(1967) 08 CAL CK 0008

In the Calcutta High Court

Case No : Appeal from Original Decree No. 221 of 1957

Khemchand Pemchand APPELLANT

Vs

Dalhousie Jute Company Ltd. RESPONDENT

Date of Decision : 17-08-1967

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23
Contract Act, 1872 — Section 230
Evidence Act, 1872 — Section 159, 160, 32(2), 63, 63(5)

Citation : (1968) 1 ILR (Cal) 277

Hon'ble Judges : S.K. Mukherjea, J;Ray, J

Bench : Division Bench

Advocate : Subimal Ray, Dipankar Gupta and Babulal Jain, for the Appellant;P.P. Ginwalla, Sankar Ghose and Goutam Chakravarty, for the Respondent

Final Decision : Allowed

Judgement

Ray, J.—This is an appeal from the judgment of Mukharji J. whereby the Plaintiff''s suit was decreed for the sum of Rs. 44 224 with costs.

2. The Plaintiff is the Respondent in this appeal and the Defendant is the Appellant. The Respondent instituted the suit against the Appellant and claimed damages, compensation for storage of jute and costs. In short the Respondent''s suit is on these allegations: Upon terms and conditions of two several contracts evidenced in writing by two separate brokers'' notes both dated December 6, 1948, and respectively numbered B4319 and B4320, the Plaintiff bought from the Defendant 9751 mds. 20 seers and 1304 mds. 20 seers of jute respectively. Such purchases were made at Calcutta and Messrs. W.F. Ducat & Co. were the brokers. On or about the said date the said brokers disclosed to the Plaintiff that the Appellant was the seller, and disclosed to the Defendant that the Respondent was the buyer. The Appellant on January 5, 1949, tendered to the Respondent at its jute mill, situated at Dalhousie Jute Mill Company, 11,056 mads. of jute. Upon inspection and examination the Respondent found that such jute was not and no

portion of it was in terms of either of the contracts, and the Respondent rejected the said jute as it was entitled to reject. The Respondent stored the said jute so rejected in godowns and claimed compensation at the rate of two annas per maund per month from January 5, 1949, until judgment or removal of the said goods by the Defendant. The Respondent claimed loss and damages for breach of contract.

3. The Appellant in the written statement denied the claim of the Respondent and the defences will really appear from the issues raised at the trial. The issues were as follows:

(i) Is the Plaintiff entitled to maintain this action?

Is there any privity of contract between the Plaintiff and the Defendant?

(ii) Is the suit barred by reason of the provisions of Clause 9(2) of the contracts?

(iii) Was the Plaintiff entitled to reject the goods?

(iv) Is the Plaintiff entitled to claim storage charges and, if so, at what rates?

(v) To what sum, if any, is the Plaintiff entitled?

4. The learned Judge came to the following conclusions that there was privity of contract between the Respondent and the Appellant, and the Respondent was entitled to maintain the suit, that the suit was not barred by reason of the provisions contained in Clause 9(2) of the contracts, that the Plaintiff was entitled to reject the goods. The fourth issue was answered in favour of the Appellant. The Respondent was awarded damages for the sum of Rs. 44,224.

5. The first question is whether there were contracts between the Appellant and the Respondent. The Respondent''s case as alleged in the plaint is, first, that the contracts were evidenced in writing by the broker''s notes, secondly, that W.F. Ducat & Co. were brokers, thirdly, that the brokers disclosed to the Respondent that the Appellant was the seller and that the Respondent was the buyer of the said goods and, fourthly, that the Respondent accepted the Appellant as such seller and the Appellant accepted the Respondent as such buyer.

6. Some oral evidence was adduced on these questions. It will appear from the oral evidence of Bertie Meyer on behalf of the Plaintiff Respondent at p. 74 of the paper-book and in answer to Q. 94 that the word ''undersigned'' in the contract referred to W.F. Ducat & Co., brokers. In Qq. 163 to 167 of Khemchand Chopra on behalf of the Defendant Khemchand said that they were brokers in the market who charged commission at the rate of one per cent, but in the case of undersigned contracts the brokers would charge at the rate of 1 1/4 per cent, and these were Messrs. G. Das & Co. and A.M. Mair & Co. and Messrs. W.F. Ducat & Co. Khemchand further said in Q. 167 that there would be at least four to five transactions each year in which Messrs. W.F. Ducat & Co. would be concerned. Again in Q. 178 Khemchand said that the Appellant had transactions with jute companies, and Kamal Singh Dhudhuria used to sell Appellant''s goods in the

market and used to charge commission and he would sell the Appellant''s goods to many buyers. In Q. 197 Khemchand said that the Appellant sold goods to the mill. In Qq. 201 and 202 Khemchand said that the price was negotiated with the party who would purchase and there would be an intermediary, a broker in between the parties, and when the price would be decided upon as the result of negotiations that would be the price at which the goods would be sold. In Q. 228 Khemchand said that W.F. Ducat & Co. were members of the Calcutta Jute Brokers'' and Dealers'' Association. In Q. 334 Khemchand said that W.F. Ducat & Co. were the brokers and they used to charge brokerage. In Q. 335 Khemchand said that Ducat & Co. acted as the principal buyers. In Q. 384 Khemchand said that Dalhousie Jute Mills accepted the directions contained in the award of the arbitrators. Some of these questions were referred to by counsel for the Respondent in aid of several contentions advanced.

7. The learned Judge referred to two contracts and gave five reasons to show that the cumulative effect was in favour of construing the contracts to mean that the buyer was the Respondent Dalhousie Jute Mills; but the seller was the Appellant Khemchand Pemchand and W.F. Ducat & Co. only acted as brokers.

8. Reference may be made at this stage to broker''s notes appearing at p. 6 following in the paper-book. The notes appear as follows:

Messrs. Bird and Co., Managing Agents, Dalhousie Jute Mills Co. Ltd.

Dear Sirs,

We have this day bought by your order and for your account from the undersigned.

Yours faithfully,

Sd. W.F. Ducat and Co. Brokers

9. The seller''s note to which reference was made by the Appellant in the statement and, in particular, para. 4 of the written statement is as follows:

Messrs. Khemchand Pemchand

Dear Sirs,

We have this day sold by your order and for your account to the undersigned--

Yours faithfully,

Sd. W.F. Ducat and Co. Brokers

10. In each of these notes will appear the following writings:

(a) Rupees Thirtyfour annas eight for X per Calcutta Bazar Maund free to buyers'' mill siding and/or Ghat. Weight guaranteed at buyers'' mill.

(b) The amount of tax payable under the Bengal Raw Jute Taxation Act, 1941, is to be on the seller''s account and to be deducted by the buyers from the price quoted.

(c) Delivery to Dalhousie Jute Mills by I.G.N. and Ry. Co.''s R.S.N. Co.''s B.A.S.S. Co.''s E.B.R.S.S. Co.''s steamer and/or flat and/or by rail. (Numbered as Clause 2 in the note).

(d) Cash on presentation of documents. Invoices to be for lots of not less than 250 bales unless in completion of the contract. Cash against mill''s receipt.

(e) Claims in respect of short weight must be made not later than 5 working days after the arrival of the jute in buyers'' mill on application from sellers provided it is received by the mill as soon as possible and in any event not later than the fourth working day after the date of issue of mills short weight advice, reweighment by licensed measures will be allowed of 10 % of each lot contained in each short-weight advice. [Clause 9(1)].

(f) If the rates current at the date of this contract for freight by liver steamer and/or rail to the buyers'' mill siding and/or Ghat and insurance during transit shall be increased or reduced before the date of despatch of the goods consigned to buyers'' mill siding and/or Ghat, the rates mentioned in Clause 1 shall be increased or reduced accordingly.

11. The learned Judge found, first, that the obvious feature of the contracts described as jute contracts was that the contracts were made on forms sponsored and approved by Indian Jute Mills Association and used by the brokers, secondly, that the stamp used for the contracts was engrossed with the words ''brokers'' note'', thirdly, a special brokerage was charged, fourthly, the evidence is that W.F. Ducat & Co. was a member of Indian Jute Mills Association under whose rules a broker has no right to buy jute as a principal and, fifthly, the words ''free to buyers'' mill siding'', ''weight guaranteed at buyers'' mill did not refer to the undersigned but referred to Dalhousie Jute Mills. The payment of tax under the Bengal Raw Jute Taxation Act on seller''s account has been held to indicate that the buyer was not the broker. The words delivery to be made to Dalhousie Jute Mills are held to indicate that the buyer was Dalhousie Jute Mills and not the undersigned W.F. Ducat & Co. The words cash against mill''s receipts are also found to indicate that the cash was to be paid by the mill. ''The mill''s short-weight advice'' as also the words ''obligation of the mills to issue re-weighment orders'' indicate that the buyer was Dalhousie Jute Mills and not W.F. Ducat and Co.

12. The learned Judge dealt with the contention advanced by counsel for the Defendant Appellant that the name of Dalhousie Jute Mills Co. Ltd. was not disclosed and preferred the oral evidence of Bertie Meyer to that of Kamal Singh Dhudhuria that the name of Dalhousie Jute Mills Co. Ltd. was disclosed to Khemchand Pemchand after or at the time the contract was made. The learned Judge referred to the bill of lading which was made in the name of Dalhousie Jute Mills Co. Ltd. and secondly, to the awards or directions of the Bengal Chamber of

Commerce and came to the conclusion that these facts indicated that the buyer was Dalhousie Jute Co. Ltd. and Khemchand Pemchand was the seller.

13. Counsel on behalf of the Appellant contended, first, that the word undersigned would mean W.F. Ducat and Co. and that was admitted by Bertie Meyer in answer to Q. 94 and it was manifest in the contracts. Secondly, that the contracts were principal to principal contracts and were not contracts for principals or from principals. Thirdly, it was said that the various decisions to which reference had been made by the learned Judge would show distinction between contracts made for principals or from principals on the one hand and contracts which were described as undersigned contracts on the other. Fourthly, it was said that there was no allegation of custom in the plaint and, therefore, it was not competent to the Respondent-Plaintiff to take recourse to custom in regard to disclosure of principals. Fifthly, it was said that there would be no scope for oral evidence unless there was ambiguity in contracts. Sixthly, it was said that there was admission on the part of Dalhousie Jute Co. Ltd. treating W.F. Ducat and Co. as their sellers and that admission was not explained. Seventhly, it was said that there would be no room for oral testimony and no evidence would be admissible because this would be a pure question of construction of contract and the only case where evidence would be admissible was if there was a pleading of custom or usage or if there would be ambiguity as to context in which a particular word was used and if there was ambiguity subsequent conduct might be admissible or surrounding circumstances in a limited way would be admissible to show as to who were W.F. Ducat and Co. and in what capacity W.F. Ducat and Co. entered into the contract.

14. Counsel for the Appellant placed some reliance on the correspondence and, in particular, referred to the letter dated January 3, 1949, at p. 372, the letter dated January 4, 1949, at p. 375, and letters dated January 7, 1949, at p. 387 to 389, letters dated January 7, 1949, at p. 390, January 10, 1949, at p. 391, January 10, 1949, at p. 393, 394 and 396, January 10, 1949, at p. 392, January 10, 1949, at p. 395, January 11, 1949, appearing at p. 400, January 12, 1949, at p. 401 and January 12, 1949, at p. 403 of the paper-book. On the correspondence counsel for the Appellant contended, first, that the correspondence shows that the words ''our buyer'', ''your buyer'' ''our seller'', ''your seller'', ''our principals'', ''your principals'' would indicate that the contracts were between W.F. Ducat & Co. on the one hand and Dalhousie Jute Mills Co. Ltd. on the other. Reference was made in this connection to the oral evidence of Bertie Meyer at p. 93 being Qq. 210 to 218 and Qq. 224 to 225 at pp.95 and 96 of the paper-book. Bertie Meyer was cross-examined in those questions on the correspondence and in his oral evidence he said that they referred to Dalhousie Jute Mills Co. Ltd. ''as our buyers'' and Khemchand Pemchand were to send the jute goods to Dalhousie Jute Mills. In Q. 218 Bertie Meyer said that the contracts were always made in the form in which they were made and the broker signed underneath. Reference was made to the case of A.M. Mair and Co. Vs. Gordhandass Sagarmull, (which was decided by the Supreme Court) in the oral

evidence of Bertie Meyer who said in Q. 218 that subsequent to the decision of the Supreme Court the form of contracts was changed with the result that all payments were to be made through the brokers and all corresponding documents would pass through brokers with the exception of arbitration cases. In other words, Bertie Meyer''s oral evidence is that the form of the contract was changed subsequent to that decision. It is not in evidence as to what the changes are. In Qq. 224-225 Bertie Meyer said that it would appear from the correspondence that Dalhousie Jute Mills Co. Ltd. was referred to as the buyer.

15. The correspondence to which reference was made by counsel for the Appellant will indicate that W.F. Ducat & Co. wrote to Khemchand Pemchand on January 3, 1949, referring to contracts Nos. B4319 and B4320 in suit:

Our buyers received 3325 bales jute and on examination they found the jute to be of inferior quality. Our buyers are therefore submitting the matter to arbitration.

Again on January 4, 1949, Khemchand Pemchand wrote to W.F. Ducat and Co. referring to contracts Nos. 4319 and 4320 showing the name of Dalhousie in the margin as follows:

We are sorry to write to you that you have not yet paid our Bill Nos. 087 and 088...although the jute under the above bills have already arrived at your buyers'' mills,... Your buyers cannot refer the matter to arbitration without making payment of bills first.

On January 6, 1949, Dalhousie Jute Co. Ltd. wrote to W.F. Ducat and Co. as follows:

Your contract No. B4320. Our contract No. 82. Against above contracts we have received 464 bales...and on examination we find the jute to be of inferior quality. We are therefore submitting the matter to arbitration for settlement.

The other letters to which reference has been made were between W.F. Ducat & Co. and Khemchand Pemchand where W.F. Ducat & Co. used the words ''our buyers'' and Khemchand Pemchand also used the words ''your buyers'' and there are also letters to show that W.F. Ducat & Co. used the words ''our sellers'' and the words ''our principals''. In the letter dated January 10, 1949, W.F. Ducat & Co. wrote to Messrs. Khemchand Pemchand:

We enclose copies of letters addressed to us from our buyers...these letters clearly show that the buyers are not prepared to accept this delivery against our contracts and look to you to remove the same and fulfil your obligations thereunder.... Since the buyers have addressed you direct on the subject as our principals it is desirable to institute your proceedings before the Tribunal direct....

On January 11, 1949, Khemchand Pemchand wrote to W.F. Ducat & Co.

...You being our principals under the contract your buyers are not eligible to address us directly as mentioned in your letter under reply nor they have yet addressed directly to us....

16. Counsel for the Respondent contended, first, that evidence could be led as to the condition or capacity of the parties in entering into the contract, secondly, that evidence could be led that there was knowledge of the parties that one was a broker and that was an undersigned contract and that the broker was agent of both, thirdly, it was said that if the parties knew and if the contract established who the parties were, evidence was admissible to show that the party signing was not discharging or denying liability but was showing that the real liability of the party to be charged under the contract was the principal.

17. The two old decisions of this Court being Patiram Banerjee v. Kanknarrah Co. Ltd. ILR 42 Cal. 1050 and Nanda Lal Roy v. Gurupada Haldar ILR 51 Cal. 588 may be referred to for appreciating the principles involved in contracts which are described as undersigned contracts or contracts which are described as having come into existence by the exchange of bought and sold notes. In Patiram''s case the contract was in this form:

Messrs. Jardine Skinner and Co., Agents, Kankinarrah Jute Mills Association

Jute Contract

Dear Sirs,

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

Yours faithfully,

Sd. S.N. Banerjee and Co., Brokers

The corresponding sold note was signed and sent by the broker to the other party. The names of the principals were disclosed to each other by the broker on a subsequent date. At p. 1062 following the report the question was considered as to whether the contract in that case was entered into by the Plaintiff as an agent. Jenkins, C.J. said that it had to be found what the contract was between the Plaintiff on the one hand and Messrs. Jardine Skinner & Co. as representing the Kanknarrah Co. Ltd. on the other and for that purpose the bought note, surrounding circumstances were all to be examined. The observations of Jessel, M.R. in Southwell v. Bowditch L.R. 1 C.P. 374 were referred to that where a broker dealing as a broker and not as purchaser made a contract from the very nature of things between the buyer and the seller he was not himself either buyer or seller and where the broker signed simply as broker he did not make himself by that either purchaser or seller of the goods. The observations of Mellish L.J. in Southwell v. Bowditch are important that the rule of law is that if the principal is undisclosed the broker saying ''bought of you for my principals was liable; but when the contract said ''sold for you to my principals'', that is, ''I, your broker, have made a contract for my principals, the buyers'', the position is different. The form of the contract in Patiram''s case ILR 42 Cal. 1050 was beyond any measure of doubt different to the form of the contract in the present case.

18. In the case of Nanda Lal Roy v. Gurupada Haldar ILR 51 Cal. 588 the form of the contract was as follows:

Sold this day by order and for account of Babu Gurupada Haldar to selves for principal etc.

The sold notes were signed by the Plaintiff over the word ''brokers''. It was held that the Plaintiff in that case entered into contracts on behalf of his principals who were undisclosed and that he did so in the character of broker or agent. The form in Nanda Lal Roy''s case Supra made it manifest that the broker made the sale to self for principal. It was said that a broker who entered into a contract for and on behalf of the principal was not entitled to sue upon the contract even though the principal would be undisclosed and the reason is that the broker contracted as a broker in Nanda Lal Roy''s case. Reference was made to the decision in the case of Gubboy v. Avetoom ILR 17 Cal. 449 where the contract was in the form--

Sold this day by order and for account of E.E. Gubboy, to my principal etc.

In Gubboy''s case the seller sued the broker for damages and the case turned upon the question whether the presumption u/s 230 of the Contract Act was rebutted by the form of the note. The broker was held liable in that case. It was said that evidence of usage was admissible to augment the responsibilities of a broker. It should be stated that in the present case there is no such aspect of usage. The principles enunciated in Nanda Lal Roy''s case Supra in the light of the form of the contract in that case are not of assistance to the questions in controversy in the present case.

19. Counsel for the Appellant relied on the unreported decision in In re Arbitration Gordhandas Sagarmull v. A.M. Mair & Co. judgment of S.B. Sinha, J., dated April 6, 1948 in Suit No. 44 of 1948 and submitted that the form of contract in the present case was on all fours with the form in the case of Gordhandas Sagarmull v. A.M. Mair & Co. In Gordhandas Sagarmull the sold note was in the form:

We have this day sold by your order and for your account to the undersigned.

The note was signed at the foot by A.M. Mair & Co., the Respondents over the printed word ''brokers''. Sinha, J. considered the questions as to whether there was contract between the parties namely, between Gordhandas Sagarmull and A.M. Mair & Co. The four principles laid down by Sinha, J. were, first, that if the broker is merely an intermediary Section 230 of the Contract Act does not apply and the broker is not liable even if the principal is undisclosed. Secondly, if the broker is not a mere intermediary but an agent for sale Section 230 applies and the broker is presumed to be liable if the principal is undisclosed though the presumption may be rebutted. Thirdly, even if the broker is an intermediary, he may be liable to both buyers and sellers if a custom to that effect is established.

Fourthly, in the market in respect of hessian, gunny and jute manufactured goods there is a custom whereby the broker is liable to both buyers and sellers on a contract where the broker does not disclose the name of the principal. Sinha, J. said that the contract in Gordhandas Sagarmull''s case Supra could be described as an ''undersigned contract'' and said that if practice or usage or custom in the jute trade was relied on evidence would be necessary. Sinha, J. came to the conclusion that the type of contract commonly known as ''undersigned contract'' came into existence in order that the brokers might be liable to both buyers and sellers who did not want to enter into direct relationship with each other as parties to the contract and to avoid the necessity of proving any custom whereby the liability of brokers for performance of the contract has to be established. Sinha, J. further said that there was nothing on the face of the contract to show that the Defendant entered into the contract on behalf of the principals or that they were falsely contracting as agents. These observations of Sinha, J. show that in coming to a conclusion in Gordhandas Sagarmull''s case Supra the facts and circumstances which aided were the absence on the face of the contract to show that the Defendant entered into the contract on behalf of the principals and the reason why the undersigned contract came into existence. In Gordhandas Sagarmull''s case the contract was construed on the words appearing at the top of the contract and without reference to any other terms or conditions in the contract. In the present case the terms and conditions of the contract are of great importance and cannot be lost sight of in the construction of the contract.

20. Counsel for the Appellant placed considerable reliance on the decision of the Supreme Court in A.M. Mair Co. v. Gordhandas Sagarmull Supra and contended that the Supreme Court laid down that it was a question of construction of the contract and if evidence could not be adduced to explain ambiguity or to introduce any allegation of custom or of surrounding circumstances to show as to who W.F. Ducat & Co. were, no other evidence would be admissible. The Supreme Court referred to the dispute which was raised in that case as to whether the brokers were parties to the contract in their own right as principals or they entered into the contract on behalf of Bengal Jute Mill & Co. The Supreme Court said that the dispute was one which turned upon the true interpretation of the contract and the parties would have to take recourse to the contract to establish their rival contentions. The Supreme Court did not express any opinion as to whether in that case the brokers were parties to the contract for the obvious reason that it was left open for determination by the arbitrators. The decision of the Supreme Court is of assistance only for the limited purpose that it is a matter of construction of the contract as to whether a party is bound by the contract as a principal or is a mere agent and is not bound by the contract.

21. Counsel for the Appellant contended that the contract in the present case was neither of Patiram Banerjee''s Supra type nor of Anderson Wright Ltd. Vs. Moran and Company, type. The Moran type of contract is to be found in the decision in Anderson Wright Ltd. Vs. Moran and Company, In this case the form

of the contract was as follows:

We have this day bought by your order and on your account from our principals.

It will appear, therefore, that the words ''from our principals'' made the contract different to the contract in the present case. Counsel for the Appellant contended that the question of disclosure would arise where the words ''from our principals'' would appear and that in the present case the absence of those words and the signing of the contract by the brokers rendered it unnecessary for any disclosure because the contract was made by W.F. Ducat & Co. in the present case.

22. The use of the word ''broker'' was explained in the case of Universal Steam Navigation Co. Ltd. v. James McKelvie and Co. (1923) A.C. 492. In that case a charter party was expressed to be made between T.H.S. & Co., agents for the owners of a steamer, ''and J. McK. & Co., Charterers'', and was signed ''for and on behalf of J. McK. & Co. (as Agents), J.A. McK.''. The decision of the House of Lords was that the. Defendants who signed as agents were not liable as principals. The obvious facts in Universal Steam Navigation Company Ltd. need not be stressed, namely, as to how the document was signed. The observations of Lord Sumner in that case were as follows:

think it follows, that the words as agents'', which as a matter of construction may be sufficient to discharge Messrs. McKelvie, have that effect because they form part of the contract and, if they are conclusive, it is by reason of their meaning as part of the contract and not because they are part of the proof of assent to a contract, which is itself distinct from them. They are more, too, than words of description of the signatory''s business. It has sometimes been said that when ''agents'' is the word added to the signature, it is a mere word of description, and so does not qualify the liability which is the act of signing imports. I question this explanation. One''s signature is not the place in which to advertise one''s calling, nor is ''agent'' ordinarily used to describe a trade, as ''tailor'' or ''butcher'' would be. I have no doubt that, when people add ''agent'' to a signature to a contract, they are trying to escape personal liability, but are unaware that the attempt will fail. The result, however, is the same. When words added to a signature in themselves qualify liability, it is because, as words, they can be so construed in conjunction with the contract as a whole.

These observations indicate enquiry and investigation into the use of the word ''broker'' in construing the contract in its entirety.

23. The decision in Gordhandas Natha Lal Vs. Gorio Ltd., was referred to. The form of the contract in that case was:

we the undersigned do hereby agree to purchase from Messrs. Gorio, Ltd. of Bombay the undermentioned goods shipped, being shipped or to be shipped to Bombay by steamers on the conditions specified on the reverse.

On a construction of the document the relationship between the parties was held to be that of principals. It may be stated that there was no question of broker having exchanged or sent bought and sold notes to the parties.

24. Counsel for the Respondent relied on the Bench decision in Venkata Subbiah Chetty v. Govindarajulu Naidu ILR 31 Mad. 45. The Plaintiff in that case sued to recover the amount on the bond executed by the first Defendant. The Plaintiff and the second Defendant were partners and money was borrowed for the partnership. It was held by the trial Court that oral evidence was inadmissible to show that the second Defendant was liable on the bond which was executed by the first Defendant alone. It was said in the Madras case that all the partners were liable jointly for a breach of the agreement and reference was made to Roscoe''s Nisi Prius Evidence in support of the statement of law that in an action on a written contract between the Plaintiff and B, oral evidence is admissible on behalf of the Plaintiff to show that the contract was in fact, though not in form, made by B as agent of the Defendant; for the evidence tends not to discharge B, but to charge the dormant principal. In Roscoe, the authority in support of that proposition is Wilson v. Hart 7 Taunt. 295. It is true that though Chetty''s case ILR 31 Mad. 45 concerns the liability of the partners, but the principle cannot be disputed that evidence is admissible not to discharge the party who is signing the contract but to charge the dormant principal. Counsel for the Appellant contended that the statement of law in Roscoe''s Nisi Prius Evidence is contrary to the provisions contained in Sections 91 and 92 of the Evidence Act. That is not so. The decisions to which reference has already been made indicate that in the case of construction of a contract the entire contract is to be looked into and evidence is admissible and oral evidence is admissible to explain ambiguities as also to explain the material terms in the contract.

25. The Supreme Court in the case of Radhakrishna Sivadutta Rai and Others Vs. Tayeballi Dawoodbhai, considered the question as to how the bought and sold notes were to be construed if there were any variation or disparities between the notes. In the Supreme Court case the documents forming the contract were exchanged between Radhakrishna on the one hand and T.N. Mehrotra on the other. Radhakrishna was addressed as A/C Khaitan and Sons Ltd. The words A/C. Khaitan and Sons Ltd. had to be construed as to whether the documents forming the contract could be said to mean that Khaitan and Sons were the parties to be bound by the contract or not. The Supreme Court observed that the bought and sold notes were to be taken into consideration and the correspondence between the parties was also taken into consideration in Radhakrishna''s case Supra. Reference was made to the observations of James, L.J. in Gadd v. Houghton (1876) 1 Ex. D. 357 that when a man said that he was making a contract on account of someone else, it seems that he used very strict terms the English language afforded to show that he was not binding himself. In Gadd''s case the brokers in Liverpool gave a fruit merchant a sold note and they said that goods were sold on account of James Morand and Co. and they signed the note without any use of the word ''brokers''. The form of the contract in Gadd''s case made it indisputable that the contract was being entered into on behalf of another person. The Supreme Court referred to the correspondence and said that the

signature of the Appellant in that case would not have much significance nor would the use of the words ''we or you'' make any difference Supra. The Supreme Court said that

parties knew that the Appellant was acting on behalf of the disclosed principal.

It is not suggested that in such a case every time the agent has to sign expressly stating that he is acting on behalf of the disclosed principal. Therefore, if he was acting for the disclosed principal, the fact that he did not add the relevant description to his signature, or he used the word ''we'' in the operative portion of the letter would not materially alter the fact spoken to by the notes that he was acting on behalf of the disclosed principal. It cannot be suggested that these letters intended to alter the position disclosed by the notes.

The letters, like the confirmation slips, are, and must be, presumed to be consistent with the notes; and so it would be unreasonable to attach undue importance to the signature and to the use of the relevant word ''we'' and ''you'' on which reliance was placed.,.

The Supreme Court also referred to the observations of Mellish, L.J. in Gadd v. Houghton (1876) 1 Ex. D. 357:

When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable.

The observations of Mellish, L.J. were referred to by the Supreme Court in order to construe the bought and sold notes as to whether the Appellant there was acting for a disclosed principal and the contracting party was a disclosed principal and no other.

26. S.B. Sinha, J. in the case of Gordhandas Sagarmull v. A.M. Mair & Co. Supra to which reference has already been made said that no case was made by the Petitioners there in the correspondence that Bengal Jute Mills Ltd. were the disclosed principals. This observation shows that in the question of construction of the contracts the correspondence between the parties is admissible in evidence. There is also an observation of Sinha, J. that, if the parties knew in that case that the contract was being made by an agent, that would also be a relevant consideration. In other words, the capacity in which a party entered into a contract would not be a term of the contract and oral evidence would be admissible to show as to in what capacity the contract was made. It is in the light of that proposition that the Madras Bench decision in Venkata Subbiah Chetty v. Govindarajulu Naidu Supra is important that oral evidence is admissible to show first as to who the dormant principal is and secondly as to who is liable.

27. If it be an express term of contract between A and T that A is the principal to the contract, it has been held that no other person but A can be principal. The main question to be considered is where there is no such express terms, the

undisclosed principal can be proved to be a principal. In most of the cases the contract has been in writing and as a result the question has sometimes been concluded by a finding whereby parol evidence cannot be given to contradict or vary written contract. In the old decision of Humble v. Hunter (1910) 102 L.T. 116. A signed charter party in his own name describing himself to be the owner of the chartered ship. When the freight was not paid, A''s principal P sued T, the other contracting party. It was held that P could not sue. This case has often been cited as authority for the proposition that P could not give parol evidence to vary or contradict the written charter party. Lord Denman, C.J. said that in that case the agent described himself as the owner of the ship and contracted as a principal. The reason is that if A described himself as owner, he impliedly contracted that there was no other owner. In cases which succeed Humble v. Hunter (1910) 102 L.T. 116 as for example in Killick & Co. v. Price (W.R.) & Co. (1896) 12 T.L.R. 263 the agent signed the contract as if he were a principal, but the third party negotiated with him as an agent and indeed knew the identity of the principal. The Court allowed evidence to prove the existence of the principal. In Killick''s case Lord Russell interpreted Humble v. Hunter as based on the theory of inadmissible evidence and doubted its correctness. In the case of Drughorn (E) Ltd. v. Rederiaktiebolaget Trans-Atlantic (1919) A.C. 203 evidence was admissible to show that an agent who signed as a charterer had an undisclosed principal who was the real charterer. In other words, if an agent contracts in the terms of the contract to be a principal, it is impossible to prove that someone else is the principal. On the other hand, the decisions indicate that if there are descriptions indicating perhaps that the person so described is not the contracting party, evidence is led to show that another person was the contracting party and the real charterer. In these cases proof of the existence of the undisclosed principal can be given because the terms used in the contract do not of themselves indicate that the agent has contracted to be a principal. In the case of Higgins v. Senior (1841) 8 M. & W. 834, 844: 11 L.J. Ex. 199 Park, B. said:

There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another.

Again in the recent decision of the House of Lords in Basma v. Weeks (1950) A.C. 441, by a written agreement, R, S and T agreed to sell to A two houses. The vendors knew that A was acting as P''s agent, but the agreement did not refer to P or to the fact that A was purchasing as P''s agent. Later P sued R, S and T for specific performance of the agreement. The Defendants pleaded the Statute of Frauds. Evidence was admitted to show that P was A''s principal. Lord Reid said that an agent who contracted in his own name did not cease to be contractually bound, because it was proved that the other party knew, when the contract was made, that he was acting as agent. Therefore, the agreement which is made in his own name does not cease in that event to contain the names of the contracting parties and it does not cease to satisfy the statute. These cases show that if the third party knew that the agent was an agent, but the written contract upon which the action was brought was signed by the agent with no reference to his agency or to the existence of his principal, evidence could be admitted to prove that someone other than the person named in the document is the principal of the latter person. Reference may be made to Article 91 of the Law of Agency by William Bowstead (11th ed., p. 193) in support of the proposition where an agent enters into a contract, oral or written, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract, provided that such evidence is not inconsistent with the terms of the written contract. The decisions in Humble v. Hunter Supra and Drughorn (E.) Ltd. v. Rederiaktiebolaget Trans-Atlantic Supra to which reference has been made are cited in support of that proposition.

28. The oral evidence of Bertie Meyer and Kamal Singh Dudhuria in the present case is that W.F. Ducat & Co. was acting as brokers and the Defendants knew that they were acting as brokers. Counsel for the Appellant contended that if it appeared that W.F. Ducat & Co. entered into the contract as agents, in that case evidence would be admissible to show who the principal was, but it did not appear that the contract was entered into by W.F. Ducat & Co. as agents. The criticism that counsel for the Appellant made on allegations in the plaint is that the contracts that the Plaintiff sued upon were evidenced in writing by two separate broker notes. The Plaintiff did not allege that the contracts were made by exchange of bought and sold notes. The Plaintiff did not allege that the contracts were made through the brokers. At the same time in para. 1 of the plaint it is alleged that purchases were made and W.F. Ducat & Co. were the brokers and the further allegations are that the brokers disclosed as to who the buyers and sellers were. These allegations in the plaint were dealt with by the Defendant in the written statement and reference was made to the sold notes. The Defendant denied that the Plaintiff bought any jute from the Defendant. The Defendant further alleged that, according to custom, practice and usage, W.F. Ducat & Co. were the principals. On these pleadings an issue was raised as to whether there was any privity of contract between the Plaintiff and the Defendant. The learned Judge held that the facts and circumstances of the case established that there was privity between the parties. The use of the word ''broker'' or the use of the stamp would not by themselves be decisive but would certainly have importance in the question of construction. The learned Judge gave one of the reasons for establishing privity between the Plaintiff and the Defendant that W.F. Ducat & Co. were a member of the Indian Jute Mills Association and under the rules a broker was not allowed to buy jute as a principal. Reliance was placed on the oral evidence of Bertie Meyer in Q. 10 that

the sellers knew that W.F. Ducat & Co. were only allowed to act as brokers and were not allowed to act as buyers. The learned Judge said that this evidence was not challenged in cross-examination. The allegation in the plaint that W.F. Ducat & Co. were the brokers and that it was made known to the Defendant that the Plaintiff was a buyer and the Defendant was a seller have to be investigated in the background of the entire contract. Counsel for the Appellant criticised the finding at p. 325 of the paper-book that the bill of lading established that the Dalhousie Jute Co. Ltd. were the buyer. The bill of lading was referred to in the oral evidence of Bertie Meyer in Qq. 27 to 35. The bill of lading though referred to by the witness was not proved and tendered. Counsel for the Appellant rightly contended that the observations of the learned Judge that the bill of lading was a piece of evidence which established privity could not be sustained.

29. In regard to the construction of contracts the bought and sold notes are to be taken together. These notes establish, first, the bought notes to be in the name of Messrs. Bird & Co., Managing Agents of Dalhousie Jute Co. Ltd. The sold notes are in the name of Messrs. Khemchand Pemchand. Secondly, both the bought and the sold notes are signed by W.F. Ducat & Co., brokers. Thirdly, both the bought and sold notes indicate that the jute is to be delivered to Dalhousie Jute Mills. Fourthly, there are words both in the bought and sold notes "free to buyers'' mill siding and/or ghat. Weight guaranteed at buyers'' mill". Fifthly, the terms in the contract indicate that claim in respect of short weight must be made not later than five working days after the arrival of the goods in buyer''s mill. The terms also provide for issue of mill''s short weight advices. Sixthly, the terms provide that the mill must issue reweighment order not later than four working days after the receipt of the seller''s application. Seventhly, the terms provide that if the rates current at the date of the contract for freight to the buyer''s mill siding and/or ghat be increased or reduced before the date of the dispatch of the goods consigned to buyer''s mill siding the rate shall be increased or reduced accordingly.

30. Counsel for the Appellant contended that the words ''buyer''s mill'' meant ''buyer''s nominated mill''. It was also contended by counsel for the Appellant that delivery to Dalhousie Jute Mills would not be synonymous with delivery to Dalhousie Jute Co. Ltd. The question is whether the bought and sold notes indicate as to who the buyer is. In Halsbury''s Laws of England (3rd ed., vol. 34, para. 44, p. 29) the law is stated to be first that where bought and sold notes in the form usual in the trade are issued by the broker to his clients, the bought and sold notes, if they correspond with one another and are complete, constitute a contract in writing. Secondly, where bought and sold notes were issued by a broker who was agent of both parties, each note if complete may be sued on as a contract in writing in the absence of proof by the party to be charged that the other note differs, thirdly where a person carrying on the business of a broker acts on behalf of only one of the parties and sends a note to the other, the contract is formed by means of that note sent to and accepted by the buyer, and in such a case a variation between that note and the one sent by the broker to

his principal is immaterial. The evidence in the present case is that the Defendant dealt with the parties as brokers for more than 20 years and every year there were three or four transactions. The further evidence is that the Defendant sold to the mills through the brokers. The business is that the Defendant gave the lowest price at which they might sell with the direction that the broker should conclude the deal at the highest price. The broker charges 1 1/4 per cent brokerage on all undersigned contracts and assumes full responsibility as agent. Counsel for the Respondent contended that the rate charged by the undersigned broker was higher because of assumption of liability.

31. The pre-eminent question is whether the contracts indicate that W.F. Ducat & Co. is the buyer or whether Dalhousie Jute Co. Ltd. is the buyer. The words in the contract impose an obligation as an express term that the mill must issue a reweighment order. An obligation cannot be imposed save by contracts on the contracting party. Various references to buyer''s mill and the name of Dalhousie Jute Co. Ltd. appearing in the bought note and the name of Khem chand Pemchand appearing in the sold note are to be taken together for considering as to whether these parties are constituted the buyer and the seller by the exchange of bought and sold notes. The words ''buyer''s mill'' occurring as a part of the express term that claims in respect of the short weight must be made not later than five days after the arrival of the jute in buyer''s mill are to be taken along with other references to buyer''s mill particularly where delivery is stipulated to Dalhousie Jute Mills and delivery is stipulated free to buyer''s mill side. Counsel for the Respondent contended that various terms in the contract indicated that the buyer was the mill and whoever was the owner of the mill was the buyer. In my opinion this contention is correct and is established by the bought and sold notes as also the facts and circumstances of the case to which reference has been made, particularly that it was known that W.F. Ducat & Co. acted as brokers in the contracts forming subject-matter of the suit and the Plaintiff, i.e. someone other than the ''undersigned'' in the note, was the buyer. Evidence is admissible to show the capacity in which a party entered into a contract and also to show that the party signing is not denying signature but is denying liability and effectiveness in order to charge the dormant principal. It is an express term of the contract that the buyer is the mill where the goods are to be delivered and obligations are cast on the buyer by requiring the buyer to do certain things at the mill and identity of the buyer is established by the ownership of the mill. The Plaintiff and the Defendant were the buyer and the seller.

32. The second question in the present case is whether the suit is barred by reason of the provisions contained in Clause 9(2) of the contracts. That clause is as follows:

Claims in respect of quality and/or excessive moisture must be made not later than 14 working days after the arrival of the jute in buyer''s mill. All claims in relation to quality and/or condition (expressly including claims to reject) shall be settled in no other way than by a reference to arbitration as is in this contract provided for; but none shall be entertained unless submitted by the buyers to arbitration within three months of the date of delivery of the jute at the buyer''s mill.

The learned Judge held against the contentions of the Appellant. Counsel for the Appellant contended that the words

all claims shall be settled in no other way than by a reference to arbitration as is in this contract provided indicated that the settlement was only by obtaining an award and in no other way. The contentions of counsel for the Appellant were four-fold. First, that Clause 9(2) provided issue as to quality to be settled by settlement of award. Secondly, such dispute could not be settled in any other way. Thirdly, it followed that determination of questions of quality would not arise unless the awards were obtained. Fourthly, it followed that obtaining of award was a condition precedent.

33. Counsel for the Appellant described that clause to be in the nature of Scott v. Avery 5 H.L. Cas. 811: 10 E.R. 1121: (1843) A.E.R. Rep. 60. The relevant portions in the clause in Scott v. Avery were as follows:

Provided always, and it is hereby expressly declared to be a part of the contract of insurance between the members of the association, that no member who refuses to accept the amount of any loss as settled by the committee in manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.

Lord Crawnworth, L.C. said:

The policy of the law does not prevent parties from so contracting; and the question is here: What is the contract? Does any right of action exist until the amount of damage has been ascertained in the specified mode? I think, clearly not.... There is the express stipulation that the obtaining of the decision of the arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.

Lord Campbell said that

in this contract of insurance, it is stipulated in the most express terms that, until the arbitrators have determined, no action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined.

34. Reference was made by the learned Judge to the decision in Cipriani v. Burnett (1933) A.C. 83. In Cipriani''s case a contract was constituted on the tickets which bore the following clause: This ticket was sold subject to the condition that in the event of any dispute arising with respect to any matters connected with the drawing of the sweepstake, or the awarding of the prizes, the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final. It was held that the terms of the ticket, having regard to the circumstances belonging to it, made a decision by the stewards a condition precedent to any action to recover the stakes. It was held that failure to produce the decision of the stewards was a failure to fulfil the conditions precedent of his right to sue. It will appear at p. 88 of the report that the question is one of construction, and counsel for the Appellant contended that in the present case the provisions contained in Clause 9(2) should be construed as constituting condition precedent to the right of action.

35. Counsel for the Appellant also relied on the decision of Spurrier v. G.F. la Cloche (1902) A.C. 446: (1900-3) A.E.R. Rep. 277. In Spurrier''s case the twelfth condition was, inter alia, as follows:

And it is hereby erpressly declared to be a condition precedent to the liability o? the company in respect of any claim under this policy that the claim shall, if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire.

It was held that the contract was so framed in Spurrier''s case (1902) A.C. 446: (1900-3) A.E.R. Rep. 277 as to given no cause of action unless a certain condition was performed, e.g., the determination by an arbitrator of liability and the amount payable under the contract. Cipriani''s case (1933) A.C. 83 was distinguished by the learned Judge as having reference to the decision of a domestic tribunal having been agreed to by the parties to be a condition precedent and the decision in Scott v. Avery Supra as having application only to insurance cases.

36. Counsel for the Appellant rightly relied on the decision in Caven v. Canadian Pacific Railway 133 Law Times 774 in support of the proposition that it would be a mistake to treat Scott v. Avery Supra principle as confined to insurance or building contracts.

37. Counsel for the Defendant in the trial Court relied on the decision in Pomp v. Fuchs 34 T.L.R. 800 in support of the condition that in commercial contracts there could be application of Scott v. Avery Supra principle. In Pomp v. Fuchs the Plaintiffs bought of Defendant jute of a particular mark, to arrive from Calcutta, the Defendant guaranteeing the jute to be of the average quality of that mark as hitherto imported and promising that if found to be inferior, a fair allowance should be made to the Plaintiffs. The quality was found to be inferior and

damages were claimed accordingly. The Defendant stated in defence that the Plaintiff''s purchase was subject to a term that in the event of any dispute arising out of the contract, it was to be referred to jute brokers for arbitration and that any reference to arbitration was to be demanded within fourteen days of final landing of jute. The Defendant alleged that this was a dispute arising out of the contract and no reference was demanded within the stipulated time. Cockburn, C.J. said that reference to arbitration was a remedy provided for the settlement of complaints as to quality and that was not an unreasonable mode of determining a dispute about quality and is a good answer to the action. The decision in Pomp v. Fuchs Supra is really an authority for the proposition that if arbitration is provided for, the parties should be relegated to that course of action. This decision in Pomp v. Fuchs does not aid the Appellant in the present case as constituting bar to the maintainability of the suit or the accrual of the cause of action.

38. Counsel for the Respondent on the other hand contended that if the conditions prescribed in Clause 9(2) of the contract were contract were construed to be a condition precedent, that would be first supplying new words to the contract and secondly the provisions contained in Clause 9(2) make otherwise explicit what is implicit in Clause 13 which is the arbitration clause. In other words, the main contention of counsel for the Respondent is that the award was not made a condition precedent in the present case according to the terms. Counsel for the Respondent referred to the decision in Vigers Bros. v. Sanderson Bros. (1901) 1 Q.B. 608, in support of the contention that Clause 9 related to contracted goods and if the contracted goods were not supplied, there could be no claims under that clause. It was said that arbitration clause would apply only to contracted goods and Clauses 9 and 13 when read together would indicate that the parties contemplated arbitration in regard to contracted goods and there was no restriction on the right of action by making award a condition precedent in the present case.

39. Reference may be made to the decision in Pinnock Brothers v. Lewis and Peat Limited (1923) 1 K.B. 690. In Pinnock''s case there was a clause which provided for arbitration. An arbitration was contemplated in respect of disputes in connection with quality or condition of goods sold for shipment as also disputes in connection with quality or condition of goods otherwise than for shipment. The question for consideration was whether the presence of the arbitration clause was a bar to the action. At p. 695 of the report it is stated that the first defence in that case was based on the existence of an arbitration clause and upon an award made in consequence of that clause. In Pinnock''s case Supra it was held that the arbitrator before whom the matter came held that he had no jurisdiction as notice of arbitration was not given nor the arbitrator nominated in time. The suit was maintainable and it was held that the arbitration clause did not consistitute a bar to the action. It was held that neither the arbitration clause nor the award constituted a bar to the action. In the present case counsel for the Appellant contended that there was a reference to arbitration. The Appellant filed

claims before the arbitrators for price of goods. The parties asked for time. Directions were given by the arbitrators to pay the price first in cases Nos. 126 and 127 of 1947 instituted by the Respondent regarding quality. The directions of the arbitrators were forwarded to the parties. The Respondent paid to W.F. Ducat & Co. a certain sum in compliance with the directions of the arbitrators W.F. Ducat & Co. offered to pay the money to a stake holder. Eventually the Registrar of the Chamber of Commerce informed the parties that the arbitration cases should be kept in abeyance pending the disposal of the suit which had in the meantime been instituted. Counsel for the Respondent rightly contended on those facts that claims were made within time and the contract did not provide that, if claims were not made within time, the contracts would be waived and in any event there was no award by the arbitrators and directions of the arbitrators could not be said to amount to an award.

40. I am unable to accept the constructions of counsel for the Appellant that the provisions contained in Clause 9(2) constitute what was contended to be a Scott v. Avery Supra clause. There is no stipulation making an award condition precedent to any cause of action or any right to sue. Counsel for the Respondent is right in his contention that Clause 9(2) is really an explicit amplification of the implicit terms contained in the arbitration clause. There is no bar to a suit. Counsel for the Respondent is also right in his contention on the authority of Jureidini v. National British and Irish Millers Insurance Co. (1915) A.C. 499 that repudiation of a contract could not be insisted along with enforcement of a subordinate term of the contract because it would be within the mischief of the doctrine of approbate and reprobate. Even if arbitration could be enforced it would appear in the present case that arbitrators declined jurisdiction. But even at the risk of repetition I would say that the clause relied upon is neither of the Scott v. Avery Supra type nor does it prevent accrual of cause of action or of right to sue.

41. The third question is whether the goods were validly rejected. Though there is no specific date in the bought and sold notes for delivery, it appears on evidence that the goods were delivered on December 31, 1948. The Respondent informed W.F. Ducat & Co. on January 3, 1949, that the goods were of inferior quality. On the same date W.F. Ducat & Co. passed on the information to the Appellant. On January 4, 1949, the Appellant claimed payment. On January 5, 1949, W.F. Ducat & Co. informed the Appellant of short weight. On January 5 there was inspection. According to the Respondent the goods were of grossly inferior quality. That is the oral evidence of Bertie Meyer. On January 6 the Respondent informed of the inferior quality. On examination the goods were found to be of inferior quality. On the same day the Appellant pressed the Respondent for payment and W.F. Ducat & Co. returned the bill for amendment in accordance with mill''s weight. On January 7 the Appellant again demanded full payment. On January 7 W.F. Ducat & Co. informed the Appellant that the mill was claiming allowance or rejection. On January 7 W.F. Ducat & Co. requested to send the amended bills according to the mill''s weights. On January 10, 1949, the

Appellant agreed to payment of the bill after deducting value of short weights. On January 10 the Respondent informed W.F. Ducat & Co. that the goods which were tendered against the contract were of grossly inferior quality and that they were not prepared to accept the same. The agreement that the Appellant spoke of on January 10, 1949, will appear in their letter at p. 391, pt. II of the paper-book, and by agreement it should not be understood that there was any agreement between the parties.

42. On these facts counsel for the Appellant did not contend that the goods which were delivered were of the contracted quality, but the only contention which was advanced was that the rejection was not properly made and the Respondents were not entitled to reject, because first, all factors were known to the Respondents on January 5, 1949, secondly, on January 2, 1949, the Respondents did not make up their mind about rejection but asked for allowance or rejection, thirdly, they were not entitled to reject on January 10 and finally, on January 6, 1949, W.F. Ducat & Co. asked for re-settlement of bills.

43. Counsel for the Appellant placed reliance on the Bench decision in Kissendoyal Jitsaria v. Askaran Chowthmull 23 C.L.J. 415. In that case a contract was made on April 23, 1914, for 125 bales of jute. The documents were received by the Defendants from the Railway company on July 28 and the goods were actually delivered to them on July 31, and the goods were found to be of inferior quality. The Defendants did not adduce sufficient evidence that they definitely rejected the goods before August 22. The suit was filed for recovery of price of 125 bales of jute. It was held that the goods not being in accordance with the contract, the Defendants could have rejected them when tendered or kept them for a time reasonably sufficient for examining and trying them and then refused to accept them. At p. 421 of the report Sanderson, C.J. said that

the Defendants accepted the goods in this sense that they allowed them to be placed in their godown on the 3lst of July. They say that they examined them either the next day or a day or two afterwards. What would one expect business people to do if the buyers found that the goods were not of the contract quality, and if they intended to reject them? I should have expected business people to put on record at once by writing to the sellers and saying that the goods were not in accordance with the contract quality, and that they rejected them. We cannot find the slightest trace of that in this case; the only letter which does in so many words say that they rejected these goods was written as late as the 22nd of August and then that was written in answer to a letter pressing them for payment. I must also say that inasmuch as the goods were delivered to the Defendants, it is obvious that the onus of proving that they in fact rejected, lies upon them, and the learned Judge in effect says that the Defendants have not satisfied him that they did in fact reject the goods. Of course, if the learned Judge took that point of view he was perfectly right in saying that the Defendants had not rejected the goods. Speaking for myself, I have read the evidence very carefully, and I am not satisfied upon the evidence which has been put before me that the learned Judge was wrong; and, that would be quite sufficient for me. I need not say any more, because there was evidence both ways; the learned Judge was there to give his decision upon this question of fact, which is a pure question of fact and no matter of law is appertaining to it, and it is quite sufficient for me to say that I am not satisfied that the learned Judge was wrong. I may go further and say that I think it is quite possible that what happened was that there were conversation between the parties with regard to the quality of the goods, discussions as to what had been done and so on, but I am quite satisfied that the Defendants have not given sufficient evidence to discharge the onus that they definitely rejected the goods before the 22nd of August.

44. Reasonable time is a question of fact. The entire question is whether the rejection was within reasonable time. Counsel for the Respondent contended that claims for rejection were to be made within 14 days and, therefore, rejection was also to be made within 14 days. The relevant Clause No. 9(2) which has already been referred to states that claims in respect of quality and/or excessive moisture must be made not later than 14 working days after the arrival of the jute in buyer''s mill. Counsel for the Respondent rightly contended that the right to reject was upto 14 days. In contrast the provisions contained in Clause 9(1) were referred to by counsel for the Respondent that after short weight 5 days were to be taken up and the total effect of Sub-clauses (1) & (2) of Clause 9 was that the period of rejection was within 14 days.

45. A contention was advanced by counsel for the Appellant that the Respondent was deemed to have accepted the goods because they did not reject within reasonable time. I am unable to accept that contention. The Respondent inspected the goods on January 5. By January 10 the goods were rejected. The observations of Sanderson, C.J. in Kissendoyal v. Askaran Supra were to find out what business people would do if the buyers found that the goods were not of the contracted quality. In the present case the correspondence was in no uncertain terms that the goods were not of the contracted quality. In my opinion the contention advanced on behalf of the Appellant fails.

46. The last question of importance is whether the Plaintiff Respondent is entitled to succeed on the question of damages. The learned Judge awarded the Plaintiff Rs. 44,224. The issue as to damages is discussed at pp. 355 to 357 of the paper-book. The conclusions of the learned Judge are that the damage must be on the basis of the difference between the contract rate and the market rate after January 5, 1949, when the breach was finally discovered. The learned Judge referred to the oral evidence of Bertie Meyer that the trend of market was upwards from the end of December 1949 to the beginning of January 1949. The learned Judge referred to the oral evidence of Alfred Lowdon Scott and Qq. 12, 20, 21, 22, 26 and the entire evidence of Scott and held that the price of bottom jute was Rs. 40-8 on December 30, 1948, and the rate of middle jute in December 1948 was Rs. 44 per maund according to the evidence of Scott and

the difference between top and middle would be between Rs. 3 per maund according to the evidence of Scott. The learned Judge, however, found that the rate of bottom jute was Rs. 41. The further finding of the learned Judge is that the evidence of Scott was that the rates on December 31, 1948, being a holiday, were Rs. 43-8 for middle and Rs. 40-8 for bottom. On January 6, 1949, the rate that was found by the learned Judge was Rs. 48. On December 6, 1948, the date of contract, the rate was found to be Rs. 42 for the middle and Rs. 37 for bottom. Counsel for the Appellant contended that there was no evidence to warrant any finding on damages and the award of damages could not be upheld on the evidence. First, it was said that there was no pleading as to when the breach occurred. Secondly, it was said that, until and unless the date of breach was pleaded, the Plaintiff-Respondent would not be entitled to claim damages between the contract rate and the market rate on that basis. The third contention was that the entire evidence of Scott was useless and was no evidence at law.

47. Counsel for the Respondent on the other hand contended that the evidence of Scott was admissible because he gave secondary evidence of the contents of a document and there could be oral evidence of contents of a document as secondary evidence and tendering of secondary evidence of a document was a mode of proof and, therefore, the mode of proof might be waived by the Appellant not having objected to the same at the time the evidence was tendered.

48. In order to appreciate the rival contentions the best course is to refer to the evidence that was adduced. The oral evidence of Bertie Meyer in Q. 76 that the trend of the market was upwards was not supported by any figures save and except that he said that it must have been moving possibly from eight annas to rupee one per maund. The learned Judge did not award damages on that evidence. That evidence of Bertie Meyer does not in my opinion prove and establish any upward trend in price or any increase in market price. The other evidence is of Scott. His evidence will appear at pp. 161 to 166 of the paper-book. The examination-in-chief consisted of 26 questions. Cross-examination consisted of Qq. 27 to 33. In Q. 6 Scott was asked as to what his duties as jute purchaser were. His answer was that as jute purchaser he interviewed brokers who came along and made the offers and entered into contracts through brokers for the purchase of various classes of goods. In Q. 9 he was asked that as jute purchaser he was interested in market rates. His answer was in the affirmative. In Q. 11 he was asked what sort of record he kept. His answer was ''a diary is kept''. In Q. 12 he was asked as to under what process the diary was kept. His answer was that the diary was kept every day. His further evidence in Q. 12 was that

when we interviewed the brokers, the price of various kinds of jute, their market rates, all these particulars were entered in that book every day.

In Q. 13 he was asked who entered them in the book. His answer was as follows: ''I as jute purchaser enter them in the book''. In Q. 14 he was asked whether he had got the book. His answer was in the affirmative. In Q. 15 he was asked how long he had been the jute purchaser. His answer was ''since last year, March'' meaning thereby since March 1956. In Q. 16 the witness was asked who kept the book before the witness became the jute purchaser. The witness gave the name of T. B. Kidd. In Q. 17 the witness said that R. Roger was the jute purchaser before Kidd. In Q. 18 the witness was asked as to whether the practice of keeping the diary had been started since he became the jute purchaser or it had been there all along. His answer was that it had been there all along to his knowledge. In Q. 19 the witness was asked whether he could state what the market rates were in or about December 1948 of the various qualities of jute which he might have entered in that book. His answer was in the affirmative. In Q. 20 the witness was asked whether he could state what the rates of tops of Assam jute in December 1948 were and counsel in framing the question put as a part of the question that the witness was entitled to refresh his memory. The answer of the witness was that there was no record of tops but there was record of middle quality which was Rs. 44 per maund. In Q. 21 the witness was asked whether he was able to say that there was any difference between tops and middle and his answer was that he did not know what it was at the particular point of time but the difference would be probably Rs. 3. In Q. 22 the witness was asked whether there was any record of bottom. The answer was in the affirmative and he said that the bottom price was there Rs. 41. In Q. 23 the witness was asked to look at the entry of December 27. His answer was that he made a mistake that it was not 24 but 27. In Q. 24 the witness was asked what was the rate of December 24. His answer was that 24 was not there but 27 was there. In Q. 25 the witness was asked whether he could give the rates of December 31. His answer was that December 31 was a holiday. He did not know the rates of December 30 were Rs. 43-8 for middle and Rs. 40-8 for bottom. In Q. 26 the witness was asked what the rates were at the beginning of January 1 or January 2, 1947. His answer was that on January 6 the rates were Rs. 44-8 for middle and Rs. 41-8 for bottom. In cross-examination the witness said that he was employed at Narayanganj in the year 1948 and that he went to Narayanganj in the month of June or July 1948, and he was asked as to when he came back from Narayanganj to Calcutta. His answer was that it was in the month of April 1949. In the subsequent question the witness was asked as to whether from the month of June or July 1948 upto the month of April 1949 he was at Narayanganj. His answer was in the affirmative. In Q. 32 he was asked whether he was connected with Bird & Co. in 1948-49. His answer though printed in the negative was said by counsel to be corrected to be read in the affirmative that he was connected with Bird & Co., Pakistan. The witness said that he was not connected with the Calcutta company.

49. On this oral evidence counsel for the Respondent contended that secondary evidence of documents was admissible under the provisions of the Evidence Act. Reliance was placed on Section 63 of the Evidence Act that the secondary evidence would mean and include oral account of documents. It was, therefore,

contended that Scott could give oral evidence of the contents of a diary. Secondly, it was said that when such evidence was led, it was the duty of counsel for the Appellants to object to such evidence and the Appellants did not object to such evidence. Thirdly, it was said that the diary of which the witness spoke was admissible u/s 32(2) and 63(5) of the Evidence Act by offering secondary evidence thereof. Various decisions were cited in support of these propositions.

50. I shall first deal with the question as to whether it is at all leading secondary evidence of the contents of a document. When the witness was asked in Q. 9 following as to whether a diary was kept, the witness said that a diary was kept and particulars were entered in the book every day and he as jute purchaser entered them in the book (vide Qq. 9 to 13). The witness then stated in Q. 14 that he had the book there. Therefore the witness was asked in Q. 19 as to whether he could give the market rates which he might have entered in the book. The witness answered in the affirmative. The witness was then asked in Q. 20 to look at the book and it was put to him that he was entitled to refresh his memory. These questions indicate that the witness had the book in his hand, that the witness might have entered the details in the book and that counsel examining the witness said that the witness was entitled to refresh his memory by looking at the book and, therefore, counsel for the Defendants was under the impression as these questions indicate that the witness was going to prove the entries in that book. There would be no occasion for counsel to object upto Q. 20. In the subsequent Qq. 21-26 when the witness was asked as to what would be the difference, he answered by giving certain price which was in the book. These questions also do not predicate that any secondary evidence was being given of the documents. On the contrary these questions suggest that the witness was going to prove the diary. The diary was spoken to by the witness. The witness was asked to refresh his memory by looking at the book. The witness was giving answers from the book. The natural thing expected in the light of these questions was that the witness was going to prove the book and the entries.

51. Counsel cross-examining the witness challenged his capacity to speak with regard to the book. Counsel cross-examining the witness did not put a single superfluous question. The questions elicited beyond any doubt that the witness had no knowledge of entries in the book and that the witness had not seen the book earlier. Counsel examining the witness in Q. 20 put as a part of the question that the witness was entitled to refresh his memory. This question suggested that the book was going to be proved by the witness. Sections 159 and 160 of the Evidence Act are relevant as to when a witness can refresh his memory. Section 159 shows that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness in the present case did not make any writing himself either at the time of the transaction or afterwards and, therefore, he was not entitled to

refresh his memory by looking at the book. Section 159 indicates that the witness may also refer to any such writing made by any other person and read by the witness within the time mentioned in the first limb of Section 159, namely, the time of the transaction or soon afterwards and the further condition is that when the witness read it he knew it to be correct. The knowledge of correctness should relate to the time of the transaction or soon afterwards when the witness read it. The contemporaneous character and quality of knowledge is the safeguard. The witness in his evidence did not satisfy the requirements laid down in Section 159 of the Evidence Act. Section 160 does indicate that a witness may testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. There is no evidence to support any application of Section 160 of the Evidence Act. The witness was not entitled to refresh his memory by looking at the book. What the witness did was to read from the book when the book was handed up to the witness by suggesting that he could refresh his memory. The introductory questions suggested, as I have already indicated, that the witness was going to prove the entries because it was put to him that he might have made the entries. The evidence that the witness gave was no evidence of the contents of a document. There was no introduction for leading any secondary evidence of documents, or if such introduction was given, counsel would have objected to it.

52. Counsel for the Respondent relied on the decision in AIR 1943 83 (Privy Council) in support of the proposition that where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient; it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. The case before the Judicial Committee concerned the Registrar''s receipt of the year 1881. The trial Judge admitted as proved and marked it as exhibit. There was no objection taken at the trial to the admission in evidence of the receipt. No document was proved or tendered in the present case. I am unable to see how this decision can be of any assistance to the Respondent in the present case.

53. Counsel for the Respondent relied on the Bench decision in Hasmatulla v. Hari Mohan Sarma AIR 1917 Cal. 233 in support of the proposition that where no objection was taken in the primary Court to the oral evidence of the contents of a document at the time it was given, the High Court in appeal did not discard it, although strictly speaking the only secondary evidence of the contents of the document was a certified copy. The suit was for repayment. The first three Defendants were mortgagees. The mortgage had been executed by the Plaintiff and the bond was registered. The other Defendants were assignees and the assignment took place by means of a deed. The deed of assignment was not produced and its evidence of contents was admitted. In the present case there was no admission of contents of a document, nor was evidence of contents of a document given. It will appear from the judgment that the document was executed in favour of Defendant No. 6. This decision does not support any of the

contentions advanced in the present case.

54. The decision of the Supreme Court in Sitaji and Others Vs. Bijendra Narain Choudhary and Others, was also relied on by counsel for the Respondent. In that case each and every document was proved. There were two sets of documents. The first set concerned those written to the dictation of the five Plaintiffs and the other set was dictated by others. It will appear from the report that the first set and the second set were all proved and had been put in evidence.

55. These decisions touch on the question that when there is evidence adduced if there is any irregularity as to any form of proof it is the duty of the opponent to object to that course of action. In the present case, as I have already indicated, there is no evidence of any market rate and, therefore, these decisions are of no help to the Respondent.

56. Counsel for the Respondent relied on decision of the Supreme Court in Biswambhar Singh and Others Vs. The State of Orissa and Another, in support of the proposition that no objection was taken in arguments at the trial as to the evidence of Scott and no ground in appeal as to the evidence of Scott was taken and, therefore, it was not open to the Appellant to contend that the evidence was inadmissible. In the Supreme Court case the original ekrarnama had not been filed and no evidence was led to explain its non-production. Secondary evidence was given of the ekrarnama. The Supreme Court said that secondary evidence had been led and no grievance had been made of that and it was not open to object to the same. This decision is also of no aid to the Appellants because, as I have already indicated, even at the risk of repetition there is no secondary evidence adduced in the present case of the contents of a document. I am, therefore, of the opinion that the evidence on which the learned Judge awarded damages is no evidence at law and cannot be relied upon to sustain any award of damages.

57. Counsel for the Respondent relied on Deo v. Ross 10 L.J. Eq. 201 in support of the proposition that oral secondary evidence of the contents of a document could be given and it was contended that the diary that Scott spoke of was admissible u/s 32(2) and 63(5) of the Evidence Act and the Appellant did not object to the evidence that was led. There is no secondary evidence adduced in the present case. There was no foundation for leading secondary evidence of the diary. The witness Scott read entries and it was suggested to him that he could refresh his memory from the diary. He was not entitled on the materials on record to refresh his memory. Reading entries is not giving evidence. There was no occasion to object when it was suggested that the witness Scott might have made entries and he could refresh his memory. His oral evidence proved that he had nothing to do with the entries which he read out in Court. There is no evidence of market rates and of damages suffered thereby.

58. Counsel for the Respondent finally submitted that the case should be remanded and that it was no fault of the party that there was no proper

evidence. Reliance was placed on the decision in Union of India (UOI) Vs. Mouji Lal Shaw and Others, It was held there that the Plaintiff failed to prove the market rate and the Plaintiff was at best entitled to nominal damages. An opinion was expressed that the Plaintiff would be given another opportunity to prove the market price as on the date of breach and the reason was given that the Plaintiff might have been misled by the Appellant''s officers and agents. This decision does not assist the Respondent in any manner whatsoever. It cannot be said that anyone on part of the Defendant misled the Plaintiff. It cannot be equally said that counsel cross-examining the Plaintiff''s witness did not challenge the evidence that was adduced.

59. The provisions as to remand indicate first that it will appear from Order 41, Rule 23 of the CPC that the Appellate Court if it thinks fit may remand the case and may further direct what issue or issues shall be tried in the case so remanded. The Full Bench decision in Abdul Karim Abu Ahmad Khan Ghaznavi v. Allahabad Bank Ltd. AIR 1917 Cal. 44 held that the powers of an Appellate Court as regards remand are not limited to the specific case under Order 41, Rule 23, Code of Civil Procedure, but a Court, in the exercise of its inherent jurisdiction to do what is right and necessary, may order remand. It was also said in that case that whether inherent jurisdiction should be involved had to be determined by the Court with reference to particular facts of the case and the Court could not invoke the inherent jurisdiction where there was a provision in the Code, whether by way of remand or otherwise, which if applied would meet the justice of the case. It was also said that in that case the exercise of inherent power can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the justice of the case. It does not mean that when the Plaintiff failed to prove a case and when the Plaintiff did not avail of the opportunity to prove the case and when the Plaintiff was in possession of documents, yet justice demands that the case has to be remanded to give the. Plaintiff an opportunity of curing lack of evidence after the lapse of so many years. If the Plaintiff failed to prove the case on merits, the only answer is that the suit should fail.

60. In the Bench decision in Jatindra Mohan Chakravarti and Others Vs. Bijoy Chand Mahatab, it was said that, although a question was disputed from the very commencement by the Defendants, the Plaintiff did not produce the evidence that was necessary to establish his right and it was not proper that the Plaintiff could ask for a remand in order to prove that fact by new evidence when the suit was instituted 11 years after the date of the Plaintiff''s purchase of the putni. It is apparent that when the Plaintiff does not produce evidence that is necessary to establish his right, he cannot ask for a remand. In another Bench decision in Ram Chandra v. Abeda Khatun Sahebani AIR 1919 Cal. 836 in a suit upon a mortgage purporting to have been executed by the husband of a lady on her behalf under a power of attorney from her, the Plaintiff did not take any step for the production of the power or to prove it or to give secondary evidence of its contents; it was held that the case ought not to be remanded to give him an

opportunity of producing and proving the power. If there was no evidence, the remand will not be made for the purpose of filling up the lacuna and gap in the evidence. In the Bench decision in Bhagaban Das Mahesri Vs. Prosanna Dev Raikot and Others, it was said that where evidence had been adduced by the parties with regard to all the issues which had been framed and there was no complaint that any evidence was shut out, an Appellate Court should not make an order of remand but should dispose of the case on the evidence already on record. In State of West Bengal Vs. Lakshmi Narayan Singh and Another, the Bench decision was to the effect that a party to an appeal was not entitled to get an order of remand to cover up the deficiencies due to the laches of that party.

61. The latest pronouncement of the Supreme Court is referred to in a decision of the Orissa High Court in the case of Bishnu Putel Vs. Bajra Putel, . The Supreme Court in the case of A. Sankaraniah v. M.S. Lakshminarayanamoorthy Unreported. Vide Annual Digest, Supreme Court, note No. 415 which has not been reported but has been referred to in the Annual Digest, Supreme Court, said that where a party had an opportunity of adducing evidence in the case but with open eyes failed to adduce that evidence, the case should not be remanded to give a second chance to the party to adduce that evidence. The Supreme Court said that the power of remand could not be exercised merely because the Appellate Court was of the view that the party who could lead better evidence in the Court of first instance had failed to do so. In, the present case the Plaintiff-Respondent went to trial on the issues settled. They adduced evidence. The evidence which is on record is no evidence in law. It cannot be said that the Plaintiff was misled or prejudiced by any act of the Defendants-Appellants.

62. For these reasons I am of the opinion that the Plaintiff-Respondent failed to prove any damages. I am also of opinion that it would be unjust to make an order of remand. The Plaintiff-Respondent is not entitled to any order of remand. The decree which was made cannot be sustained. The decree for damages is set aside. The Plaintiff was awarded costs. That order for costs is set aside. The Defendant-Appellant will be entitled to general costs of suit and four days'' cost of hearing in the trial Court. The Appellants will be entitled to four days'' costs of hearing of this appeal. Certificate for two counsel.

63. The appeal is allowed and the decree is set aside as aforesaid.

S.K. Mukherjea, J.

64. The main question which has to be decided in this appeal is whether the contracts evidenced in writing by certain bought notes were contracts between the Plaintiffs and the Defendants. On December 6, 1948, W.F. Ducat & Co., the brokers, Executed the bought notes addressed to the Plaintiffs and the sold note''s addressed to the Defendants in respect of a quantity of jute. The terms and conditions of the bought notes and the sold notes are indentical.

65. In para. 1 of the plaint it is said that on the date of execution of the bought notes, the brokers disclosed to the Plaintiffs that the Defendants were the sellers

and to the Defendants that the Plaintiffs were the buyers. It is also alleged that the Plaintiffs accepted the Defendants as the sellers and the Defendants accepted the Plaintiffs as the buyers. It was contended by counsel for the Defendants that as the Plaintiffs have stated that the contract is evidenced by the bought notes and there is no reference to the sold notes in the plaint, the Plaintiffs cannot rely on the sold notes for construction of the contracts.

66. No doubt the Plaintiffs have not referred to or relied on the sold notes but what the Plaintiffs omitted to do, the Defendants have done. The Defendants, in dealing with para. 1 of the plaint have relied on the sold notes and have said that save as what appears in the sold notes, they deny each and every one of the allegations contained in para. 1 of the, plaint. Copies of the sold notes have been annexed to the written statement. The sold notes are, therefore, attractee for the purpose of construction of the contract, if for no other reason, at least for the reason that the Defendants have invited the Court to take them into consideration. Counsel appearing for the Defendants can, therefore, hardly expect the Court to ignore the sold notes in construing the contract.

67. Apart from the pleadings, there is no reason why in the facts and circumstances of the present case the bought notes and the sold notes which are in identical terms should not be read together. Where bought and sold notes are issued by the broker to his clients, the bought and sold notes if they correspond with one another and are complete, constitute a contract in writing (Halsbury, 3rd ed., vol. 34, p. 29, Article 44). The bought notes are addressed to Bird & Co., Managing Agents, Dalhousie Jute Mill Co. Ltd. and are signed by W.F. Ducat & Co. who describe themselves as brokers, below their signatures. The sold notes are addressed to the Defendants and are signed by the brokers in the same manner. The bought notes read--

We have this day bought by your order and for your account from the undersigned.

Similarly, the sold notes state that--

We have this day sold by your order and for your account to the undersigned.

There is no dispute that ''the undersigned'' in these contracts are the brokers. In the broker''s notes the rates are ''free to buyer''s mill siding'', weight is ''guaranteed at buyer''s mill'' and delivery is to be made to Dalhousie Jute Mill by the Inland River Steamship Companies. Payment is to be made against mill''s receipt. Claims in respect of short weight, quality or condition are to be made after arrival of the jute in the buyer''s mill. The broker''s notes also provide that the contract has been accepted by the buyers on the seller''s representation and assurance that the jute is to be marked, packed and baled in strict accordance with the contract. The important question arises who are the buyers under the broker''s notes. If the matter were to be decided entirely by reference to the clause ''we have bought from the undersigned'' or ''sold to the undersigned'' independently of the terms and conditions of the contract or description of the undersigned as broker, the conclusion would be irresistible that the only contracting parties are the brokers and the Plaintiffs in respect of the bought notes, and the brokers and the Defendants in respect of the sold notes. The bought notes and the sold notes, however, have to be read as a whole. The brokers have clearly indicated in the contracts that they are brokers. A broker has been judicially defined as a mercantile agent who in the ordinary course of his business is employed to make contracts for the purchase or sale of property or goods of which he is not entrusted with the possession or documents of title. Halsbury 3rd ed., vol. 1, p. 151, Article 362; and Milford v. Hughes (1846) 16 M. & W. 174; Foster v. Pearson (1835) 1 Cr. M. & R. 849; Baring v. Corrie (1818) 2 B. & L.D. 137. The documents of title in the present case, that is to say, the bills of lading were not entrusted with the brokers but were made out in the name of Dalhousie Jute Mill Co. Ltd. at the instance of the Defendants as will appear clearly from the uncontradicted evidence of Khemchand Chopra, Qq. 19 and 23 nor is it the evidence that the goods ever came into the possession of the broker. The use of the word ''broker'' in relation to the ''undersigned'' is not without significance. It does not conclude the matter. It suggests that it is possible or even probable that the brokers were not entering into the contract with the buyers or with the sellers as a principal party but only as brokers with all the incidents which a broker''s contract implies. Add to this, the use of the words ''bought by your order'' and ''for your account'' which is not necessary in a contract of sale entered into between two principal parties but is usual in a broker''s contract where the broker enters into a contract on behalf of his principal and intimates to the principal that he has acted in accordance with the principal''s orders and has entered into the transaction on the principal''s account.

68. If the bought and sold notes are taken together to constitute one transaction, as they ought to be, it appears that the expression ''buyers'' contemplates a party other than the undersigned brokers. Under the bought notes the buyers are undoubtedly Dalhousie Jute Mill Co. Ltd. to whom they are addressed. In the sold notes the name of Dalhousie Jute Mill Co. Ltd. does not appear, but the notes provide that the rates are free to the buyers'' mill siding and the goods are to be delivered to the Dalhdusie Jute Mill. Payment is to be made against the buyers'' mill receipts. Therefore the owners of Dalhousie Jute Mill are the buyers. It is not unreasonable to equate the owners of Dalhousie Jute Mill, the buyers under the sold notes, with Dalhousie Jute Mill Co. Ltd., the buyers under the bought notes. Under the sold notes the Defendants are unmistakably the sellers. It appears from Clauses 2 and 10(3) of the sold notes that it is the seller''s duty to ship the goods by inland steamers. The same duty is cast on the sellers under the bought notes. If the broker''s notes are taken together, it is made clear that the sellers contemplated in the broker''s notes are the Defendants and not the brokers. I am, therefore, of opinion that on the construction of the broker''s notes, a contract of sale was entered into between the Plaintiffs and the Defendants.

69. In any event, having regard to the fact that the purchase and sale are

expressed to be made by the undersigned brokers in the broker''s notes and the buyers are indicated to be Dalhousie Jute Mill Ltd. and the sellers Messrs. Khemchand Pemchand, in the body of the broker''s notes, an element of ambiguity arises in the contract and, therefore, it becomes necessary in the facts and circumstances of the case to look into the surrounding circumstances for construction of the contract. On a consideration of the evidence and examination of the surrounding circumstances the learned trial Judge has come to the conclusion that a contract of sale came into existence between the Plaintiffs and the Defendants under the broker''s notes.

70. The decisions in Patiram Banerjee v. Kanknarrah Co. Ltd. Supra, Nanda Lal Roy v. Gurupada Haldar Supra, Anderson Wright Ltd. v. Moran & Co. Supra, Gordhandas Nathalal v. Gorio Ltd. Supra, Mollett v. Robinson 7 C.P. 84, Hutcheson v. Eaton 13 Q.B.D. 861 were cited before the learned trial Judge and, except for the last two, were also cited before us.

71. In Patiram''s case Supra the bought note was to the effect--

We have this day bought by your order and for your account from our principals.

In Nanda Lal Roy v. Gurupada Haldar Supra the goods were sold by the broker by order and for account of the Defendants to selves for principals. In Anderson Wright v. Moran & Co. Supra the bought note was to the effect that--

We have bought by your order and on your account from our principal.

In Gordhandas Nathalal Supra the contracts were not broker''s contracts at all but were clearly and unequivocally contracts between the Plaintiffs and Defendants as Kania, J. found in his judgment. In Mollett v. Robinson 7 C.P. 84 as also in Hutcheson v. Eaton & Sons 13 Q.B.D. 861 the question arose whether the brokers were liable under the contract on the basis of a custom or usage of the trade. The judgment in Radhakrishna v. Tayeballi Supra was also cited before us. The contract in that case although effected by broker''s notes was not an undersigned contract at all. Moreover, the contract was expressed to be made on account of Khaitan & Sons Ltd. As the contracts which came up for consideration in those cases were different in material particulars, they are in my opinion of no assistance in deciding the appeal. In saying so, I am reminded of the memorable words of Jessel M.R. in Southwell v. Bowditch Supra--

There is no more vicious line of argument.

said the Master of the Rolls,

if I may say so with deference to the Court below, than that which was adopted by the Court below in the case of comparing one contract with another and saying it differs very little; you arrive ultimately at identifying wholly different contracts.

In Gordhandas Sagarmull v. A.M. Mair & Co. Supra the Respondents who were the brokers sold by the order and for account of the Petitioners to the undersigned, that is to say, to the Respondents themselves. The word ''broker'' appeared below the signature. There was an arbitration clause in the sold note. On the same day the Respondents put through a contract in writing in the form of a ''bought note'' addressed to Surajmull Nagarmull, Managing Agents, Bengal Jute Mill Co. Ltd. which reads as:

Bought by your order and for your account from the undersigned.

The note is signed by the Respondents A.M. Mair & Co. over the words ''brokers''. The terms and conditions of the bought note and the sold note and the goods covered by these notes were the same. The Petitioners delivered a portion of the goods but failed to deliver the balance. They asked for an extension of time to complete the contract. The Respondents granted an extension of time. Thereafter, the Petitioners disputed the validity of the extension of time and contended that the contract had stood cancelled. On account of nondelivery of the balance portion of the goods, the Bengal Jute Mill Co. preferred a claim against the Respondents, who in their turn made a claim on the Petitioners. The Petitioners refused to pay the bills. Thereafter, the Respondents referred the disputes to the arbitration of the Bengal Chamber of Commerce. An award was made by the arbitrators directing the Petitioners to pay the Respondents'' claim. Thereafter, an application was made by the Petitioners for an order that the Award was void and of no effect and for setting aside the Award. One of the grounds on which the Petitioners attacked the Award was that there was no contract between the parties. It was contended that the contract was entered into between the Petitioners and the Bengal Jute Mill Co. Ltd. The Petitioners claimed that the Respondents were only brokers or agents for their principals, Bengal Jute Mill Co. Ltd., and were not, therefore, entitled to enforce the arbitration clause in the contract.

72. S.B. Sinha, J. held that the brokers, that is to say, the Respondents, were a principal party to the contract. In course of his judgment the learned Judge said:

By the contract, the Respondents sell by the order and for account of the Petitioners to the ''undersigned'' who are A.M. Mair & Co., Respondents. It is true that below the signature of the Respondents the word ''broker'' appears. If the terms of the contract so provide, a broker may act as a broker and yet be a principal party to a contract. The fact that the Respondents acted as brokers does not preclude them from being a principal party to the contract if the other principal party knows about it and if the terms of the contract so provide. The brokers here are not contracting for and on behalf of undisclosed principal and they are not merely intermediaries. The sale is by express terms to them, though they are described as brokers.

I have looked into the contract evidenced by the broker''s notes and found that the text of the broker''s notes which fell to be decided by S.B. Sinha, J. was similar to the contracts in this appeal. It has to be borne in mind, however, that S.B. Sinha, J. was concerned with the question whether the brokers entered into the contract as a principal party. Here, that is not the question before the Court. The brokers are not a party to the suit nor is it necessary in this appeal to decide whether the brokers are a principal party to the contract or are liable to the Plaintiffs under the contract. What has to be decided in this appeal is whether a contract was entered into between the Defendants, the addressees of the sold notes, and the Plaintiffs, the addressees of the bought notes.

73. It appears from the judgment that S.B. Sinha, J. found that the brokers had acted as brokers because they signed as brokers, but by the terms of the contract they made themselves a principal party to the contract. Although the learned Judge says that by the terms of the contract the brokers made themselves a principal party to the contract, it does not appear from the judgment that the learned Judge addressed himself to any of the terms in the sold note except the clause ''sold to the undersigned'' which is not a term at all. That the learned Judge did not take the terms into consideration appears from his remark that the

sold note contains various terms to which it is not necessary to refer except to Clause 11 which is the arbitration clause.

If the question to be decided is whether a contract was entered into between the seller and the broker as principals, with great respect I cannot agree that it is not necessary to refer to any of the terms other than the arbitration clause. It does not also appear from the judgment that the learned Judge addressed himself to the question how far the terms and conditions of the broker''s notes throw light on who are the contracting parties or in what capacity the brokers entered into the contract nor does it appear that the learned Judge considered the bought note and the sold note together for determination of those questions, and it he did not, why he did not.

74. With very great respect to S.B. Sinha, J. I cannot agree with his conclusions that the broker in that case was a principal party to the contract and I agree even less with the method of construction of the contract adopted in that case. If the terms of the broker''s notes had been considered by the learned Judge and not put out of the way as not necessary to refer to, as was done by him and the bought note and the sold note had been considered together and the matter had not been decided on the ''undersigned'' clause in the contract alone without reference to the terms of the contract. I venture to say that the learned Judge would have found that under the sold note the owners of the Bengal Jute Mill were the buyers, a conclusion which would have been reinforced by the bought note which specifically mentions Bengal Jute Mill Ltd. as the buyers. He would have found that the brokers who signed under the description of brokers were acting as brokers in entering into the contract with the sellers on behalf of the buyers, Bengal Jute Mill Co. Ltd.

75. An appeal was preferred by the Respondents against the order of S.B. Sinha, J. The Appellate Bench of the High Court held that having regard to the

Appellant''s contention that they had entered into the contract as brokers and were entitled to enforce the terms of the contract by reason of the usage and custom of the trade, it was not open to Sinha, J. to treat them as principals. On appeal the Supreme Court did not consider it necessary to decide the dispute whether the brokers were parties to the contract as principals and held that the dispute was one, the determination of which depended on the construction of the contract. The Court was of opinion that it was a dispute which was covered by the arbitration clause and it was for the arbitrators to decide it. In those circumstances, the order of S.B. Sinha, J. was restored. The order was restored not because the Court agreed with the conclusion of the learned Judge that the contract was entered into by the broker as a principal party but because, in the opinion of the Court, it was for the arbitrators to decide the question in dispute. In the case before Sinha, J. the arbitrators had expressly or impliedly decided that question and Sinha, J. rightly refused to set aside the Award.

76. In the view I have taken of the contracts in this appeal. I have to hold, in agreement with the learned trial Judge that there was privity of contract between the Plaintiff and the Defendant. I am also of opinion that the learned trial Judge acted rightly in adopting the method which he did for the purpose of construction of the contract, namely, examination of surrounding circumstances.

77. On the question whether the suit was barred by reason of the provision for arbitration in Clause 9(2) of the broker''s note, I also agree with the conclusions of the learned trial Judge for the reasons he has given. I only desire to add that the Defendant having denied the existence of the contract cannot be heard to plead the arbitration clause in the contract as a bar to the suit. He cannot approbate and reprobate. In this connection I may refer to the statement of the law in Preston and Colinvaux on the Law of Insurance, 2nd ed., p. 155:

The Court of Appeal in Woodall v. Pearl (1919) 1 K.B. 593, regarded Jureidini''s case Supra as establishing that one cannot both dispute the existence of a binding contract and invoke the aid of a clause for arbitration within it, and in Toller v. Law Accident (1956) 2 A.E.R. 952--another strong Court of Appeal took the same view.

Learned Counsel for the Appellants, as far as I understood, did not dispute this proposition of law. He contended that his client is entitled to plead the clause as a bar to the action in the alternative. The argument is that if it be held that there is a contract between the parties, then the Defendant is entitled to rely on the arbitration clause as a bar to the suit. In my opinion, the Appellant cannot do so because his denial of the existence of the contract or rather his denial that he is a contracting party to the contract, raises an estoppel and he cannot be heard to say that the arbitration clause in the contract is a bar to the suit. It was said that the Plaintiff has not taken the point of estoppel, that the plea that no contract was entered into between the parties was taken in the written statement. But then the Plaintiff had no opportunity of pleading estoppel in defence to the Defendant''s contention that Clause 9(2) is a bar to the action. It is true that the

Defendants had asserted in their correspondence that they were not parties to the contract. The Plaintiff, in my opinion, was not obliged to plead to the correspondence in the plaint. The Defendant cannot be heard to argue that the matter must be referred to arbitration under Clause 9(2) of the contract, having regard to the total denial of the existence of the contract. If one cannot approbate and reprobate, one cannot also approbate and reprobate in the alternative.

78. On the question of damages, it appears that the learned trial Judge has awarded damages solely on the strength of Mr. Scott''s evidence who read to himself certain entries in a diary maintained by Bird & Co. Ltd. The diary was not tendered in evidence nor was it sought to be tendered. The entries were not made by Mr. Scott himself nor were they made under his supervision or to his knowledge. It appears clearly from the evidence that Mr. Scott had nothing whatsoever to do with those entries and, in fact, at the material time when those entries were made he was in Pakistan. There is also no evidence if he ever saw or read those entries before he read them in Court in the course of giving evidence. In Q. 20, he was told by the learned Counsel for the Plaintiff that he was entitled to refresh his memory by looking at the diary. In the previous question he was told that the entries with regard to the market rates might have been entered by Mr. Scott himself in that book. In answer, Mr. Scott neither affirmed that the entries were made by him nor denied that they were so made. The Court as well as the learned

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cross-examining counsel were, therefore, left in doubt. If those entries had been made by Mr. Scott, he was certainly entitled to refresh his memory by looking at those entries and it was hardly possible to object to it. Mr. Scott was, however, asked to look at the entries and say in Court what he read, which he did. Only six questions were asked in examination-in-chief after the diary was introduced as a diary in which the relevant entries might have been made by Mr. Scott. It was contended before us that the learned cross-examining counsel not having objected to the questions put to Mr. Scott from Q. 20 onwards, no objection can be taken as to mode of proof of the entries. In my opinion, it was not possible for cross-examining counsel to object because he could not have possibly known while the examination-in-chief was in progress whether Mr. Scott made those entries himself or whether he was going to depose that those entries, although not made by him, had been read by him and he could testify to their correctness. In cross-examination, Mr. A.C. Mitter, learned Counsel for the Defendant, elicited from Mr. Scott that Mr. Scott had nothing whatsoever to do with those entries and he had no knowledge of those entries at all. As I said before, Mr. Scott read the entries and what he read was recorded as evidence. In my opinion, in the circumstances of the case, the witness was not entitled to read and say what he read in the course of giving evidence of market rates. He was not refreshing his memory at all although he was told that he was refreshing his memory to which he did not demur. He did not say that he knew market rates at the material time or at all or that he had read those entries ever. In these circumstances he cannot be said to have refreshed his memory. Moreover, neither u/s 159 nor u/s 160 of the Evidence Act was Mr. Scott entitled to look into the diary and give evidence by a process which was mis-described as refreshing the memory. He did not make the entries himself nor had he read those entries at the time they were made or soon thereafter as is required by Section 159 of the Evidence Act. Mr. Scott never said that, although he had no specific recollection of the facts disclosed by the entries, he was sure that the facts were correctly recorded in the entries. Mr. Scott was not under the disadvantage of loss of recollection but under the disadvantage of lack of any knowledge at any point of time of the relevant market rates. Sections 159 and 160 of the Evidence Act cannot, therefore, have any application. There can be no occasion for recollection of a fact which one never knew. Apart from that the diary in which the entries occurred is not such a document as is specified in Section 159. In these circumstances, Mr. Scott''s evidence of the market rate is no evidence at all or, if it is. It is evidence which is inadmissible in law. The fact that no objection was raised--and it seems to me that the Defendants'' counsel could not have objected till Mr. Scott''s examination-in-chief came to an end, does not make the evidence any the less inadmissible. The argument that Mr. Scott gave secondary evidence of the contents of the diary by reading the entries, in my opinion, does not merit consideration if only for the reason that counsel asked him to give oral evidence not as secondary evidence of the contents of a document but as primary evidence after he had refreshed his memory on reference to the diary. The diary was not tendered although the witness was reading from it nor was any explanation given as to why it was not tendered although Mr. Scott knew who the writers of these entries were and although the diary came from the custody of Bird & Co. Ltd., the Managing Agents of the Plaintiff company. The diary was not tendered and therefore no cross-examination was possible on those entries. In any event, it is crystal clear that the object of Mr. Scott was not to prove the contents of the diary. The diary was sought to be used for the purpose of refreshing his memory and, if he was not entitled to do so, what he said by looking at the diary cannot be taken in evidence for the purpose of determination of the market rates. This is not a case of an unsatisfactory evidence or inadequate evidence of market rates or of damage but a case of no evidence at all.

79. In that view of the matter I respectfully agree with my Lord, that no damage has been proved. One word more. I do not think that it is a case where there should be an order of remand to enable the Plaintiffs to lead fresh evidence to prove damage. The transaction was of 1948. The suit was heard in 1957. For one thing it will be inadvisable to make an order of remand after the lapse of two decades. Apart from that, what is exercising my mind is that the Plaintiffs came to Court at the trial with a diary maintained by their Managing Agents where, according to the Plaintiffs'' witness, the relative market rates did appear and yet

for some inexplicable reason the Plaintiff chose not to make any attempt to prove it or to tender it. The Plaintiff tried to take full advantage of the diary, unsuccessfully it may be, by asking Mr. Scott quite unjustifiably to look into the diary to refresh his memory and say what he read but carefully avoided tendering the document. This is a course of conduct which does not command itself to me and, in my opinion, does not merit remand of the case to enable the Plaintiff to lead evidence which could have been led at the trial. As I agree with my Lord on the other issues as well, I do not wish to add anything more.

80. In the result the appeal succeeds and the decree of the learned trial Judge is set aside. The order for costs will be as directed by my Lord.

