tata deferred shares and, therefore, both the purchases of these twenty Tata deferred shares and the sales of these twenty Tata deferred shares were eliminated from the account and no indemnity was given to the defendant in respect of these shares. On January 16, 1940, as the record of suit No. 227 of 1939 shows, an application was made by the plaintiff's counsel to file a counter-claim in that suit, The draft of that counterclaim has now been put in, and it shows that by that draft the plaintiff avoided the sales of these twenty Tata deferred shares purported to be effected by the defendant. The learned Judge in that case refused leave to put in the counterclaim.

13. In this suit now the plaintiff has made a claim with regard to these twenty Tata deterred shares and his claim is formulated in this way: he says that the defendant was bound to deliver to him twenty Tata deferred shares with all the dividends accrued due thereon, and he claims in this suit delivery of those twenty specific shares or, in the alternative, the value of the shares at the rates prevailing in the market at the date of the decree.

14. Now this claim of the plaintiff is clearly untenable. The plaintiff had given instructions to the defendant to make a forward purchase of these twenty Tata deferred shares, The plaintiff had two options open to him before the due date: he could either close this outstanding purchase of twenty shares by the sale of these shares, or he could direct his broker to take delivery of the shares on the due date. It is clear that the plaintiff had no intention whatever to take delivery of these shares because, as I have pointed out, on January 19, 1939, and on January 27, 1939, he gave specific instructions to the defendant to sell these shares, tit is difficult, therefore, to understand how the defendant could be liable to give delivery of these shares to the plaintiff or to pay the value thereof on the footing of conversion. In fact the defendant never took delivery of these shares. In fact the plaintiff never gave instructions to the defendant to take delivery of the same. At no time did the plaintiff offer the purchase price of these shares to the defendant, There could only be conversion of an article provided the person against whom the suit is brought has been in possession of that article and has refused to hand it over to the person filing the suit on a demand being made for the same. As I have pointed out, in this case the defendant never came into possession of the twenty Tata deferred shares on behalf of the plaintiff and no question of conversion can ever arise.

15. The utmost that the plaintiff can .say is that the defendant in appropriating the sales to himself and not putting the transaction through in the open market was guilty of wrongful conduct as an agent and the plaintiff would be entitled to damages for such wrongful conduct, But when one looks at the plaint, no damages are claimed on that footing whatsoever. But even assuming such damages were claimed, then the measure of such damages would be what these twenty Tata deferred shares fetched if they had been sold in the open market. If the rate was higher than the rate allowed by the defendant to the plaintiff in his account, then the plaintiff would be entitled to that difference. But in this ease Mr, Taraporewalla has not attempted to

prove the actual market rates prevailing on January 19, 1939, and on January 27, 1939, and that is for a very good reason because these sales were effected, as I have pointed out, against the outstanding purchase of the plaintiff. These twenty Tata deferred shares had been purchased at a very high rate and by no stretch of imagination can it possibly be suggested that the market on January 19, and January 27, 1939, reached a rate higher than the rate at which these shares had been purchased by the plaintiff. Therefore even if it was established that the actual market fate was a little higher than the rate at which the defendant appropriated the sales to himself, even so as against the plaintiff's purchase the rate would be lower, and if anything the plaintiff would be liable to pay to the defendant something rather than the defendant being liable to pay to the plaintiff.

16. I do not think any authority is needed for the proposition that the plaintiff is not entitled to recover from the defendant the value of these shares. But the position has been very clearly set out in the decision of the House of Lords reported in *Christoforides v. Terry*[5] In his judgment at p. 574 Viscount Finlay points out that when a broker closes tie transactions of his client wrongfully, the client could not complain except in one of two forms; either that the broker had made a profit for himself out of the transaction, in which ease he would have to account for it; or that the shares had not been sold at the market price, in which case he might be liable for damages. And Lord Sumner at p. 578 states that a principal has three rights as against his agent who fails in his duty-one, to recover damages for want of skill and care and for disregard of the terms of the mandate; second, to obtain an account and payment of secret and illicit profits which have come to the hands of the agent as an agent; and, finally, the principal's right to resist the agent's claims

[5][1924] A.C. 566

for commission and for indemnity against liability incurred as a mandatory by showing that the agent has acted as a principal himself and not merely an agent. Now with regard to the last, the defendant gave up his claim to indemnity with regard to these shares in suit No. 227 of 1939. With regard to the first two, no damages are claimed by the plaintiff under either of the two heads. It seems to me that the plaintiff has invented a new head under which he seeks to hold the defendant liable for conversion of these shares. In my opinion, the plaintiff's claim with regard to the value of these twenty Tata deferred shares is unsustainable and must fail.

17. In the result the plaintiff's suit will be dismissed with costs. The plaintiff is entitled to get the costs of the first issue with regard to res judicata. The costs of this issue will be set off against the general costs of the suit which I have awarded to the defendant.

Suit dismissed.