
(1916) 02 CAL CK 0028
In the Calcutta High Court

Raghumull

APPELLANT

Vs

Luchmondas

RESPONDENT

Date of Decision : 11-02-1916

Acts Referred:

Contract Act, 1872 — Section 253(10)

Citation : 38 Ind. Cas. 278

Hon'ble Judges : Lancelot Sanderson, C.J.; John Woodroffe, J.; Asutosh Mookerjee, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This is an appeal by the defendant Raghumull from a judgment of Greaves, J., delivered on the 31st May 1915.

2. The plaintiffs' claim against the defendant was for damages for breach of an agreement in writing, dated the 8th June 1911, for money due for under-brokerage under the said agreement for brokerage and profits alleged to be due by reason of a verha arrangement, by which it was alleged the plaintiffs were to receive remuneration for certain transactions on the terms of the written agreement: and for brokerage in respect of other matters set out in the statement of claim.

3. It appears that by an agreement dated 31st May 1911, Messrs. David Sassoon & Co. appointed the defendant Raghumull and Juggoomul (who is since dead), trading in the name of Madhoram Hurdeodass, their brokers for the sale and purchase of sugar during the subsistence of that agreement, that is for a period of five years from the date thereof, or for such other period as might be mutually agreed upon unless sooner determined under the provisions in that behalf thereafter contained.

4. The Clause relating to the determination of the contract is 15, whereby it is provided as follows: "This agreement may be determined by either party giving the other three calendar months" notice. Provided always that the company shall

be at liberty to terminate this agreement at any time in the event of the brokers failing duly and faithfully to perform their duties under the agreement, and thereupon the accounts between the broker and the company shall at once be closed."

5. By Clause 2 of the agreement the brokers were to employ such under-brokers as should be necessary for the purposes of the company's sugar business and that such under-brokers should be under the control of the company.

6. Consequently on the 8th June 1911, Raghumull and Juggoomul entered into an agreement with the plaintiffs, by which the plaintiffs were appointed to act as under-brokers for the brokers for the sale and purchase of sugar in respect of all contracts to be entered by them for or on behalf of David Sassoon & Co. under the agreement of 31st May 1911, and during the subsistence of the said agreement or for such other period as the brokers (that is Raghumull and Juggoomul) and the company might further extend. Clauses 2, 3, 4, 5, 8, 10 and 11 of the agreement provide as follows:

2. All purchases and sales of sugar through the under-brokers shall be guaranteed by them and all contracts for all such sales and purchases shall be countersigned by the under-brokers, who shall in every respect be responsible for the due observance and performance and fulfilment of all such contracts; provided the said under-brokers or their subordinate under-brokers shall be unable to obtain contracts for the sale and purchase of sugar at the rates quoted by the said brokers, the said brokers shall be at liberty to enter into contracts for the sale or purchase of such sugar through other under-brokers or under-broker at or above the quoted rates and in such cases the under-brokers shall not be responsible to the brokers nor shall be entitled to any brokerage in respect of such contracts.

3. During the subsistence of this agreement the under-brokers shall not act as under-brokers for any other broker for purchases and sales of sugar and unless prevented from illness or any other unavoidable cause shall attend the office or place of business of the broker daily either by himself or his duly authorised agents.

4. The brokers shall on arrival of the goods sold through the under-brokers give notice of the arrival or any other notice required to be given to purchasers by delivering such notice to the under-brokers and the notice so given shall be deemed sufficient for all purposes.

5. The under-broker shall be entitled to during the continuance of this agreement on all contracts passed through him at the rate of eight annas per cent, on the value of the goods, the subject-matter of the contracts, and brokerage shall only become payable by the brokers to the under-broker after delivery of the goods under each of such contracts and after the said brokers shall become themselves entitled to their brokerage and commission from the said company under the said agreement.

8. That the under-brokers shall be liable for all loss and damages (if any) and costs of all suits and proceedings in respect of and on all contracts which may be passed through there as aforesaid and by reason of the bankruptcy of any contracting party to the extent of one-fourth or twenty-five per cent. of such loss and shall also be entitled to the profits arising out of the said contracts to the extent of one-fourth or twenty-five per cent, of such profits besides the commission mentioned in paragraph 5 of this agreement. That in case of any such loss the under-brokers shall on demand by the brokers forthwith deposit with them their share of such loss, unless there be sufficient money in the hands of the brokers belonging to the under-brokers and in such case the brokers shall have full power to deduct the same from such deposit.

10. The under-brokers shall not during the subsistence of this agreement directly or indirectly act as under-brokers of any other company or person whomsoever for the sale or purchase of sugar and that they will not, during the subsistence of this agreement without the written consent of the brokers first had and obtained, buy or sell or trade or deal or speculate in sugar, the subject-matter of this agreement, or guarantee any sugar contract with any other firm or firms, and in case it is discovered that the under-brokers have committed a breach of this clause, it shall be lawful for the brokers to terminate this agreement and the brokers shall in that case be entitled to recover from the underbrokers damages by way of liquidated claim the sum of Rs. 1,000 for the breach of this clause.

11. The brokers shall have full power to cancel this agreement, should it be found that the under-brokers have acted contrary to any of the Clauses of this agreement or have been unfaithful in the discharge of their duties under this agreement.

7. Business was carried on under these agreements until 27th April 1912 when Juggoomul died. No difference at that time was made in the business arrangements of the parties and Raghumull appears to have carried on the brokerage business, at all events so far as the plaintiffs were concerned, in the same way as before Jnggoomul's death.

8. On the 12th August 1912 the defendant's attorney wrote the following letter:

I am instructed by Messrs. Madhoram Hardeodass to give you notice, which I hereby do, that under and by virtue of the power vested in them by the 11th Clause of agreement, dated the 8th day of June 1911 and made between my clients of the one part and yourselves of the other part, they hereby cancel the said agreement as and from this date by reason of your having acted contrary to the terms and conditions thereof.

My clients in giving this notice do so, without prejudice to their rights under the said agreement to hold you responsible in respect of contracts and transactions entered into by you prior to this date.

I am further instructed by my clients to give you notice not to act in any way

under the said agreement by entering into any fresh contract or otherwise, and that if you act contrary to this notice you will do so at your own risk and peril.

9. Several matters were relied upon at the trial as being specific breaches of contract, on all of which the learned Judge found in the plaintiffs' favour. On the hearing of this appeal the defendant relied upon two of these alleged breaches only:

(1) The first was that without the order or knowledge of the defendant, the plaintiffs entered into a contract for the purchase of 950 tons of sugar.

(2) The second was that the fact that the first plaintiff was an undischarged bankrupt was concealed from the defendant and Juggomull.

10. As regards the first of these, it appears that the plaintiffs wrote to the defendant on or about the 15th July 1912 the following letter:

To Sri Lala Madhoramjee Hurdeodass Ji--Please accept the compliments of Luchmondas Joynarain. Further, white-sugar, tons 950, in words nine hundred (illegible) tons we sold for August-December without your order in respect of which you held us liable for your loss in respect of difference at one anna a maund, in words one anna per maund. We agree to the same, Miti Assar 11, Sudi 1, Sambat 1969.

11. This letter undoubtedly shows that 950 tons were sold by the plaintiffs without the defendant's order, and if it could be shown that this related to "sugar, the subject-matter of this agreement," within the meaning of the words in Clause 10 of the 8th June 1911 agreement, it would have been a breach of the contract which would have entitled the defendant to terminate the agreement, for Clause 10 provides that the under-brokers "will not during the subsistence of this agreement without the written consent of the brokers first had and obtained buy or sell sugar, the subject-matter of this agreement, and in case it is discovered that the under-brokers have committed a breach of this clause, it shall be lawful for the brokers to terminate this agreement, and the brokers shall in that case be entitled to recover from the under-brokers damages by way of liquidated claim the sum of Rs. 1,000 for the breach of this clause."

12. But undoubtedly there were transactions between the plaintiffs and the defendant which were outside the agreement in the sense that they did not relate to "sugar, the subject-matter of this agreement," and it is alleged by the plaintiffs that the transaction with reference to which the letter of the 15th July 1912 was written, was one of the transactions outside the agreement, and that the parties settled the matter by agreeing that the plaintiffs should pay the difference at one anna per maund.

13. It was for the defendant to prove that the transaction related to "sugar, the subject-matter of this agreement," and consequently came within Clause 10 of the agreement and in my judgment, the defendant has not afforded such proof and consequently he fails in this ground of appeal.

14. As regards the second alleged breach, the learned Judge has found as a fact, though not without some doubt, that the defendants Raghumull and Juggoomul were aware of the insolvency of Luchmondas; there was evidence on which he could come to the above-mentioned conclusion, and on consideration of the evidence relating thereto, I am not prepared to say that the learned Judge's finding on this question of fact was wrong, and, therefore, in my judgment, the second ground fails.

15. The next point taken by the learned Counsel for the defendant was that the agreement of 31st May 1911 was terminated by the death of Juggoomul and that as the under-brokerage agreement of 8th June 1911 was dependent on the subsistence of the agreement of 31st May 1911, the under-brokerage agreement became determinable at will, although, until determined by notice at any time, the course of dealing between the plaintiffs and the defendant would be regulated thereby; and that consequently the defendant was entitled to put an end to the contract on 12th August 1912, even though there were no breaches of contract the part of the plaintiffs.

16. In the further alternative it was contended that the plaintiffs were in any event not entitled to more than reasonable notice.

17. I am not prepared to accept these contentions; it was alleged in the statement of claim and not denied that the defendant and Juggoomul were members of a joint Hindu family which carried on the joint family business under the name Madhoram Hardeodass, of which the defendant was the karta, and in my judgment, both, the plaintiffs and defendant by their course of dealing, after Juggoomul's death, must be taken to have treated the agreement of the 8th June 1911 as binding and subsisting in all its material terms.

18. The plaintiffs, therefore, were entitled to a continuance of the employment as under-brokers, in the absence of any breach of contract which rendered it lawful for the defendant to put an end to it, under the agreement of 8th June 1911. This agreement, however, was dependent upon the subsistence of the agreement of 31st May 1911 between the defendant and David Sassoon & Co.

19. Now, on the 2nd of December 1912, a fresh agreement was entered into between the defendant and David Sassoon, & Co. with regard to the brokerage business. The fact of this agreement was referred to at the trial, but on objection by the plaintiffs' Counsel it was not admitted in evidence. On the hearing of the appeal the defendant's Counsel submitted that it should be admitted as evidence, and after some argument the learned Counsel for the plaintiffs withdrew his objection and the document was admitted.

20. This agreement differs from the agreement of 31st May 1911 in many material respects it is not necessary for me to refer in detail to the Clauses which have been read in the course of the argument; it is sufficient for me to say that the terms of it are inconsistent with the subsistence of the old agreement of 31st May 1911, and, in my judgment, it must be taken that as from the 2nd

December 1912 at all events, the agreement of the 31st May 1911 came to an end. It was urged by the learned Counsel for the defendant that the old agreement must be taken to have come to an end, on the 13th day of August 1912, because it appears from the terms of the agreement of 2nd December 1912, that part of the deposit of three lacs of rupees, viz., Rs. 87,186-9-4 was paid on the 13th August 1912, but, in my judgment, in the absence of any other evidence, this is not sufficient to justify us in holding as against the plaintiffs that the agreement of 31st May 1911 was terminated on the 31st August 1912.

21. It was argued by learned Counsel for the plaintiffs that the defendant could not voluntarily put an end to the business under which the plaintiffs were employed, and consequently that they were entitled to damages based on the continuance of the employment for the remainder of the five years.

22. But the plaintiffs' agreement was expressly made to be dependent upon the subsistence of the defendant's agreement with David Sassoon & Co., and it was provided by the terms of the latter agreement that it might be terminated by three months' notice by either party; the plaintiffs' agreement recites the agreement of the 31st May 1911 and the plaintiffs must, therefore, be taken to have contracted with reference to and subject to the terms thereof, including the right of the defendant and David Sassoon & Co., to put an end to the agreement of 31st May 1911.

23. There is no suggestion that the agreement of the 2nd December 1912 was not a bona fide business arrangement between the defendant and David Sassoon & Co., and it must, therefore, be taken that the old agreement of 31st May 1911 came to an end on the 2nd December 1912, and in the absence of any evidence to the contrary, it must further be taken that it was put an end to in a regular and proper manner, by reason of and in accordance with the provisions contained in the agreement of 31st May 1911. The agreement between David Sassoon & Co. and the defendant of the 31st May 1911 having come to an end on December 2nd, 1912, it follows that the agreement between the plaintiffs and the defendant of the 8th June 1911 also came to an end on that date, because the latter agreement by its terms was made dependent on the subsistence of the former.

24. The case, therefore, stands thus: the defendant by his letter of the 12th August 1912 committed a breach of the agreement of 8th June 1911, inasmuch as at that date he had no right to put an end to the agreement, and the plaintiffs are entitled to damages in respect thereof, but that inasmuch as the agreement came to an end as above-mentioned on the 2nd December 1912, the plaintiffs are not entitled to damages for any period beyond that date, and the damages should be assessed accordingly. As regards the rate at which damages should be allowed, the learned Judge has assessed them on the basis of Rs. 1,000 a month and has given damages for the unexpired period of 46 months: with the decision as to the period I cannot agree, as already explained; and as regards the rate, this Court has been asked by the learned Counsel for the plaintiffs to assess the

damages and to increase the figure beyond Rs. 1,000. After taking into consideration all his arguments on this point, I think that the rate at which the damages should be assessed is Rs. 1,250 a month; and, in my judgment, the plaintiffs are entitled to damages at that rate from the 12th August 1912 until the 2nd December 1912, instead of the sum of Rs. 30,000 awarded by the learned Judge.

25. The next point urged by the learned Counsel for the appellant was that the decree should be varied by striking out the words "And profits" in the 3rd and 4th paragraphs of the first part of the direction as to the accounts.

26. This depends on the alleged verbal arrangement as to business between the plaintiffs and the defendant and Juggoomul which was outside the under-brokerage agreement.

27. It was alleged by the plaintiffs that they were entitled to a considerable sum. in respect of "brokerage and profits" in respect of certain goods which the brokers bought from time to time on their own account from David Sassoon & Co. and the buyers of David Sassoon & Co., Ltd., and then sold through the plaintiffs, in regard to which it was alleged to have been agreed that the plaintiffs should receive remuneration on the terms of the agreement; that is, including both brokerage and a share of the profits. The question is, whether such an agreement was proved.

28. The evidence relating to this is to be found at pages 28, 46, 107, 125, 126, and the Exhibits H and I.

(At page 28, see lines 22 to 40.)

(At page 46, see lines 8 to 29.)

29. Juggoomul, being dead, could not be called as a witness, the defendant denied the alleged arrangement (107) and our attention was not drawn to any evidence given by the other plaintiff Joy Narain as to the alleged verbal agreement, and as far as I know, he did not deal with it.

30. The learned Judge dealt with this matter at page 160. He said: "With regard to items Nos. 4 and 6, I accept the plaintiffs' story as to the verbal arrangement, and as to the amount of the brokerage payable, namely, 8-annas per cent., having regard to the terms of the Exhibits H and I, and unless the figures are agreed an account must be taken of all sums due to the plaintiffs for brokerage calculated at 8 annas per cent, on goods of the defendant sold by the plaintiffs in the years 1911 and 1912".

31. With regard to items Nos. 2, 3 and 5, I accept the plaintiffs' story, and if the figures are not admitted, an account must be taken of what is due to the plaintiffs for brokerage in respect of these transactions."

32. Items Nos. 4, 5 and 6 of Exhibit B contained a claim for brokerage only.

33. Items Nos. 2 and 3, viz., Rs. 7,017 and Rs. 4,401, contained a claim for 1/4th share of the profits made by the defendant, as well as brokerage at 1/2 per cent. As to these the learned Judge says: "With regard to items Nos. 2, 3 and 5, I accept the plaintiffs" story, and if the figures are not admitted, an account must be taken of what is due for brokerage in respect of these transactions," and in his summary at page 162, he directs an account of the brokerage only.

34. So far, therefore, it is not clear that the learned Judge has found in favour of the plaintiffs as to the profits, on the contrary he seems to draw no distinction between items Nos. 2 and 3 and 5, though items Nos. 2 and 3 contained a claim for profits, whereas item No. 5 was confined to brokerage only.

35. In the decree, however, it must be pointed out, the words "and profits" have been added to the direction for accounts in respect of these matters, and the question is whether they should be allowed to remain.

36. It is significant that in examination-in-chief at page 28 the first plaintiff said nothing as to the arrangement to share profits, but he spoke of an arrangement as to "Commission," page 28, line 33: and the other plaintiff said nothing at all about the arrangement. The evidence really consists of one or two sentences in the cross-examination at page 45, which are in themselves ambiguous: see lines 14 and 25, 26. There is no evidence, as far as I am aware, that accounts were ever made up on the basis of the plaintiffs sharing such profits in respect of this business, and, in my judgment, the evidence was not sufficient to justify the addition of the words "and profits" in the decree, and I am of opinion, therefore, that these words should be struck out in the above-mentioned paragraphs of the decree.

37. As regards the sum of Rs. 1,600, referred to at page 160, line 13, of the judgment, it was alleged that there was no evidence with regard to this: we intimated during the course of the argument that this was a matter which must be investigated in the taking of the accounts.

38. The next point is as to the account directed in paragraph 2 of the second part of the decree, viz., as to the loss sustained by the defendant. This, as it stands, is limited to loss sustained by the defendant between the 8th June 1911 and the 12th August 1912, whereas it is contended by the defendant that the account should be taken of any loss sustained by the defendant in respect of contracts entered into through the plaintiffs between those dates.

39. Clause 8 of the agreement of 8th June 1911 provides that the under-brokers shall be liable for all loss in respect of, and on, all contracts which may be passed through them as aforesaid to the extent of one-fourth or 25 per cent., and shall also be entitled to the profits arising out of the said contracts to the extent of one-fourth or 25 per cent., besides the commission mentioned in paragraph 5. In view of this clause, I think the defendant's contention is correct, and just as the plaintiffs are entitled to an account of what is due to the plaintiffs for

commission and profits on contracts passed through them before August 12th 1912, so also are the defendants entitled to an account of the losses sustained by the defendant in respect of contracts passed through the plaintiffs before 12th August 1912.

40. It is admitted, as I understand, that the defendants are entitled to set off the two sums of Rs. 1,700 and Rs. 750: the first, in respect of the contract referred to in the letter of 15th July 1912 at page 139 of the paper-book, which has inadvertently been omitted, and the second, in respect of the plaintiffs' share of the costs of a suit to which the defendant is entitled under Clause 8 of the agreement.

41. The result is that the decree, in my judgment, should be varied in accordance with the above-mentioned conclusions, and, as the defendant has succeeded in some parts of his appeal and failed in others, I think he is entitled to receive two thirds of his taxed costs of this appeal from the plaintiffs, and that the learned Judge's direction as to the costs of the trial should not be altered.

John Woodruffs, J.

42. Of the five alleged specific breaches of contract set forth in the judgment, three have been abandoned on appeal, in which we have been asked to consider items Nos. 3 and 5 only. The onus of justifying the termination of the contract lies on the defendants who claim to have rightly terminated it by reason of the plaintiff having acted contrary to its terms and conditions.

43. As regards the first point I think that Mr. B.C. Mitter establishes that the case originally sought to be made was that any dealing in sugar was a breach of the contract, a point which has not been here insisted upon: that is, the case made was that the plaintiff could not sell or buy any sugar in the market irrespective of the question whether the sugar belonged to Messrs. Sassoon & Co. The evidence, therefore, was not directed to the point as to whether the 950 tons were sugar in which Sassoon & Co. had a proprietary interest. There is no evidence that this sugar was subject of the agreement and the alleged breach of contract is not made out. The fifth ground is that the first plaintiff was (as is not disputed) an undischarged insolvent and that that fact was concealed from the defendants. The learned Judge has held, though not without some doubt, that the defendants were aware of the insolvency of Luchmondas. There is evidence in the case which may be considered as justifying this conclusion of fact. Chattermull was not called, and in my opinion no sufficient ground has been established for reversing the decision of the Trial Judge on this point. This ground also fails and the only question upon this part of the case is, what are the damages to which the plaintiffs are entitled. I may here notice the contention of the appellant that on the death of Juggoomul the business came, to an end and that there was thereafter a contract terminable at will. It does not, however, necessarily follow that where two or more agents are employed and one of the agents dies, it is a termination of the agency, and the notice of the 12th August 1912 (Exhibit D)

seems inconsistent with the appellants' argument. The case is not open on the pleadings. I am not prepared to hold that Raghumull did not continue the business or that the agreement with Sassoon and Co., so far as Raghumull was concerned, was done away with. The old agreement I think continued until at least December 1912. The question then is, what is the effect of the agreement of the 2nd December 1912 between, Sassoon and Co. and Raghumull, which was tendered and rejected in the first Court but was admitted by us on appeal. There is no question but that the agreement of the 6th June 1911 is dependent on the head agreement between the defendants and Sassoon and Co. of the 31st May 1911. The latter was put an end to by the agreement of the 2nd December 1912, and in the absence of any evidence to the contrary it must be assumed it was properly terminated as between the parties thereto. The question is, does the existence of such fresh agreement affect the plaintiffs' claim to damages. It is not denied by the learned Counsel for the respondents that in assessing damages the Court is entitled to take into consideration the fact that under Clause 15 of the head agreement it might be terminated by three months' notice, But it is denied that the defendants employer could by entering into this new contract put an end to the business in which the plaintiff was employed, there being an undertaking under Clause 1 of the subordinate agreement to employ the plaintiff for live years. It is admitted that if the notice under Clause 15 had been properly given so as to terminate the head agreement, the under-broking agreement would fall also: but it is said this has not been shown and, therefore, the plaintiff is entitled to the damages awarded. I think this argument erroneous and that if, as hers, the head contract was terminable on three months' notice, the plaintiff is not entitled to damages for any longer period, and the learned Judge was in error in assessing damages on the basis of a five years' term. The respondent contends that in any event he is entitled to three months' notice from December but this is not established, seeing that there is no provision for it in the under-broking agreement which existed only during the subsistence of the head agreement. Mr. Justice Greaves has based his decree for damages on the basis of a profit of Rs. 1,785 a month from which the deduction mentioned in his judgment made leaves Rs. 1,000 a month. He has given damages for 46 months, the remaining term of the agreement, or Rs. 46,000 less Rs. 16,000, as stated in his judgment, or Rs. 30,000. It is contested that the profit earned during the 14 months is a test for the remaining period as also the assumption that there would be no losses. It is objected that the Court has not taken into account the loss actually suffered. In my opinion, however, the plaintiffs are only entitled to damages for the period between the 12th August 1912 when notice was given terminating the contract and the 2nd December 1912 when by the new head agreement entered into with Sassoon and Co. the former agreement was terminated.

44. Then, what should be allowed? Learned Counsel wished to show that the profits were Rs. 42,000, and, not Rs. 30,000 as stated in the judgment, from which Rs. 4,000 on account of under-brokerage and Rs. 1,000 for establishment

charges should be deducted, leaving Rs. 37,000 or some Rs. 3,000 a month, that is Rs. 12,000 for four months. But it is not open in appeal to learned Counsel to go beyond the admission of fact recorded in that judgment, viz., that the under-brokerage earned was Rs. 30,000 and that damages should be assessed on the basis of a profit for 14 months of between Rs. 25,000 and Rs. 39,000. Counsel then argued that he is entitled to take it at the higher figure of Rs. 30,000 or say Rs. 1,785 a month. He rightly contends that if damages are given for only four months, no deduction should be made on the ground that other employment might have been obtained; for seeing the shortness of the period it was not reasonable to expect that employment might be obtained during that time. I see no sufficient reason, to disturb the learned Judge's conclusion as to the other sums which the plaintiff claimed to deduct. A fair sum under the circumstances to allow would be Rs. 1,250 a month as damages for the termination of the agreement. For I think that the appellant's contention that the plaintiff is not entitled to any damages at all fails. That contention is based on the assumption that at the date the notice terminating the contract was given, the head contract with Sassoon and Co. had been terminated. This is a new case. The suit and notice proceed on the assumption that at the date of the latter there was a subsisting agreement which was cancelled by reason of the acts of the plaintiff contrary to the terms thereof. The point as put before us is not raised in the grounds of appeal. It is, in my opinion, open to us to consider the agreement of 2nd December 1912 on the question of quantum of damages, but it is a different thing to entertain a new contention that the plaintiff is not entitled to damages at all, not because he had acted in breach of the agreement but because there was no subsisting agreement at all. The evidence is not sufficient to support the contention that the agreement with Sassoon and Co. had been terminated prior to December 1912, and the notice given to the plaintiff implies by its terms that it was still subsisting--otherwise there was no necessity to allege a breach of the " agreement as ground for its cancellation. It would have been sufficient to say that the agreement with the plaintiff was at an end because the defendant's agreement with Sassoon had been terminated. An application was accordingly made to us to adduce evidence on this point, This, however, could not be granted at this stage of the proceedings, raising as it did a new case, and a defence which, if it were established, would make a large part of the evidence unnecessary. In my opinion the defendant may seek to establish that the plaintiff is not entitled to damages on the ground that he has committed a breach of contract or that if he has not committed such a breach, he is not entitled to so much in the way of damages as the Judge has awarded, but not that he is not entitled to any damages on the ground that at the date of the notice there was no subsisting agreement to terminate at all.

45. The ether claim is for Rs. 48,705-7-3, the particulars of which are given in Exhibit B attached to the plaint. It was contended that the respondents had failed to prove the agreement set out in paragraph 8 of the plaint. The learned Judge appears to have accepted the plaintiff's case as to both brokerage and profit.

46. In the decree account of profit is given and it is said this is not in conformity with the ordering portion of the judgment. There is no ground of appeal on this point. Had objection been taken the judgment would, having regard to its findings, have been rectified. The minutes were settled by the learned Judge in the -presence of both parties and an account directed both as to brokerage and profits which the learned Judge would not have done had he not in fact decided the claim and intended to direct an account on both heads. The evidence does not, however, appear to sufficiently support the decree from which in accounts (2) and (3) the words "and profits" should be excluded. In the second account in the set-off account the decree should run "sustained by the defendants on account of contracts entered into between the 8th day of June 1911 and 12th August 1912."

47. In my opinion, therefore, the judgment of the first Court should be varied by substituting the sum of Rs. 1,250 a month from the 12th August to 2nd December 1912 in lieu of Rs. 30,000 awarded by the learned Judge and by the amendments last mentioned and in the judgment of the Chief Justice, but that in other respects the judgment and decree should stand. The appellant having reduced the sum decreed by some Rs. 24,000 has achieved substantial success and is entitled to the costs of this appeal, except as to such portion of the hearing which may be taken to represent the time occupied in the discussion of points on which the appellant has failed. On this as on other points dealt with by the Chief Justice I agree with his judgment.

Asutosh Mookerjee, J.

48. This is an appeal by the defendant in an action for recovery of damages-for wrongful termination of a contract of under-brokerage, as also of brokerage commission and profits. On the 31st May 1911, David Sassoon & Co. appointed the appellant Raghumull and his brother Juggoomul, since deceased, (who constituted the firm of Madho Ram Hardeodas) as brokers for the purchase and sale of sugar. The contract was to be in force, as provided in the first clause, for a period of five years, or for such further period as might be mutually agreed upon between the parties, unless sooner determined under the provisions contained in the agreement itself. This referred to the fifteenth clause, which laid down, first,- that the agreement might be determined if either party gave the other three calendar months" notice, and, secondly, that the company might terminate the agreement at any time should the brokers fail to perform their duties duly and faithfully. The second Clause gave liberty to the brokers to employ under-brokers who would be under the control of the company. Pursuant to the provision of this clause, the brokers, on the 8th June 1911, appointed the respondents Luchmondas Khandelwal and Jaynarayan as under-brokers. The under-brokerage agreement recited the fact of the brokerage contract, and expressly stipulated in the first Clause that the under-brokers would act during the subsistence of the brokerage agreement or for such additional period as the brokers and the company might further extend. Business was carried on under

these contracts till the 27th April 1912, when Juggoomul died; and, thereafter, the business the continued apparently as if no change had taken place. On the 12th August 1912, Raghumull, the surviving broker, notified to the under-brokers that the agreement with them stood cancelled as they had acted contrary to the terms and conditions thereof, and asked them not to take any further action as under-brokers. On the 2nd December 1912, a new agreement was made between Raghumull on the one hand and David Sassoon & Co. on the other. The under-brokers thereafter instituted the present suit for recovery of Rs. 1,98,705-7-3 from Raghumull. They claimed Rs. 150,000 as damages for wrongful termination of the under-brokerage contract; the remainder they claimed as brokerage and profits in respect of various transactions which they had carried on, on behalf of the defendant, under an alleged oral agreement. The defendant repudiated the claim as unfounded, and alleged that if proper accounts were taken, a large sum would be found due to him from the plaintiffs. Upon the fundamental question in the case, namely, whether the under-brokerage agreement had been wrongfully terminated, Mr. Justice Greaves has found in favour of the plaintiffs, and he has awarded them damages to the extent of Rs. 30,000: he has further directed various accounts to be taken in respect of transactions between the parties. On the present appeal, the decree has been assailed in respect of the written as well as the oral agreements, and the arguments addressed to us may conveniently be separately considered.

48. As regards the under-brokerage contract of the 8th June 1911 the appellant has contended that he had validly terminated it on the 12th August 1912 under paragraph 10 of the agreement, as the plaintiffs had, without his written consent and contrary to the provisions of the instrument, dealt in sugar. In support of this contention, reliance has been placed in this Court upon one transaction only, namely, a sale of 950 tuns of sugar by the plaintiffs, without the authority of the defendant, a few days prior to the 15th July 1912. It is plain that this transaction does not avail the defendant. The burden of proof is on the defendant to establish that there was just cause for dismissal; this he has failed to discharge, *Cussons v. Skinner* (1843) 11 M. & W. 161 : 12 L.J. Ex. 347 : 152 E.R. 758. Paragraph 10 of the agreement of the 8th June 1911 entitles the brokers to terminate the contract for improper dealing in sugar which was the subject-matter of the agreement. There is no evidence to show that the 950 tons of sugar mentioned formed the subject-matter of the agreement; it might well have been sugar outside the agreement. Consequently the defendant has not established the only ground now assigned to justify his action under paragraph 10 of the agreement.

49. It has next been argued that, apart from paragraph 10, the defendant was entitled to terminate the -agreement on the ground that the plaintiff Luchmondas had, prior to his appointment as under-broker, been adjudged insolvent, and had concealed from the brokers the fact that he was an undischarged bankrupt. On this point, Mr. Justice Greaves has found that the brokers, when they appointed the plaintiff as an under-broker, knew of his insolvency. The evidence in support

of this view is rather slender, and the learned Judge arrived at his conclusion not without some doubt. This, I think, does not weaken the value of his opinion; it indicates, on the other hand, full appreciation of the character of the evidence on the point. I have considered the evidence and I see no reason to take a different view. The direct testimony available at this distance of time is, as may be expected, meagre; but the surrounding circumstances make it extremely probable that the brokers knew about the insolvency of the plaintiff; the fact of such knowledge is, I think, "proved" within the meaning of the Indian Evidence Act (section 5) which requires that the Court should consider the existence of the disputed fact so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In this view, it is unnecessary to consider what the legal position of the defendant would have been, if he had proved that the plaintiff had, at the time of his appointment, concealed from him the fact of his bankruptcy.

50. We must then proceed on the assumption that the dismissal of the plaintiffs on the 12th August 1912 was wrongful, and determine on this basis the damages to which they are entitled for breach of contract. Mr. Justice Greaves has assessed the damages on the hypothesis that the plaintiffs would have, but for their wrongful dismissal, continued to act as under-brokers for the full term of five years from the 8th June 1911. This view has been contested by the appellant, and it has been argued, first, that the contract was terminated by the death of Juggoomul on the 27th April 1912, and, secondly, that, in any view, it came to an end on the 2nd December 1912, when the appellant, entered into a new agreement with David Sassoon & Co. The first branch of this contention cannot, I think, prevail. It is plain, as appears from the decision in *Bhagirath Samanta v. Prem Chand Pal* 16 Ind. Cas. 852 : 17 C.L.J. 201, that where there are two joint agents and one of them dies, upon his death the contract of agency terminates, only so far as he is concerned, but not as regards the surviving agent. Consequently notwithstanding the death of Jaggoomul, the agreement between David Sassoon & Co. and Raghumull, made on the 31st May 1911, prima facie continued in operation. It is equally plain that the death of Juggoomul did not operate to dissolve the firm of Madjio Ram Hardeodas, which was owned by a Hindu, joint family whereof the defendant Raghumull was the karta. Section 253, Clause 10, of the Indian Contract Act, which provides for the dissolution of a partnership on the death of a partner, must be read as qualified by the introductory words, "in the absence of any contract to the contrary." A contract to the contrary may well be inferred, in the present case, from the conduct of the parties. The business was carried on, as it would have been, on the footing that the position of the firm was not affected by the death of Juggoomul.

51. The plaintiffs expressly asserted this in paragraph 3 of the plaint, and the defendant admitted the allegation as substantially correct in paragraph 1 of his written statement. The notice whereby the defendant terminated the agreement on the 12th August 1912, proceeded on the basis that the firm was still in

existence. In these circumstances, the principle recognised in *Gukul Krishna Das v. Sashi Mukhi Dasi* 13 Ind. Cas. 23 : 16 C.W.N. 299 : 15 C.L.J. 204 clearly applies. It is further worthy of note that the case of joint ownership in a trading business, created through the operation of Hindu Law, between the members of an undivided Hindu family, does not stand on precisely partnership arising out of contract. The rights and liabilities of co-parceners in a joint Hindu family firm cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general Rules of Hindu Law which regulate the transactions of such joint families; according to those rules, the death of one of the co-parceners does not dissolve a family partnership *Samalbhai Nathubhai v. Someshvar* 5 Ind. Jur. 372 : 3 Ind. Dec. (N.S.) 26, *Lutchmanen Chetty v. Siva Prokasa Modeliar* 26 B. 349 : 3 C.W.N. 190 : 13 Ind. Dec. (N.S.) 826, *Vadilal Lallubhai v. Shah Khushal Dalpatram* 27 B. 157 : 4 Bom. L.R. 968, *Maharaj Kishen v. Har Gobind* 27 Ind. Cas. 69 : 218 P.L.R. 1915 : 101 P.R. 1914 and *Narain Das v. Ralli Brothers* 31 Ind. Cas. 45 : 61 P.R. 1915 : 136 P.W.R. 1915.

52. But though the first branch of the argument for the appellant thus proves untenable there is, I think, no answer to the second branch of the argument, namely, that the agreement dated the 31st May 1911 and along therewith the subordinate agreement of the 8th June 1911 came to an end on the 2nd December 1912. The test to be applied to determine whether the later agreement operated as a rescission of the prior contract was formulated in *Mathura Mohan Saha v. Ram, Kumar Saha* 35 Ind. Cas. 305 : 20 C.W.N. 370; 23 C.L.J. 26 : 43 C. 790: the true principle is that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together. In the present case, the agreement made between David Sassoon & Co. and Raghumull on the 2nd December 1912 is different in material particulars from the agreement of the 31st May 1911, which, we must consequently hold, was rescinded on that date. The appellant has, on this ground, contended that as the under-brokerage contract was to continue in force only during the subsistence of the agreement of the 31st May 1911, the plaintiffs are not entitled to the benefit of the dependent contract beyond that date. The respondents have argued, on the other hand, that there are two valid answers to this position, namely, first, that in the absence of evidence to prove that the brokerage contract was terminated in strict conformity with Clause 15, which contemplates three months' notice, that agreement cannot be deemed to have been legally determined; and secondly, that as on the illegal cancellation of the under brokerage contract on the 12th August 1912, a right to recover damages accrued to the plaintiffs, their position could not thereafter be prejudiced by any termination of the brokerage contract even in strict conformity with Clause 15. In my opinion, neither of these contentions is tenable. As regards the first branch, it is plain that the three

months" notice, required by Clause 15 was for the benefit and protection of the contracting parties themselves, and that the plaintiffs are not competent to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice. It is significant that the under-brokerage contract does not even require that in the event of a determination of the brokerage contract by three months' notice, the brokers would be bound to give similar notice to the under-brokers. The under-brokers might have protected themselves by the insertion of a Clause to this effect in their agreement, and if we were to accede to their argument, we would have in substance to read such a provision into the agreement. As regards the second branch of the contention, it is obvious that there is no foundation for it. When the under-brokerage agreement of the 8th June 1911 was illegally cancelled by the brokers on the 12th August 1912, a right, no doubt, accrued to the under-brokers to recover damages for breach of contract. But the inference is manifestly fallacious that the damages must be assessed on the hypothesis that the under-brokers would have held their employment for a term of five years from the 31st May or 8th June 1911, i.e., up to the 31st May or 8th June 1916. The under-brokerage contract was liable to come to an end, whenever the contingency mentioned in Clause 15 of the brokerage contract might happen. Consequently, even if the contingency - had not actually happened before the assessment of damages, it would have been incumbent upon the Court to make allowance for the probability of such termination of the contract. The calculation of the value of the damages, with any approach to exactness in such circumstances, might have been a problem of great practical difficulty. But here, fortunately, the contingency did happen before the institution of the suit, and the Court thus possesses an accurate measure of the loss actually sustained by the plaintiffs. On no conceivable principle can the Court be invited to base its decision on the calculation of the chance of a probable event, when that event has actually happened and the chance has been transformed into a certainty. There is also no force in the contention that after breach of the under-brokerage contract, the brokerage contract could not be terminated, as between the parties thereto, by notice under Clause 15. No such limitation can be read into that clause. It is plain that David Sassoon & Co. might at any time determine the agreement, notwithstanding what might have passed between their brokers and under-brokers; and as the right to rescind under Clause 15 was mutual, there is no reason why the brokers should be in a different position. The respondents placed much reliance upon the decisions in *Inchbald v. Western Neilgherry Coffee Co.* (1864) 142 R.R. 603 : 17 C.B. (N.S.) 733 : 44 L.J.C.P. 15 : 10 Jur. (N.S.) 1128 : 11 L.T. 345 : 13 W.R. 95 : 144 E.R. 293, *In re Patent Floor Cloth Co.* (1872) 41 L.J. Ch. 476, *Joyner v. Weeks* (1891) 2 Q.B. 31 : 60 L.J.Q.B. 510 : 65 L.T. 10 : 39 W.R. 583 : 55 J.P. 725 and *Ogdens Ltd. v. Nelson* (1901) 2 K.B. 410 : 73 L.J.K.B. 865 : 53 W.R. 71 : 90 L.T. 656 : 20 T.L.R. 466, *Ogdens Ltd. v. Nelson* (1905) A.C. 109 : 74 L.J.K.B. 433 : 53 W.R. 497 : 92 L.T. 478 : 21 T.L.R. 359. These cases are clearly distinguishable; they merely illustrate the elementary principle that where a principal in breach of an express or implied contract with his agent, refuses to complete a transaction or

otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract; in the case before us, the under-brokerage contract, if it had continued in operation till the 2nd December 1912, would then have come to an end, not in breach, but in conformity with an express agreement between the parties. The question of the mode of assessment of damages where there has been an anticipatory breach of a contract, is of considerable nicety, but the principle has been recognised in cases of high authority that the damages are to be estimated with reference to what would have been the position of the party wronged if the contract had been duly performed. Reference may in this connection be made to a familiar class of decisions considered in the case of *Bilasiram Thakursidas v. Ezekiel Abraham Gubbay* 33 Intl. Cas. 1 : 20 C.W.N. 240 : 23 C.W.J. 62 : 43 C. 305 *Johnstone v. Milling* (1886) 16 Q.B.D. 460 : 55 L.J.Q.B. 162 : 54 L.T. 629 : 34 W.R. 238 : 50 J.P. 694, *Hochster v. Be La Tour* (1853) 2 El & Bl. 678 : 22 L.J.Q.B. 455 : 17 Jur. 972 : 1 W.R. 409 : 118 E.R. 922; 22 L.T. (O.S.) 171 : 95 R.R. 747, *Frost v. Kinght* (1872) 7 Exch. 111 : 41 L.J. Ex. 78, 26 L.T. 77 : 20 W.R. 471, *Brown v. Mutter* (1872) 7 Exch. 319 : 41 L.J. Ex. 214 : 27 L.T. 272 : 21 W.R. 18, *Cherry v. Thompson* (1872) 7 Q.B.573 : 41 L.J.Q.B. 243 : 26 L.T. Ex. 791 : 20 W.R. 1029 and *Boper v. Johnson* (1873) 8 C.P. 167 : 42 L.J.C.P. 65 : 28 L.T. 296 : 21 W.R. 384 and *Roehm v. Horst* 178 U.S. 1 : 44 Law. Ed. 953.

53. I do not feel pressed by the contention that the view I take may open the door to fraud and that the brokerage contract niay, by mutual and collusive agreement, be terminated to the prejudice of the under-brokers. Clause 1 of the under-brokerage agreement, read with Clause 15 of the brokerage contract, affords ample protection against such a device; what is essential to terminate the under-brokerage contract is a real and not merely colourable determination of the brokerage contract; the former will continue unaffected so long as the latter subsists in fact; the Court will not hesitate to look behind the mere form through which the parties might have gone and give effect to the substance of the transaction. There is, however, no suggestion in this case that the new contract of the 2nd December 1912 was other than a genuine and bona fide business arrangement. I hold accordingly that the parties to the brokerage contract were fully entitled to rescind that agreement, as they did, by a new contract; that the plaintiffs cannot escape the inevitable consequences of such action on their part, and that they are consequently entitled to damages, not up to the 31st May 1916, but only up to the 2nd December 1912. Such damages, I think, should be allowed at the rate of Rs. 1,250 a month; this is higher than the rate adopted by Mr. Justice Greaves, because, if the damages are allowed for a short period, deductions cannot be legitimately made to any large extent on account of fluctuations of profits and like circumstances. The decree, in so far as it allows Rs. 30,000 as damages for breach of contract, must accordingly be varied.

54. The only other point argued with reference to the under-brokerage contract relates to the liability of the plaintiffs for loss, if any, sustained by the defendant

on account of contracts made by them between the 8th June 1911 and the 12th August 1912. The decree directs a if account of the loss actually sustained by? the defendant during this period; the appellant argues that an account should be taken of the loss on all contracts made during the period mentioned, though the loss might have accrued at a later period. In my opinion, this contention is clearly well-founded. The plaintiffs have claimed and have been awarded the benefit of all profits on contracts made during this period; it is only fair that they should bear the loss as well cf. *McClean v. Kennard* (1874) 9 Ch. 336 : 13 L.J. Ch. 323 : 30 L.T. 186 : 22 W.R. 382. The decree must consequently be varied in this respect.

55. As regards the claim on the verbal agreement, the only substantial question in dispute is the liability of the defendant to allow the plaintiffs' profits in addition to brokerage on sales and purchases made by the plaintiffs for the defendant though not included in the agency agreement. I cannot find in the evidence, which has been analysed in detail in the judgment of the Chief Justice, any satisfactory proof in support of the claim to profits in addition to brokerage, and it is significant that no reference was made to profits in the decree is originally drawn up. In my opinion, this part of the claim must be disallowed. Finally, we have the claim in respect of the three sums of Rs. 1,750, Rs. 750 and Rs. 1,600; as regards the first two it is practically conceded that they should be allowed in favour of the appellant, while, as regards the third, an enquiry must be directed.

56. On these grounds, I agree to the order which the Chief Justice proposes to make in this appeal.