

(1922) 01 AHC CK 0046
In the Allahabad High Court

Kishori Lal

APPELLANT

Vs

Jiwan Lal and Another

RESPONDENT

Date of Decision : 16-01-1922

Acts Referred:

Contract Act, 1872 — Section 78

Citation : AIR 1923 All 242 : 67 Ind. Cas. 231

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In this case, two suits have been brought arising out of some transactions, which may or may not have been speculative in the real sense of the word, for the purchase and sale of grain-pits confining wheat in the town of Hapur. The period fixed for delivery and completion of the purchase-money was the month of March, 1916, the contracts having been for the most part made in the previous October. It appears that there were at least two contracts, one for two grain pits and one for five but, although that might have been material in one aspect of the case, neither party has made anything of the point and the transaction has been treated as that of one contract only for the sale of seven grain pits. Where it does not otherwise appear in this judgment, the purchaser, Kishorei Lal, is called the plaintiff and Jiwan Lal, the agent, is called the defendant. It is admitted on both bands that the contract was not carried out. The purchasers who were plaintiffs in one of the suits paid a sum of Rs. 3,500 in advance as earnest money for the purchase of the pits, whereas, on the other hand, the defendants, before the time allowed by the contract for the purchaser to take delivery, re sold four of the pits to other purchasers, so that the sellers whether they were actually agents or principals in their dealings with Kishori Lal, the purchaser, were unable to deliver more than three and declined to deliver even these three, which the purchaser was willing to accept and pay for, unless he also took four other pits which the sellers undertook to deliver, and which were different from those which were originally purchased for the plaintiff

appellant. It should be noted that the price in March 1916 had fallen so that the plaintiff, if he had been compelled to take delivery, would have completed the contract at a loss. This may account for the advantage, which he has taken of the alleged breach of contract by the agents who bought for him, and this may also possibly have influenced the mind of the learned Judge against Kishori Lal's case though we are not prepared to agree if it did so, that there was not a legitimate reason for Kishori Lal repudiating the whole contract as will appear (sic). Under these circumstances, the defendants brought a suit for the loss which they had incurred by re-sale owing to the refusal of the plaintiffs to take delivery of the entire quantity tendered. They have recovered in that suit a sum of Rs. 5,757-4-0 with costs against Kishori Lal, the purchaser. In the other suit, Kishori Lal sued for the return of his principal and Rs. 339-8-0 interest from the 23rd of October 1915 which was presumably the date of payment, down to the 16th of February 1917 presumably the date of the institution of the suit. That suit was dismissed. The purchaser appeals against both the decrees. It would not be necessary to deal with the same case and detail with the matters raised by these appeals which are really perfectly simple and straight forward, if it were not for the public importance involved in the main contention of the respondents, the astounding proposition which they have had the courage to put forward in justification of their defence to the suit and the remarkable dicta contained in the judgment under review. Although a portion of the contract is in writing, namely, what is called the langot or parcha indicating the situation, quantity, price, rate and sale of the grain-pits and certain express stipulations as regards risk, the contracts are made up partly of letters and telegrams and partly of interviews which passed between the plaintiff Kishori Lal, the appellant, and Jiwan Lal, the respondent, his alleged agent. It is extremely difficult to give a clear definition of the capacity in which the defendants acted, for the purpose of reciting the allegations of the parties, as the defendants themselves do not know what they were, and they have shifted their ground in the First Court and in this Court, in defence of the attitude that they have adopted, but it is pretty clear from the evidence of Kishori Lal himself and of Pearey Lal, the son of Shib Ram, Muni of the defendants, that Kishori Lal employed the firm of Jiwan Lal, which is known by another name, as his agents to buy a quantity of grain in pits or khattis. In the English translation, it is true, that Kishori Lal used the expression "purchased from" but we think we are right in saying that there is no vernacular exactly corresponding to the English word "through" and the preposition "se" frequently stands in the vernacular both for "from" and "through" and the general tenor undoubtedly of his evidence conveys the impression that he purchased through the firm of Bansidhar Jiwan Lal, Pearey Lal, the other party to the contract, or rather the only witness who purported to represent the other party, is much more specific. He clearly entered into the contract as an agent. He explains that, in such cases, he purchases for his customers and asks them to deposit money and he makes it quite clear that this was an agency contract because he goes out of his way to explain the reason why his own firm's name was inserted in the langot which is done for obvious reasons, although his own firm are not in fact,

the purchasers at all, but merely the agents for the purchasers, and, in this case, were, in fact, agents for Kishori Lal. The langott make it clear that according to Section 78 of the Indian Contract Act, the property passed at the time of the sale, or bargain for sale, not only was part of the purchase price paid by payment of the earnest money already referred to but payment of the interest for the balance of the purchase-money was provided for. Certain express responsibility for damage was laid upon the person in whose original ownership the grain was, and rent was payable by the purchaser for the use of the place where the grain was stored. All these things are inconsistent with the hypothesis that the property was not intended by both parties to pass as between Kishori Lal and the sellers at the time of the sale. It is quite immaterial that the sellers were unknown to Kishori Lal, the purchaser; indeed that is usually the case and explains the need for the employment of an agent or middle-man. Although the order and original proposal for the purchase made was, as we have said, for an indefinite quantity, the amount became eventually ascertained and identified as being of a particular weight and situated in particular grain pits which had been filled by a particular person who was named. They, therefore, when the bargain was eventually made a contract for the purchase of specific ascertained articles ear-marked to the contract by which the firm of Jiwan Lal Bansidhar, for commission which they were to receive, had undertaken as agents to purchase from the sellers for the purchasers.

2. They brought their suit for damages and resisted the plaintiff's claim for return of the earnest money, as principals, and set up a perfectly hopeless allegation of custom, (the learned Judge seems to have been persuaded that it was introduced from Bombay to Hapur though, for the sake of Bombay, we hope he is under some delusion upon this subject which entitles the corn agents or brokers of Hapur to discard their capacity of agents and to assume that of principal, without either the knowledge or the consent of their own principal just when and how they please. The allegation is so unheard of and outrageous that it is really difficult to treat it as a serious matter requiring judicial determination, but inasmuch as it has succeeded in the First Court and Kishori Lal has been compelled to appeal to us it is necessary shortly to point the overwhelming reasons which are almost as old as the common law itself, why such a custom cannot possibly exist. In the first place, a custom has to be universal. In the second place, it has to be reasonable. In the third place, according, we believe, to one decision, at any rate, in this Court it has to be immemorial, though in the case of some commercial custom, that proposition requires to be stated with some qualification. The custom alleged in this case is not universal by any means. It is not necessary to review the evidence on this point but it was strenuously denied by, at any rate, one witness and many others could be cited from this and other cases to show that it is by no means universal. The right of sale possessed by the agent in whose name the langot happens to be drawn up (and to that extent the langot being a title deed enables him to obtain delivery to himself in his own name) was stated by one of the witnesses called by the

plaintiff whose name is also Pearey Lal, son of Lala Khushi Ram, is really the only way in which a reasonable man could have stated it:

The practice is that when there is an apprehension of loss, khattis are sold after giving notice and that, if the goods are not weighed on the due date (we take that to mean delivery taken by the purchaser who would naturally weigh them), they are Soil.

3. He thus makes it clear that the right of sale does not arise until the date fixed by the contract has expired; in other words, he is stating the practice to be in accordance with the simple and fairly obvious proposition of law that if a purchaser does not take delivery and pay the balance of the purchase money on the due date, the seller or his representative may sell the goods against him and charge him with the loss. There was abundant evidence before the learned Judge on which he could have dismissed this allegation of custom without more ado as having no foundation of fact. Secondly, the alleged custom is unreasonable: it is immoral in the sense that it is likely to lead to gross frauds and, in any event puts an agent in a double capacity in which his duty and interest must necessarily conflict and is contrary to the general principles of agency and, therefore, needless to say, highly unreasonable. The learned Judge has cited a passage from Anson on Contracts which, even if separated from its context, does not appear to apply to this case at all, because the passage cited represents Jiwan Lal as selling to Kishori Lal at a price equal to the price that he has had to pay to the original owner plus his own commission and award, and if that were the real contract in this case and that had been the real position of Jiwan Lal-Bansidhar, as the learned Judge conceived it, there would have been no room and no necessity for any allegation of custom. The case, as put by the learned Judge, may be illustrated by a simple example. If a resident in the country applied to the Army and Navy Stores to obtain for him and send a box of Sunlight Soap, the Army and Navy Stores in such a case are a kind of agent whether working for a profit on a sale, or working for a commission based upon a percentage of the value of the article it is selling, which again depends upon his contract with the proprietors of Sunlight Soap. In such a case it is no business of the purchaser what arrangement the middle man, who is only a sort of agent, has with the vendor, and there is no privity between the purchaser and the owner of the proprietary article and, in effect, the Stores are selling the soap to the purchaser themselves although they are probably controlled by their contract with the proprietors of the soap as to the conditions and price at which they are to sell. The learned Judge has found nothing in this case and could have found nothing which corresponded in the slightest degree with that illustration, and if he had taken the trouble to study the three classes of contract with which the late Sir William Anson was dealing in the passage cited, he would have found it laid down in the most unequivocal language that, both with regard to the first and the third, (the one that the learned Judge selected was the second), it is said that, an agent, in the true sense of the word, is a medium of communication between the two contracting parties and it is imperative that he should not divest

himself of his character as agent and become a principal to the transaction. Thirdly, the learned Judge states that "only two or three years ago, commission agents at Hapur were not in the habit of selling grain-pits that they had once bought for their constituents without the letter's permission but recently a number of instances of this kind have occurred "which the learned Judge seems to think are sufficient to create a custom in a trade, In the face of this fact, he would have been justified in rejecting the custom on the ground that it was an entry modern idea. To sum up, there are, the suggestion that any agent, without the consent of his principal or without a term in his contract authorising him to do so, which is the same thing, can turn himself in o a principal and use his own principal's money and the advantages which he has obtained from his position, as agent, to make a profit for himself, is unheard of in a Court of Law, and outrageous and ought to have been dismissed with contempt by the learned Judge. If the position of the defendant really is that he was the principal in the transaction, his position became almost equally hopeless. As we have already pointed out, the sale was for specific articles in an ascertained situation and indeed the defendant's Counsel actually asked the plaintiff whether he had been to the place to see them, a question impossible upon any other hypothesis, and inasmuch as the property undoubtedly had passed and the real date for paying the balance of the purchase money and for delivery of the wheat had not arrived, the re sale by the respondent, even in that view, was a breach of contract entitling the plaintiff to repudiate the transaction. It may be that the plaintiffs were glad to get out of this bargain on account of the drop in the price, although, according to their agent whom they employed to take delivery, they were always willing to take the three pits that were left. We do not think that any shabby or unfair conduct ought to be attributed to them in this respect. They had entered into a forward contract which always involves a risk of loss. They had chosen to do it through an agent and if the agent had conducted himself as an agent should, when the time came for the completion of the contract, the plaintiffs would have found themselves fated with a loss on their purchase, but, when the time came, they found that their agent had committed a breach of contract and they were clearly entitled to take advantage of that and of any legal right which he had placed in their hands by his own folly, in order to escape from the loss which would otherwise have fallen upon them and there is nothing inequitable, in any point of view, in this result, inasmuch as, in any event, the seller gets his contract price, indeed must have received it long ago, if Jiwan Lal and Bansidhar had really re sold this grain, and the loss which would otherwise have fallen on the plaintiff, has fallen upon the agents who are alone responsible for what has happened and has, therefore, fallen on the right shoulders. In conclusion, it is impossible to pass the judgment by without inviting the learned Judge, in matters of this kind which are frequently matters of great importance and, in this case, we are told, affect a number of other disputes, to clear his mind as to the fundamental principles involved, and the real questions which he has to determine. The judgment in this case simply bristles with legal fallacies and contradictory views. The learned Judge has allowed himself to be persuaded to

follow an authority in Bombay which has no more to do with the question in this case than the man in the moon and he has cited a passage from Anson on Contract which does not apply. He points out, with great care, that the relation of principal and agent did not exist between the parties in the Bombay case, and then he goes on to apply that principle to the case which he is deciding and, as a result of such application, to hold that no special usage in Hapur need be proved but that the right of the commission agent to sell away the pits follows as an incident of his contract; thus applying the decision which he himself said did not relate to principal and agent, to the duty of an agent. He seems to vacillate continually between the question whether Jiwan Lal Bansidhar were agents or not and, among other inconsistencies, he arrives at the extraordinary conclusion, (apparently in considering the question whether specific grain was dealt with by the contract or not) that so long as there was no difference in the capacity of the particular grain-pits at Hapur, it was immaterial whether the grain-pits which were subsequently tendered, were those which the plaintiff originally bought or not. If the learned Judge had stopped to consider what would have happened, if after the purchase and, as we have pointed out, the passing of the property, some fire or riot or inevitable accident had destroyed one of the grain-pits mentioned in the plaintiffs original largest and the question had arisen as between the plaintiffs and the owner of the grain pits as to whether they had intended to buy that one or any other and as to whether the loss should fall on the plaintiffs or the original vendor, he would have realised the fallacy of this view. The main ground on which we rest our decision in these two appeals is that this was a contract of agency, and that, as between principal and agent the custom alleged is unreasonable even impossible, as a matter of law. The result is that the two appeals are allowed". The defendant, Jiwan Lal's suit in appeal No. 191 of 1919 is dismissed with costs in all Courts. The plaintiff's appeal against Jiwan Lal (Appeal No. 305 of 1919) is allowed with costs and a decree must be granted to him for Rs. 3,500 plus interest thereon at 7 per cent, per annum from the 23rd of October 1915 to the institution of the suit and thereafter at the rate of 0 per cent, until payment with costs in the Court below costs in this Court to include fees on the higher scale.