

(1965) 02 PAT CK 0010

In the Patna High Court

Case No : Letters Patent Appeal No's. 90 of 1959 and 23 of 1960

Saligram Marwari and Others

APPELLANT

Vs

Ayodhya Prasad Musaddilal and Another

RESPONDENT

Date of Decision : 10-02-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33, 107
Contract Act, 1872 — Section 191, 194

Citation : AIR 1966 Patna 61

Hon'ble Judges : S.C. Misra, J;G.N. Prasad, J

Bench : Division Bench

Advocate : A.N. Chatterji, in L.P.A. No. 90 of 1959, R.S. Chatterji and A.K. Mitter, in L.P.A. No. 23 of 1960, for the Appellant; R.S. Chatterji, A.K. Mitter and Hira Lal Agarwal, in L.P.A. No. 90 of 1959, J.C. Sinha, A.N. Chatterji, Hari Lal Agarwal and Mangal Prasad Misra, in L.P.A. No. 23 of 1960, for the Respondent

Judgement

G.N. Prasad, J.—These two appeals arise out of two suits which were tried analogous and they have, therefore, been heard together, although the First Appeals arising therefrom were dealt with separately by the same learned Single Judge. Letters Patent Appeal No. 90 of 1959, from the decision of the learned Single Judge in First Appeal No. 361 of 1953, arises out of Money Suit No. 12 of 1952, and Letters Patent Appeal No. 23 of 1960, from the decision of the learned Single Judge in First Appeal No. 475 of 1954, arises out of Money Suit No. 76 of 1953. The plaintiff in both the suits is Nalam Kanaka Raju, Respondent No. 2 in Letters Patent Appeal No. 90 of 1959 and the appellant in Letters Patent Appeal No. 23 of 1960. There were two sets of defendants in each suit, and one of them was common to both the suits, and will, for the sake of convenience, be referred to as the Sakti merchant. The other set of defendants are merchants of Jharia who, however, are two different parties. The Jharia merchants, who were defendants in Money Suit No. 12 of 1952, are the appellants before us in Letters Patent Appeal No. 90 of 1959. The other set of Jharia merchants, who were defendants in Money Suit No. 76 of 1953, are respondents 2 to 5 in Letters

Patent Appeal No. 23 of 1960. Both these appeals have been heard together as they involve identical questions for decisions.

2. The following facts of the two cases are not in dispute. The plaintiff, who is a merchant of the district of Ganjam, in Orissa, desired to purchase Mahua flowers at Sakti in the State of Madhya Pradesh to transport them to Jharia in the State of Bihar for the purpose of sale at profit. Accordingly, in December 1947, he entered into a contract with the Sakti merchant for the purchase of 1000 maunds of Mahua at the rate of Rs. 5 per maund. He had, however, to experience certain difficulties on account of the fact that at the relevant time there was a ban upon, export of Mahua flowers outside the State of Madhya Pradesh and the Mahua flowers purchased by the plaintiff could not be exported to Jharia without permit from the Government of the State of Madhya Pradesh. Accordingly, the plaintiff applied for the necessary permit, but it was not issued to him until the 27th January 1949. Meanwhile, however, the plaintiff who had already become the owner of the Mahua flowers in question made part payment of their price to the Sakti merchant. After the issue of the necessary permit, steps were taken to arrange for railway wagons for transporting the consignment from Sakti Railway station to Bhaga Railway station situated near Jharia. The consignment was transported in three different wagons. The first wagon reached the destination on or about the 19th February 1949 and the delivery of the consignment was taken by the Jharia merchants, who are defendants in Money Suit No. 12 of 1952 and will be referred to as the Jharia merchants No. 1. The second and the third wagons reached the destination on or about the 24th February 1949. The delivery of the consignment of the second wagon was taken by the Jharia merchants, who are defendants in Money Suit No. 76 of 1953 and will be referred to as the Jharia merchants No. 2, while that of the third wagon was taken by the plaintiff and made over to the Jharia merchants No. 1. The consignment of the second wagon was the subject matter of Money Suit No. 76 of 1953, while the consignments of the first and the third wagons were the subject matter of Money Suit No. 12 of 1952. After the deliveries as aforesaid, the Mahua flowers in question were sold at Jharia through the agencies of the two sets of Jharia merchants at different rates ranging between Rs. 10 to Rs. 12-8-0 per bag, but the sale proceeds were not paid by them to the plaintiff, and that gave rise to exchange of correspondence between the parties and ultimately culminated in the institution of the two suits. In Money Suit No. 12 of 1952, the total claim was laid at Rs. 7,371-11-0 inclusive of interest for the price of 273 bags at the rate of Rs. 11-8-0 per bag and of 250 bags at the rate of Rs. 12-8-0 per bag; and in Money Suit No. 76 of 1953, the total claim of Rs. 2,834 inclusive of interest for the price of 90 bags at the rate of Rs. 10 per bag and 112 bags at the rate of Rs. 11-8-0 per bag. The real dispute between the parties is with respect to the true contractual relationship of the Jharia merchants and the Sakti merchant vis-a-vis the plaintiff. The case of the plaintiff is that the Jharia merchants were his agents whom he had employed for selling the Mahua flowers and, therefore, they were accountable to him for the sale price, and not to the

Sakti merchant. On the other hand, the stand taken by the Jharia merchants is that there was no privity of contract between them and the plaintiff, and the contract was between them and the Sakti merchant to whom they had paid a sum of Rs. 3,900-14-6 in respect of the claim laid against them in Money Suit No. 12 of 1952 and Rs. 1,403-9-0 in respect of the claim laid against them in Money Suit No. 76 of 1953. The Sakti merchant admitted to have received the money from Jharia merchants and that they were his agents and accountable to him alone, instead of to the plaintiff.

The learned Subordinate Judge recorded the following findings:

- (i) The Sakti merchant worked as the commission agent of the plaintiff for export of the Mahua flowers on certain terms;
- (ii) The plaintiff was both the consignor and the consignee of each of the three consignments ;
- (iii) The Jharia merchants were not the sub-agents of the Sakti merchant, but they were nominated by the Sakti merchant as substitute agents for the plaintiff and as such they were liable to render accounts to the plaintiff as his agents or substitutes;
- (iv) The Jharia merchants paid the sale proceeds of the Mahua flowers to the Sakti merchant though they should have paid them to the plaintiff, but the action of the Jharia merchants was not mala fide because the true nature of the transaction was so confused that the Jharia merchants might well have felt that the Sakti merchant was entitled to the sale proceeds;
- (v) The Sakti merchant had received a total sum of Rs. 10,904-8-0 on the plaintiff's account inclusive of Rs. 8,654-8-0 from the Jharia merchants. The plaintiff was also entitled to a further sum of Rs. 250, being the price of 50 maunds of Mahua flowers which the Sakti merchant had failed to deliver to the plaintiff and, therefore, the total liability of the Sakti merchant was for Rs. 11,154-8-0. Out of this amount, the Sakti merchant was entitled to retain for himself Rs. 7,000-1-0 on account of unpaid price of the Mahua flowers, besides commission expenses and interest;
- (vi) Therefore, the plaintiff was entitled to Rs. 4,154-7-0 from the Sakti merchant in respect of his claim in both the suits.

Upon those findings, the learned Subordinate Judge decreed the suit against the Sakti merchant alone.

3. The Sakti merchant thereupon filed the two First Appeals, and in both of them a cross objection was filed by the plaintiff. First Appeal No. 361 of 1953 was disposed of by the learned Single Judge, Raj Kishore Prasad, J., in the first instance, who discharged the decree passed by the learned Subordinate Judge against the Sakti merchant and decreed the plaintiff's claim against the Jharia merchants, also allowing the plaintiff's cross objection in part in respect of his

claim for freight and interest pendente lite, both of which had been refused by the trial Court. In First Appeal No. 475 of 1954, however, which was heard subsequently, the learned Single Judge, came to a different conclusion. His Lordship dismissed the plaintiff's suit against the Sakti merchant, but declined to pass a decree against the Jharia merchants, with the result that the plaintiff's suit (Money Suit No. 75 of 1953) was dismissed in toto. The appeal was allowed and the cross objection was dismissed.

4. Letters Patent Appeal No. 90 of 1959 has accordingly been preferred by the Jharia merchants No. 1 who carry on business in the firm name of Saligram Baijnath. Letters Patent Appeal No. 23 of 1960 has been preferred by the plaintiff, the respondents therein being the Sakti merchant and the Jharia merchants No. 2. The latter carry on business in the first name of Baldeodas Kashiram.

5. The main point which has been canvassed before us in these appeals is whether the plaintiff is entitled to a decree in respect of his claim and if so against which of the defendants. In both the suits, the plaintiff prayed for judgment against the Jharia merchants on the footing that they were his substitute agents, but he also prayed, in the alternative, for a decree against the Sakti merchant. The question for decision, therefore, is whether the Jharia merchants were the substitute agents of the plaintiff or they were simply the agents of the Sakti merchant and as such accountable to him alone. In the latter event, a further question which will arise for decision is whether a decree can be passed in favour of the plaintiff against the Sakti merchant.

6. There was no formal deed of agreement entered into between the parties and, therefore, the question as to whether the Jharia merchants were the substitute agents of the plaintiff or the sub-agents of the Sakti merchant will have to be decided in the light of the circumstances and the broad probabilities of the case. One of the relevant circumstances in regard to which there is no dispute before us is that the ownership in the Mahua flowers which had been transported to Bhaga was in the plaintiff. It is also an undisputed fact that in the railway receipt in respect of each of these consignments, the name of the plaintiff was shown both as the consignor and the consignee. The permit authorising the export of the Mahua flowers from Sakti in Madhya Pradesh to Bhaga in Bihar also stood in the name of the plaintiff. It is manifest, therefore, that it was the property of the plaintiff which the Jharia merchants were employed to sell on certain terms, and this fact must have been within their knowledge. It is true that the railway receipt in respect of the first consignment of which delivery was taken by the Jharia merchants No. 1 on the 19th February 1949 was forwarded to them by the Sakti merchant by post with a registered letter (Ext. A 22-1) dated the 15th February 1949, wherein they were directed to receive the consignment which consisted of 273 bags of Mahua and to sell them "with profit and send its account", without there being any indication that the goods belonged to the plaintiff. A similar letter (Ext. A45-1) was sent to the Jharia merchants No. 2 on

the 16th February 1949 along with the railway receipt in respect of the second consignment of 202 bags. Another letter (Ext. A24-1) forwarding the railway receipt in respect of the third consignment of 250 bags to the Jharia merchants No. 1 was to the same effect. But the Jharia merchants on receipt of the railway receipts must have noticed that they stood in the name of the plaintiff, and from this they must have realised that it was the property of the plaintiff which they were dealing with. Besides, it appears from the materials on the record that soon after despatching the consignments from Sakti, the plaintiff personally came to Jharia and met the Jharia merchants along with a letter to each of them, which was by way of introduction of the plaintiff to them. Both these letters were dated the 18th February 1949; Ext. A. 23-1 having addressed to Jharia merchants No. 1 and Ext. A55-1 to Jharia merchants No. 2, and they are more or less in identical terms. It will, therefore, be sufficient to refer to the terms of only one of them. Ext. A23-1 was in the following terms:

"Greeting from Ajodhya Prasad Musadi Lal of Sakti to Saligramji Baijnath. The Mahua trader Nalam Kanak Raju comes to you. According to his instructions please sell mahua of both wagons with profit. Please send invoice and money to us. You will do the work with profit as you deem proper. Dated Faguit Badi 5, Samvat 2005."

On behalf of the Jharia merchants strong reliance was placed upon these letters (Exts. A23-1 and A55-1) for the purpose of showing that they were to act as the sub-agents of the Sakti merchant, inasmuch as the instruction to sell the goods was given to them by the Sakti Merchant who had also directed them to send the invoice and the money to him. In these letters there was no instruction from the Sakti merchant that the Jharia merchants should pay the sale proceeds after deducting their commission to the plaintiff. But these letters cannot be construed in isolation and must be considered in the light of the surrounding circumstances. If the intention of the Sakti merchant would have been to appoint the Jharia merchants as his sub-agents then he would not have mentioned, as he did in both these letters (Exts. A23-1 and A55-1), that they were to sell the Mahua flowers in accordance with the instruction of the plaintiff who had carried the letters to them personally. From the fact that they were to sell the Mahua according to the instructions of the plaintiff, coupled with the fact that the plaintiff was the consignee in the relevant railway receipts, the Jharia merchants must have been conscious of the fact that the goods belonged to the plaintiff, who had merely been introduced to them by the Sakti merchant so that they might act according to his instructions in the matter of disposal of the Mahua flowers. If any doubt arose in their mind by reason of the fact that the Sakti merchant had asked them to send the money to him, as the letters Exts. A23-1 and A-55-1 as also another letter Ext. A25-1 show, then as prudent businessmen the Jharia merchants ought to have got the matter clarified by entering into correspondence with the Sakti merchant and inquiring from the plaintiff as to how the matter stood, but no such step was taken by the Jharia merchants, evidently because they knew full well that they were dealing with the property of

the plaintiff. Besides, in the mailer of the disposal of the goods, they had to take instructions from the plaintiff, and not from the Sakti merchant. It seems to me, therefore, that the Jharia "merchants were not appointed as the sub-agents of the Sakti merchant. On the other hand, it is manifest that they were substitutes who, though named by the Sakti merchant, had to act for the plaintiff, and their liability must be governed by Section 191 of the Contract Act, which is in the following terms:

"Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him."

In this connection I may also refer to the definition of "sub-agent" which is to be found in Section 191 of the Act. According to this definition, a sub-agent is a person who is employed to and acts under the control of the original agent in the business of the agency. The letters (Exts. A23-1 and A55-1) do not show that the Jharia merchants were to act under the control of the Sakti merchant. Had it been true that the Sakti merchant had employed the Jharia merchants as his sub-agents, then he would not have mentioned in his letters (Exts. A23-1 and A55-1) that they were to dispose of the goods in accordance with the instructions of the plaintiff. I have, therefore, no doubt in my mind that the Jharia merchants were accountable to the plaintiff in respect of the business as substitutes of the original agent.

7. The fact that such was the true contractual relationship between the plaintiff and the Jharia merchants is amply indicated by the terms in which the plaintiff wrote a letter to each of them on the 25th February 1949 that is to say, very soon after the Jharia merchants had taken delivery of the goods. The letter to Jharia merchants No. 1 is Ext. 1 and that to Jharia merchants No. 2 is Ext. 1(y) both written by the plaintiff on the 25th February 1949 from Jharia itself. In his letter Ext. 1 to Jharia merchants No. 1, the plaintiff wrote that it was he who had obtained the permit for export of the Mahua flowers and that the railway receipts in respect of the two consignments of 273 and 250 bags respectively, which were sent to them, stood in his name. He further laid stress upon the fact that it was he who had delivered to them the railway receipt in respect of the consignment of 250 bags. Further, the plaintiff said in Ext. 1:

"I requested you to sell the first wagon 273 bags at Rs. 10 (ten) per bag net excluding commission etc. The second wagon containing 250 bags at Rs. 11 (eleven) net excluding commission etc.

I request you to send the S. P. of the bags after selling to my address Parlakimedi per insured post or if you act otherwise I will be compelled to recover the amount from you through legal court with court expenses, interest, losses, damages and travelling expenses."

Similarly, in his letter Ext. 1(y) to Jharia merchants No. 2, the plaintiff wrote as

follows:

"I have obtained permit from the Provincial Government Nagpur and D. C. C. Raigarh and Sakti and on production of this, the Station Master Sakti is ordered to book mahua flower from Sakti to Bhaga. The wagon containing 202 mahua flower bags delivered to you which is booked on my name self. Out of 202 bags you have sold 90 bags at Bhaga Station at Rs. 10 net per bag Bhaga Station delivery. So kindly sell by that rate only remaining 112 and request you to send the full amount to my address, Parlakimedi per insured post or if you act otherwise I will be compelled to recover the amount from you through legal court with court expenses, interest, losses, damages and travelling expenses etc."

These two letters clearly show that it was the plaintiff who had given instructions to the Jharia merchants for the disposal of the Mahua flowers, including the fact as to the rates at which they were to be sold. Further, the plaintiff had also given clear instructions to each of them that they were to send the sale proceeds to his home address at Parlakimedi. These two letters were written by the Plaintiff to the Jharia merchants only one day after they had taken delivery of the second and the third consignments, and the Jharia merchants must have received them before they were in a position to send the sale proceeds to the Sakti merchant, which they had admittedly done. In other words, long before remitting the sale proceeds to the Sakti merchant, the Jharia merchants were apprised by the plaintiff of the fact that he was the owner of the goods which they were to sell at the rates approved of by the plaintiff. From these circumstances, the conclusion is irresistible that the Jharia merchants were the substitutes accountable to the plaintiff, and not the sub-agents of the Sakti merchant.

8. On behalf of the Jharia merchants, reliance was placed by Mr. A. N. Chatterji upon a long series of correspondence which passed between the Jharia merchants and the Sakti merchant, starting from Ext. A26-1 dated the 21st February 1949 letters (sic) is that the Jharia merchants sought instruction from the Sakti merchant who, in his turn demanded the sale proceeds from them and ultimately in May or June 1949, the Jharia merchants remitted the sale proceeds to the Sakti merchant. I propose to make particular reference to five of these letters, namely, Exts. A26-1, A29-1, A27-1, A31-1 and A32-1, because the subsequent letters are of consequential nature. In Ext. A26-1 dated the 21st February 1949, the Jharia merchants No. 1 wrote to the Sakti merchant that his Beyapari, meaning the plaintiff, had instructed them not to sell below Rs. 11 per bag, but the market rate was only Rs. 10-1-0 per bag and, therefore, "If you will write, we shall sell the goods, otherwise not". In Ext. A29-1 dated the 2nd March 1949, which appears to have been in reply to Ext. A26-1, the Sakti merchant wrote to the Jharia merchants No. 1 to "sell the goods with profit at market rate and send full payment soon". In the meantime, the Jharia merchants No. 1 had already received the registered letter Ext. 1, which the plaintiff had addressed to them and on the 3rd March. 1949, they wrote Ext. A27-1 to the Sakti merchant informing him that the plaintiff had left Jharia after posting a registered letter to

them wherein he had said that the two wagons of Mahua which had been delivered to them related to the permit standing in the plaintiff's name and that "we should not sell his mahua of the lot of 273 bags at less than Rs. 10 per bag and the lot of 250 bags at less than Rs. 11 per bag. He has further written that we should sell his goods at this rate and send the money soon to his address. Otherwise he would take legal action in Court against us." In the same letter, the Jharia merchants No. 1 wrote to the Sakti merchant that they had sold 60 bags out of the lot of 273 bags at the rate of Rs. 9-14-0 and another 60 bags out of the lot of 250 bags at the rate of Rs. 11 per bag, and they had received another letter from the plaintiff in which the plaintiff had asked them "not to sell his Mahua of the lot of 273 bags at less than Rs. 11-8-0 and of the lot of 250 bags at less than Rs. 12-8-0", but the local market rate was not so high and therefore "we will sell mahua when you wrote to us otherwise not. We shall do as you advise us". The Jharia merchants No. 1 further informed the Sakti merchant that they had not sent any reply to the plaintiff. Then came Ext. A31-1 dated the 5th March 1949, in which the Sakti merchant wrote to Jharia merchants No. 1 in the following terms:

"We received your letter and became acquainted with the facts. The byapari of Mahua has gone to Madras straight and is doing mischief from there. You might have also received a letter from him. Either you do not send any reply to him or if you send a reply please write clearly that you have no concern with him hence whatever he wants to write he should write to Sakti. If he comes now, even then you need not talk with him. Your favour is solicited. You may have sent the money. If not please send it. Please do not make payment of money to him nor allow him even to stand at your place."

In a subsequent letter, Ext. A32-1 dated the 7th March 1949, the Sakti merchant reiterated the same stand and asked the Jharia merchants No. 1 not to act according to the instructions of the plaintiff and not to pay him even a single pice. This subsequent correspondence, however, cannot alter the true character of the contractual relationship which had already been created between the plaintiff and the Jharia merchants. The Jharia merchants having already come in direct contact with the plaintiff, could not possibly alter their position into one of sub-agents of the Sakti merchant. So far as the Sakti merchant is concerned, his own letter Ext. 1(u) dated the 1st April 1949 addressed to the plaintiff, in reply to certain notice which the plaintiff had given to him, makes it clear that the Jharia merchants were not the sub-agents of the Sakti merchant. In course of that letter, Ext. 1(u), the Sakti merchant wrote to the plaintiff in the following terms:

"After the despatch of the three wagons of mahua when the amount could not be paid by you on the spot, you requested me to send the R/R to two merchants (i) Saligram Baijnath and (ii) Baldeodas Kashiram of Jharia by way of surety for the goods. The aforesaid two merchants were to sell the goods and remit the amount to me, and you were to assist those two merchants in selling the goods. You had

also taken two letters dated 18-2-1949 to the effect in the name of the said two merchants of Jharia and I hope you handed the letters to the respective merchants."

In my opinion, this letter Ext. 1(u) amply indicates that it was the plaintiff who had appointed the Jharia merchants who, besides acting as his selling agents, were also to stand surety on behalf of the plaintiff for the unpaid balance of the price of the Mahua which he had purchased from the Sakti merchant. In other words, the Jharia merchants, upon the Sakti merchant's own showing, were selected as the plaintiff's agents, and the Sakti merchant, in his turn, accepted the surety which the plaintiff had so provided to him for the unpaid balance of the price of the goods which the plaintiff had purchased from him. Therefore, the Jharia merchants were not the sub-agents of the Sakti merchant, but, at best, the surety of the plaintiff for the unpaid balance of the price which the plaintiff owed to the Sakti merchant. I have, therefore, no hesitation in holding that as between the plaintiff and the Jharia merchants, there was a privity of contract, quite apart from his liability to the Sakti merchant, for the unpaid portion of the price of the Mahua which the plaintiff had purchased from him. It follows from this circumstance that the Jharia merchants were accountable for the sale proceeds of the Mahua flowers to the plaintiff as their principal and that they had no authority to ignore the plaintiff and remit the sale proceeds directly to the Sakti merchant. The Jharia merchants could not possibly have known what was the actual state of accounts between the plaintiff and the Sakti merchant and how much the plaintiff was owing to the Sakti merchant. That was a matter between the plaintiff and the Sakti merchant with which the Jharia merchants had no concern. As a matter of fact; the materials on the record do not conclusively show that Jharia merchants had agreed to act as surety for the plaintiff in respect of his liability towards the Sakti merchant. It is also not the case of the Jharia merchants that it was by way of discharging their responsibility as the surety of the plaintiff that they had remitted the sale proceeds to the Sakti merchant. Therefore, their action in sending the sale proceeds to the Sakti merchant without reference to the plaintiff and, in fact, in disregard of the instructions which he had given to them in his letters Exts. 1 and I(y), was wholly unjustified. In the circumstances, the Jharia merchants cannot be absolved of their liabilities towards the plaintiff who undoubtedly was their principal. I therefore, hold that the principal claim which the plaintiff has made against the Jharia merchants in both the suits is well founded. It is, therefore, unnecessary to go into the question whether the plaintiff is entitled to a decree against the Sakti merchant which he has claimed in the alternative. In fact, in both the First Appeals it was conceded before the learned Single Judge on behalf of the plaintiff, that he was not anxious for decree against the Sakti merchant and it was only in the alternative that the plaintiff had prayed for a decree against him, in case a decree against the Jharia merchants was not possible.

9. In First Appeal No. 475 of 1954, the learned Single Judge declined to pass a decree against the Jharia merchants No. 2 holding that there was no direct or

indirect privity of contract between them and the plaintiff. In this connection, the learned Single Judge has observed that "there is no correspondence, before the delivery of the wagons, and even after the delivery of any kind, between the plaintiff and the defendants 1 and 2, although there is an account, Ext. D-I, and a letter, Ext. 1(u) which passed between defendant No. 3 and the plaintiff". In substance, the learned Judge has found that there was a privity of contract between the plaintiff and the Sakti merchant and another privity of contract between the Sakti merchant and the Jharia merchants No. 2, but none between the plaintiff and the Jharia merchants. The learned Judge, however, has not taken into consideration the various other facts and circumstances to which I have made reference above. He has also missed to consider the letters, Exts. 1 and I(y) which the plaintiff had written to the Jharia merchants who, as I have pointed out, must have been aware of the fact that the plaintiff was the owner of the consignments and they had to act under instructions which he had given to them. I am, therefore, unable to endorse the opinion of the learned Single Judge that the Jharia merchants were not the substitutes of the plaintiff. I may refer here to the decision of the Court of Appeal in *De Bussche v. Alt* (1878) 8 Ch D 286, the material facts of which appear to be similar to those of the present case. There, the plaintiff, a merchant of the Isle of Wight, owned a ship, which he wanted to sell at a profit. In 1868, he consigned the vessel to a firm in China with instructions to the firm to sell the ship fixing 90,000 dollars as the minimum price and requiring cash payment. The firm employed the defendant in Japan to sell the ship with similar instructions. This was done with the knowledge and consent of the plaintiff. The defendant failed to sell the ship on the terms mentioned and ultimately took it himself for 90,000 dollars. But at about the same time he re-sold it to a Japanese Prince for 1,60,000 dollars, payable as to 75,000 dollars in cash and the balance on credit. The plaintiff was not informed that the defendant had purchased the ship himself or that he had re-sold it, till the transaction was completed. The defendant paid 90,000 dollars to the Chinese firm which remitted it to the plaintiff, and eventually obtained the whole amount of 1,60,000 dollars from the Japanese Prince. In 1873, the plaintiff filed a bill in Chancery to compel the defendant to account for the profit made by him in the resale of the ship. The defendant resisted the plaintiff's claim on various grounds, one of which was that there was no privity of contract between him and the plaintiff. But the plea was rejected and it was held by the Court of Appeal, affirming the decree passed by the Vice-Chancellor in favour of the plaintiff, that the relationship of principal and agent was constituted between the plaintiff and the defendant and existed at the time of the purchase and re-sale of the vessel by the defendant and, therefore, he was liable to account to the plaintiff for the profit made by him in the transaction. In arriving at this conclusion, Thesiger, L. J. who spoke for the Court, first referred to the principle underlying the general rule contained in the maxim "*delegatus non potest delegare*", that an agent cannot, without authority from his principal, devolve upon a third person the obligations to the principal which he has undertaken to personally fulfil, observing that "inasmuch as confidence in the particular person employed is at

the root of the contract of agency, such, authority cannot be implied as an ordinary incident in the contract". Then the learned Lord Justice made the following observation which is pertinent to our present purposes:

"But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person, other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "sub-agent" or "substitute" (the letter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

This exposition of the law made by the English Court of Appeal amply supports the view that I take, namely, that a privity of contract was established between the plaintiff and the Jharia merchants and that the latter are accountable to the plaintiff for the price of his goods which they sold. I am unable to agree with the view to the contrary which the learned Single Judge has taken in the First Appeal to which the Jharia merchants No. 2 were party.

10. In First Appeal No. 361 of 1953, the learned Judge passed a decree against the Jharia merchants No. 1 on the basis of admission made by them in the trial Court that it was the money of the plaintiff which they had paid to the Sakti merchant. It is urged that there was no such admission of the Jharia merchants No. 1, though there was the finding of the trial Court to this effect. But whether there was an admission or not is immaterial, because I am satisfied for the reasons already given that the finding of the trial Court to the effect that the Jharia merchants were the substitutes of the plaintiff and on contractual relationship with him in such capacity is correct.

11. The next contention put forward by Mr. A.N. Chatterjee on behalf of the Jharia merchants is that no decree can be passed against them in this Court. The argument of the learned counsel is this. When the trial Court did not grant a decree to the plaintiff against the Jharia merchants, he did not prefer any appeal; but when the Sakti merchant preferred the two appeals, then the

plaintiff filed a cross objection in each appeal under the provisions of Rule 22 of Order 41, Code of Civil Procedure. But the cross-objection was not maintainable as against the Jharia merchants, because Order 41, Rule 22 does not contemplate a cross-objection by one respondent against another. From the very nature of things, a cross-objection must be directed against the appellant who in both the First Appeals was the Sakti merchant. It is, therefore, urged that the learned single Judge was in error in passing a decree against the Jharia merchants No. 1 and that it was fortunate that this error was not repeated in First Appeal No. 475 of 1954, in which the Jharia merchants No. 2 were party. It is argued that keeping these considerations in mind, no decree should be passed against the Jharia merchants in either of these Letters Patent Appeals.

12. The true scope of a cross-objection under Rule 22 of Order 41, Code of Civil Procedure, has been the subject of discussion in a number of reported cases, and at one time there was a divergence of judicial opinion on the question whether a cross-objection can be preferred by a respondent against a co-respondent. But the divergence has since been resolved, and the view that now prevails is what was laid down by the Full Bench of the Madras High Court in *Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another*, , overruling the view that prevailed in that Court formerly. There, the law on the point was succinctly stated by Rajamannar, C.J. thus:

"The legislature by describing the objection which could be taken by the respondent as a "cross objection" must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent. The cross-objection must be an objection by a respondent against the appellant."

These observations were approved in *Pannalal Vs. State Bombay and Others*, , wherein the scope of a cross-objection has been laid down by the Supreme Court in the following words:

"In our opinion, the view that has now been accepted by all the High Courts that Order 41, Rule 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under Order 41 Rule 22 can be directed against the other respondents, is correct. Whatever may have been the position under the old Section 561, the use of the word "cross objection" in Order 41 Rule 22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant."

13. In his memoranda of cross-objection which the plaintiff filed in both the appeals, he asserted that he should have been granted a decree against the

Jharia merchants. At the same time he asked for a decree in regard to certain items which were disallowed by the trial Court. The whole transaction which formed the subject matter of the suits being one and the same, it is impossible to maintain that the Jharia merchants were not interested in the reliefs which the plaintiff had claimed in his cross-objection. It is plain that the liability of the Jharia merchants towards the plaintiff would be affected to the extent to which the decree of the trial Court against the Sakti merchant was varied by the appellate Court. The entire relief which the plaintiff claimed in his cross objections must be viewed in the light of his claims as set out in the plaint of the two suits. The plaintiff had asked for a decree against the Sakti merchant only as an alternative relief in case no decree was allowed to him against the Jharia merchants. Therefore, in considering the question whether the plaintiff is entitled to a decree for any further amount as claimed by him in his cross-objections, the appellate Court was bound to decide whether the decree should be against the Jharia merchants or not, and only when it came to the conclusion that the Jharia merchants were not liable for any further amount, beyond what had been decreed to the plaintiff, that the appellate Court could allow the cross objections in whole or in part against the Sakti merchant. One of the items of claim made by the plaintiff in his cross-objection was in respect of the railway freight in respect of the third consignment. The case of the plaintiff that this railway freight was paid by him had been negated by the trial court, and the finding of the trial Court was challenged by the plaintiff in his cross-objection. Therefore, for the purpose of deciding whether this railway freight had been paid by the plaintiff or by the Jharia merchants No. 1, the appellate Court was bound to re-open a question as between the plaintiff and the Jharia merchants No. 1. In other words, on this matter, at any rate, the relief sought by the plaintiff in his cross objection was intermixed with the relief granted to the Jharia merchants, so that the relief against the Sakti merchant could not have been granted without the question being reopened between the plaintiff and the Jharia merchants. I am, therefore, of the opinion that the present are cases of the exceptional kind envisaged in *Pannalal Vs. State Bombay and Others*, referred to above. In other words, the cross-objections were maintainable against the Jharia merchants as well.

14. Assuming, however, that the cross-objections could be directed only against the Sakti merchant, the appellate Court was not precluded from decreeing the plaintiff's claim against the Jharia merchants, but was fully competent to grant to the plaintiff a decree against the Jharia merchants in exercise of its powers under Order 41, Rule 33 of the Code of Civil Procedure. The scope of Rule 33 came up for consideration by the Supreme Court in *Pannalal Vs. State Bombay and Others*, referred to above, and after setting out the relevant portion of the rule and the illustration appended thereto, their Lordships made the following observation:

"Even a bare reading of Order 41, Rule 33 is sufficient to convince any one that the wide wording was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the appellant and the

respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require".

What had happened in Pannalal Vs. State Bombay and Others, was that the plaintiff had claimed for a decree against three defendants, but his suit was decreed against defendant No. 1 alone, who filed an appeal against the decree before the Bombay High Court, joining the plaintiff and the other two defendants as respondents in the appeal. There was no cross-objection filed by the plaintiff, but the plaintiff prayed for a decree against the other two defendants also under Order 41, Rule 33 of the Code, which was rejected by the High Court saying that it was open to the plaintiff to prefer a cross-objection under Order 41, Rule 22, and since he had not done so, no relief could be granted to him under Order 41, Rule 33. The High Court having dismissed the plaintiff's suit against defendant No. 1 also, the plaintiff went up in appeal to the Supreme Court. Their Lordships did not approve of the view taken by the High Court that the plaintiff could have filed a cross-objection and remanded the case to the High Court on the ground that the High Court had refused to exercise its power under Order 41, Rule 33 of the Code on an incorrect view of the law. Upon the authority of Pannalal Vs. State Bombay and Others, therefore I am of the opinion that this Court is not precluded from passing a decree against the Jharia merchants in exercise of its powers under Order 41, Rule 33, if it is satisfied, as it must be, that it is necessary to do so in order to do complete justice between the parties. I am, therefore, unable to accept the contention of the learned counsel that it is not open to this Court to pass any decree against the Jharia merchants.

15. It was, however, contended by Mr. A. N. Chatterji that the Jharia merchants No. 1 not having appeared in First Appeal No. 361 of 1953, had no notice of the cross-objection which the plaintiff had filed therein and, therefore, it would be unfair to allow the plaintiff's cross-objection as against them. The question is, however, academic because the Jharia merchants No. 1 have appeared before us and they have full notice of the relief which the plaintiff seeks against them. In the circumstances, no prejudice will be caused to them by decreeing the plaintiff's suit against them in the Letters Patent Appeals. A suggestion was made by the learned counsel that the powers of the appellate Court under Order 41, Rule 33 cannot be exercised by a Bench dealing with a Letters Patent Appeal, but I am unable to accept this contention as correct, because it is well settled that as an appellate court, the Bench dealing with a Letters Patent Appeal has all the powers which could have been exercised by the Single Judge. I, therefore, see no impediment in the way of our allowing the plaintiff's claim against the Jharia merchants.

16. Mr. A.N. Chatterji then put forward an alternative argument, namely, that in case a decree were passed against the Jharia merchants, then there should also be a decree in favour of the Jharia merchants against the Sakti merchant who

admittedly had received the money which the Jharia merchants were liable to pay to the plaintiff. In support of his contention, Mr. A.N. Chatterji relied upon the provisions of Section 65 of the Contract Act which is in the following terms:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

This section, however, is not applicable to the facts of the present case because it is not a case in which an agreement or contract has become or has been discovered to be void. Whatever agreement there was, was a good agreement between the defendants inter se and Section 65 can have no application thereto. Besides, as rightly pointed out by Mr. J.C. Sinha, who appears for the Sakti merchant, the Jharia merchants are not entitled to such a relief since they have paid no court fee for the same and they have come forward for such a case for the first time during the arguments before us. The pleadings of the parties and the evidence adduced by them show that both the sets of defendants had joined hands in defeating the plaintiff's claim. In such circumstances, it will not be fair to accede to the belated prayer made before us on behalf of the Jharia merchants.

17. The only other point raised is in respect of the railway freight amounting to Rs. 525-1-9 in respect of the third consignment which was not allowed to the plaintiff by the trial Court, and which was one of the items of the plaintiff's claim in his cross-objection in First Appeal No. 361 of 1953. Upon a consideration of the relevant materials on the record, the learned Single Judge has upheld the plaintiff's claim in this regard. The point taken, however, is that no claim for this item was made by the plaintiff in his plaint and as such it should not have been allowed. The schedule attached to the plaint, however, shows that what he had claimed was the price of 250 bags at the rate of Rs. 12-8-0 per bag, which was the rate at which the goods were directed to be sold in the Jharia market. The selling price at Jharia would undoubtedly include the railway freights and, therefore, the claim for railway freight was implicit in the claim for price of 250 bags of Mahua. It is also clear from the fact that in respect of the first consignment of 273 bags, the price of which was claimed by the plaintiff at the rate of Rs. 11-8-0 per bag, the plaintiff had in Schedule A of the plaint given credit for railway freight amounting to Rs. 566-15-0 which was paid not by the plaintiff but by the Jharia merchants No. 1. But the railway freight in respect of the third consignment clearly shows that he had included a claim for it in Schedule A of the plaint on the footing that the freight in question was paid by the plaintiff himself, and not by the Jharia merchants. It is, therefore, not correct to say that the plaintiff had made no claim for railway freight in respect of the third consignment in his plaint.

18. No other point was raised before us in these appeals.

19. For the reasons given above, Letters Patent Appeal, No. 90 of 1959 preferred by the Jharia merchant No. 1 is dismissed. Letters Patent Appeal No. 23 of 1960 preferred by the plaintiff is allowed. In this appeal, there will be a decree in favour of the plaintiff against the Jharia merchants No. 2 (respondents 2 to 5) for the amount of his claim found due against them by the trial Court, instead of the decree passed by the trial Court against the Sakti merchant (respondent No. 1). In the circumstances of the case, the parties will bear their own costs.

Misra, J.

20. I agree.