

(1963) 01 MAD CK 0010
In the Madras High Court
Case No : Appeal No. 221 of 1960

C. Gnanasundara Nayagar	Vs	APPELLANT
Berton Export Co. a firm of Export Merchants and Another		RESPONDENT

Date of Decision : 29-01-1963

Acts Referred:

Contract Act, 1872 — Section 230

Citation : AIR 1964 Mad 113

Hon'ble Judges : Jagadisan, J; Anantanarayanan, J

Bench : Division Bench

Advocate : K.S. Sankara Aiyar and V. Sundaresan, for the Appellant; T.G. Aravamudhan and T. Krishnamachari, for the Respondent

Judgement

Anantanarayanan, J.—The appeal has been instituted by the plaintiff in the Court below who sued for recovery of a sum of Rs. 38,064, with

further interest at six per cent and for certain allied reliefs of the character of godown charges, from the first defendant-firm (Berton Export Co.),

situated in the United States, and the second defendant-firm, alleged to be the agent at Madras. The broad facts are not in dispute, and the main

question is whether the second defendant firm is the Madras agent of the first defendant-firm, name for damages for breach of contract claimed, u/s

230 of the Indian Contract Act. The related equally important question is whether cl. 26 of the terms of the indent (Ex. A-5) constitutes a special

exemption exonerating the agent from all liabilities.

2. It is not necessary to proceed into all the particulars of the evidence. We may very briefly state that the order was in respect of cold rolled black

steel sheets, designated by the code word Dolpa. The plaintiff agreed to purchase 50 tons of the said goods, and there was an offer and

acceptance, the second defendant firm undoubtedly acting as the intermediary which actually effected the contract. An irrevocable letter of credit

was issued by the plaintiff firm, in due course, for the c.i.f., value of 6000 dollars. In due course the goods arrived^ at Madras harbour, and were

cleared in August 1956, but found, on inspection, not to answer to the description in the order or the indent. Upon objections taken by the plaintiff

firm, the goods were surveyed by a qualified person, and they were ultimately rejected. The main question argued by learned counsel for the

second defendant firm, the only party contesting the appeal, was whether, under the circumstances of the transaction between the parties, it could

be contended on behalf of the 2nd defendant that they were only brokers, that the contract was directly between the plaintiff firm and Berton

Export Co. (first defendant), and that in consequence Section 230 of the Contract Act had no application to the facts of the case.

3. On this particular aspect, we have no hesitation at all in confirming the conclusion of the Court below that the 2nd defendant firm did not merely

act as brokers in respect of the suit transaction between the plaintiff and Berton Export Co. [first defendant], but that indisputably they were the

Madras Agents of the principal firm, who throughout dealt with the plaintiff in that capacity, Learned counsel for the 2nd defendant firm contends

that from the form of the indent signed in this case, of which the duplicate and triplicate are Exs. A-2(a) and A-3, justifies an argument that the

original, which has not been produced, must have been signed by the plaintiff firm, thereby indicating a direct contract with the firm in the United

States. We are wholly unable to accept this contention. If it is well founded it would mean that Ex. A-2(a) and A-3 are not true copies of the

original, for the indent has been signed by the proprietor of trio second defendant firm. Apart from this, the language of Ex. A-2 is practically

conclusive; the second defendant firm writes-

We have this day received cable from our Principals in reply to the above telegraphed by us....."" In addition to this, we find in Ex. A-6,

after setting forth details of the order, the following inscribed:

All orders and contracts are subject to the conditions that our principals shall not be held responsible for delays in performance etc.

Indeed the very Cl. 26 of the conditions of the indent, relied upon by the second

defendant firm to absolve the firm from liability for damages, indicates in no uncertain terms that the 2nd defendant firm were the agents for the foreign principals. On this aspect the facts admit only one conclusion, and that is the conclusion arrived at by "the trial Court that this is a case of an agent"" acting on behalf of a disclosed foreign principal, disclosed an initio and that Section 230 would, therefore, directly apply to the case.

4. Having held so far, it would appear to follow Immediately that the 2nd defendant-firm, is also liable for the damages claimed, since it is not in dispute that the breach of contract occurred, and that the goods ultimately delivered were rightly rejected as not conforming to description.

Normally, such a local agent of a foreign firm, particularly where the principal has been disclosed, cannot plead any exemption from liability, unless

that flows from any of the special conditions of the contract, for u/s 230 a contract by which the agent is also bound would be presumed to exist in

the instance where the contract is made by the agent for the sale or purchase of the goods for merchants residing abroad. The evolution of law in

England with regard to this particular doctrine has been somewhat different, and principles of this development have been discussed, to a certain

extent, in V.R. Mohanakrishnan Vs. Chimanlal Desai and Co., , a Bench decision of this Court to which one of us was a party. But, equally we

have no doubt that, as far as the damages are concerned, the agent (second defendant) would be exonerated by virtue of the explicit terms of Cl.

26. Clause 26 of the conditions run as follows:

If the goods are delivered for any reason mentioned in para 22 or the goods happen to be other than the one ordered for or inferior in quality, for

all the above deviations singly or all put together I /we will not hold you responsible to pay me/us any damages or compensation but I/we will have

all our action against your principals and none against you as the agents of your principals.

The only argument of Mr. Sankara Iyer for the plaintiff-firm on this aspect is not that the clause is ambiguous, or that it does not imply an absolute

protection to the local agent, but that the plaintiff did not know English and signed the first page of the indent without acquainting himself with these

conditions, or this particular clause. In brief, the argument is that advantage has

been taken of the illiteracy and ignorance of the plaintiff to escape a liability which would normally have to , be shouldered by the local firm, as well as by the foreign principal. The argument has only to be stated in this form for its untenable character to be apparent, for obviously we cannot make an exception because of the ignorance of English of the plaintiff, or his failure to acquaint himself sufficiently with the terms and conditions of the very indent that he executed. We are therefore satisfied that, as far as the claim for damages is concerned, the second defendant firm would not be liable. But the argument that the second defendant firm could not be held to constitute an agent of a foreign principal at all, but must only be considered a kind of broker, runs counter not merely to the explicit statements in the record, but to the inference which follows from applying the principles of law to the facts. It is relevant, in this connection, to refer to the judgment of the Supreme Court in Radhakrishna Sivadutta Rai and Others Vs. Tayeballi Dawoodbhai , which was a case of an agent of a disclosed principal (Section 230 Sub-section 2).

5. But the interesting question remains whether/ with regard to the refund claimed by the plaintiff firm (appellant) the second defendant is not liable equally with the plaintiff (sic-first defendant ?). As we have earlier pointed out, the clause 26 provides an absolute immunity for the agent for damages arising from such causes as late delivery, delivery of goods other than those ordered, of goods inferior in quality of goods deviating from the contract etc. But there is not a single clause in this indent, which we have carefully perused, which expresses any protection for the agent with regard to return of monies paid, against which the goods have not been delivered. The facts here are not in dispute. The plaintiff firm paid substantial monies by unqualified letters of credit for these imports, and failed to get the goods ordered. The different goods actually sent were sold under orders of Court, and certain monies were realised. As far as the claim against the second defendant firm is concerned, it is limited to the difference between the monies paid by the plaintiff firm, and the monies realised by sale of the goods, namely, Rs. 4126 There can be no doubt that the 2nd defendant firm directed the plaintiff to dispatch the letter of credit to the foreign principal, and thereby undertook the responsibility for seeing that there was either a fulfilment of the contract, or a return of the

monies. The contract was broken, and the monies are undoubtedly thus due from both the principal as well as the agent. The claim cannot be resisted with regard to a decree for Rs. 4126 against the second defendant firm, the liability limited to this extent, and not including any amount towards damages. We also disallow interest claimed on this amount from the date of sale or the interest claimed on Rs. 30,753-9-0 from the date of plaint to the date of sale. As far as the second defendant firm is concerned, the appeal is allowed to the extent of Rs. 4126 alone, with further interest from the date of the decree, 19th February 1960.

6. As far as the first defendant is concerned, we are totally unable to see why the plaintiff should not have a decree not merely in terms of the actual claim allowed by the Court below against the ex parte defendant who never fulfilled his obligation under the contract in proper manner, but also for the interest disallowed, expenses for the letters of credit, landing and transport charges, godown charges etc. In brief the suit will be decreed against the first defendant firm for the amount of Rs. 5219 claimed in addition by the plaintiff, for which full details have been given, the plaintiff will of course have full costs also against the first defendant firm throughout. As far as the second defendant firm is concerned, the decree for costs awarded by the Court below will be set aside and the plaintiff will have costs of the suit and appeal limited to costs due upon the amount now decreed.

Jagadisan, J.

7. I entirely agree with my learned brother. I have had the advantage of reading the judgment of my learned brother in V.R. Mohanakrishnan Vs.

Chimanlal Desai and Co., where, if I may say so with respect, the question of liability of an agent of a foreign principal is fully discussed. I,

however, wish to add a few words, particularly because the subject of the rights and liabilities of the agent of a foreign principal, disclosed or

undisclosed, in regard to his dealings with third parties, is a fascinating chapter in the law of agency. In England, this particular branch of law is

linked up with the mercantile custom that the local agent of the foreign principal had no authority to bind him and was therefore personally liable.

Such mercantile usage gave rise to a presumption of the agent's personal liability and the exclusion of the principal's liability-See Harper and sons

v. Keller Byrant and Co., Ltd., (1915) 84 LJ KB 1696. if, however, there was evidence disclosed by the terms of the contract that the agent had

the necessary authority, the presumption could be rebutted. The existence of the presumption was doubled in Miller Gibb and Co. v. Smith Tyre

Ltd, 1917 2 KB 141. But in Cox v. Sorell, 1960 1 LL. Rep. 471, Pilcher J. was inclined to treat the presumption as still holding the field. In the

present day world of quick and easy communications from one part of the globe to another, the notion or presumption that the inland agent of a

foreign principal might be acting without authority should be discarded as primitive and utterly improbable. The question is really one of fact as to

what the parties intended.

There is, however, much to be said in favour of the view that the presumption helps to safeguard innocent persons acting in ignorance of the

commercial and financial status of the foreign dealer. In Haisoury's Laws of England, 3rd Edn. Vol. 1, at page 218, the legal position is thus set

out:

Where a contract is made by an agent of a foreign principal, there is a presumption that it cannot be enforced by or against such principal; but the

presumption may be rebutted by the express terms of the contract or by showing that at the time when the contract was made the agent had

authority to establish privity of contract between such principal and the other party, and that privity of contract was in fact established between

them.

8. But even as late as 1955, the English Court has stuck to the view that an agent of a foreign principle is presumed to be personally liable till the

contrary is proved. In Rushoime v. Bead, 1955 1 WLR 146, Pearce J. stated as follows:

The fact that a person is agent and is known so to be does not of itself prevent his incurring persona liability. Whether lie does so is to be

determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal, there is

a presumption that he is incurring a personal liability unless a contrary intention appears.

Section 230 of the Indian Contract Act embodies, to some extent, the principle of English law, relating to the personal liability of the agent of a

foreign principal but it is confined only to cases of a contract made by an agent for the sale or purchase of goods for a merchant resident abroad.

9. What then is the correct position on the facts of this case? We do not have the slightest doubt that the second defendant acted as the agent of

the first defendant. The terms of the contract and the surrounding circumstances establish this quite clearly. The name of the principal is also

disclosed. The second cotenant cannot, therefore, be made personally liable under the contract. But being an agent of a foreign principal who sold

the goods to the plaintiff he falls squarely within the exception u/s 230. In order to avoid personal liability, the second defendant must show that by

express words or by necessary implication he contracted out of such liability. In regard to the liability of damages cl. 26 referred to by my learned

brother in his judgment quite clearly exempts him from liability of any kind. But in regard to the refund of the advance amount, there is no specific

provision in the contract excluding his liability. It is not part of the claim for damages. Even if the plaintiff was the party in breach, he would do

entitled to a refund of the advanced amount subject of course to the claim of the defendant by way of cross claim to recover damages from him.

We have, therefore, no doubt that the plaintiff's claim for refund of the advance from the second defendant is well founded. I agree with my

learned brother in the judgment and decree passed.