(1965) 03 AHC CK 0017

Allahabad High Court

Case No: First Appeal No. 455 of 1956

Loon Karan Sohan Lal	APPELLANT
Vs	
Firm John and Co. and Others	RESPONDENT

Date of Decision: March 12, 1965

Acts Referred:

- Contract Act, 1872 - Section 182, 222
- Sales of Goods Act, 1930 - Section 23, 32, 4

Citation: AIR 1967 All 308

Hon'ble Judges: S.S. Dhavan, J; K.B. Asthana, J

Bench: Division Bench

Advocate: S.N. Misra, for the Appellant; A.K. Kirty, for the Respondent

Final Decision: Dismissed

Judgement

Dhavan, J.

I agree with the conclusions of my learned brother that the plaintiff-appellant has not established any liability on the part of the fifth defendant Sethiya and Co. I would like to add a few reasons of my own by way of supplementing those of my learned brother. Mr. Misra argued the appellant''s claim against this defendant in the alternative. First he contended that Sethiya and Co. were liable in damages to the appellant for non-delivery of 152 bales of yarn to the defendant and for the refund of the price. But this liability could only arise under a contract, and the evidence does not disclose any contract between the appellant and Sethiya and Co. The contract of sale was with John and Co., not with Sethiya. The appellant cannot hold the latter liable unless he can establish Privity of contract with that firm. The principle of law is so simple as to be elementary. If a person makes an agreement of purchase of goods with another paying the price in advance, and the seller directs his agent or stockist or pledgee to deliver the goods to the purchaser from the stock in his possession, and the agent fails or refuses to deliver them, the purchase is against the seller and not against the seller''s agent, because the latter is under no

obligation or liability to him. In the present ease Sethiya and Co. were no party to the agreement of sale of yarn, and under no obligation to the plaintiff to deliver the bales to him. They may or may not be liable for their alleged default to John and Co. under some other agreement, but they are under no liability to the plaintiff.

2. Mr. Misra then argued that Sethiya and Co. were or became, the agents of the plaintiff to receive delivery of the goods on behalf of the plaintiffs and deliver these to him, and as they failed to do so, they are liable in damages for breach of duty as agents. The short answer to this argument is that no agreement of agency between the parties, express or implied, has been established. It was not the plaintiff''s case that Sethiya and Co. were his agents and no issue was framed on this point.

3. Mr. Misra then argued that Sethiya and Co. arc liable to the plaintiff for wrongful conversion of 152 bales belonging to him. But to establish conversion, the plaintiff had to prove that he was the owner of 152 bales which were misappropriated by this defendant. To establish ownership he had to prove that the property in the goods lying in the custody of Sethiya and Co. had passed to him. The contract was for the sale of 600 bales of yarn--in other words, a contract for unascertained goods. In such a contract, the property in the goods does not pass to the buyer unless and until the goods are ascertained and unconditionally appropriated to the contract and the buyer has notice of Ibis fact. In this case it is established that Sethiya & Co. were financing John and Co. and were the pledgees of all the yarn manufactured by the latter. They had in their possession more than 152 bales of yarn. In order that properly in 152 bales could pass to the plaintiffs. Sethiya and Co had to set apart 152 bales out of a larger number and appropriate it to the contract. There is no evidence of this appropriation. Learned counsel pointed out that the defendant Sethiya, in his account books, debited John and Co. with the amount of commission on the sale of 600 bales to which he was entitled on every sale made by the Company under the financing agreement. He argued that he could not have charged it without appropriating the goods to the contract because the commission accrued only when the sale was complete. I do not think Sethiya''s inclusion of the amount of commission in his account with John & Co. necessarily leads to this inference. He might have charged it on learning of the agreement of sale. John and Co. owed him a large sum of money and he was anxious to get back as much of his dues as he could, and it is not unlikely that he was not particular about the time when he should charge the commission. At any rate, the Court cannot presume from the entry relating to the commission that 152 bales in dispute were unconditionally appropriated by Sethiya to the contract or the property in them passed to the plaintiff. The plaintiffs'' claim under conversion fails.

4. I shall now consider the plaintiff-appellants'' case against the eighth defendant, the Government of Assam Mr. Misra argued that the plaintiff was appointed by the Assam Government as their agent to perform the duties of procuring yarn and if in the performance of his duties as agent he suffered loss he is entitled under Sections

222 and 223 of the Contract Act to be reimbursed by the Assam Government as principal. According to learned counsel, the plaintiffs position under the agreement with the Assam Government (Ex. C-1) was that of an agent, and that of the Government of principal Counsel pointed out that the Assam Government had described as their agent in the agreement which begins thus :

"This agreement made between the Governor of Assam represented by the Additional Secretary in the Department of Supply (Textile) hereinafter called the Govt. of the one part and M/s Loonkaran Sohanlal hereinafter called the agent of the other part. The agent has been appointed for the purpose of procuring yarn for the month of August and September 1948 on the following terms and conditions."

5. Thus the Assam Government described the plaintiff as ''agent'' not only in the preamble but each paragraph. Paragraph 4 enjoins that "the agent shall sell and deliver yarn to such persons at such place or places within the province of Assam and in such of the States as may be approved by the Government"; paragraph 5 provides that "the agent shall purchase at prices which are fixed by law": paragraph 6 provides that "the agent shall keep all stocks of yarn", Paragraph 8 that "the agent shall accept full responsibility for any shortage, deterioration, loss of, or damage to the yarn procured and despatched", paragraph 9 that "the agent shall at his own expense arrange for maintaining an office", and paragraph 10 that "the agent shall in all respects occupy with all directions and orders which from time to time may be given to the agent by the Government." Mr. Misra also relied on the correspondence between the Assam Government and the Textiles Commissioner in which the plaintiff was described by the Assam Government as their ''agent.'' He relied on the government''s letter Exhibit 47 in which it wrote to the Textiles Commissioner that "our yarn procuring agent had complained that he had not been given delivery of all the bales released in his favour by the Com- missioner." A copy of this letter was sent to the plaintiff at the time. Learned counsel argued that the words of the agreement and the letters of the government describing the plaintiff as their agent is conclusive proof of a relationship of agency; and in the alternative, these documents estop the Assam Government from denying this relationship or the plaintiffs status as their agent. But in my opinion the description of the plaintiff in the agreement Ex. C-l and in the letter Ex. 47 as the agent of the Assam government is not conclusive. The court must examine the true nature of the agreement and the subsequent dealings between the parties, and then decide whether it established a relationship of agency under the law. It is common experience that the word ''agent'' is frequently used to describe a relationship which is not an agency in law. In several cases, a person described as an agent in the agreement or his letter of appointment was held to be not an agent according to law. Some of these cases are cited in Halsbury''s Laws of England, 3rd edition, Vol. 1 p. 146, in a foot-note to the following observation:

"351. Agency Depends on True Nature of Relationship In order to ascertain whether the relation of agency exists, the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent will be regarded and if it is found that such agreement in substance contemplates the alleged agent acting on his own behalf, and not as an agent in the agreement, the relation of agency will not have arisen."

The cases cited in the foot-note are: Re Nevill, Ex parte White (1871) 6 Ch. A. 397; Towle (John) and Co v. White (1873) 29 LT 78; Livingstone v. Ross. 1901 AC 327; Micheline Tyre Co. v. Macfarlane (Glasgow) Ltd. (1917) 55 S L. R. 35; Kitson v. King (P. S.) and Son, Ltd. (1919) 36 T. L. R. 162, Lamb (W T.) & Sons v. Goring Brick Co. (1932) K. B. 710.

6. I have examined these cases except the one reported in 55 Sc. L. R. 35 which is not available. They establish the principle that in determining legal nature of relationship between the alleged principal and agent the use or omission of the word "agent" is not conclusive. American Law is similar:

"the manner in which the parties designate the relationship is not controlling, and if an act done by person on behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called. Conversely the mere use of the word by agent in the contract cannot have to be held the effect of making one agent, who, in fact is not such."

American Jurisprudence, IInd edition Vol. 3 page 431. The foot-note on this page refers to a case in which it was held that the use of the words "agency agreement" and "agent" by the parties in a contract does not necessarily establish a relationship of agency in the legal sense. McCarty v. King County Medical Service Corp. 26 Wash 2d 660, 175 P2d 658. The law in India is the same. It has been held in several decisions that the fact that the parties have called their relationship an agency is not conclusive, if the incidence of this relationship, as disclosed by evidence does not justify a finding of agency, and that the court must examine the true nature of the relationship and the functions and responsibilities of the alleged agent Benares Bank Limited Vs. Ram Prasad and Others , Phool Chand v. Agarwal B. M. Co. AIR 1938 Lah 814; Suryaprakasaraya v. Matheson''s Coffee Works (1913) 14 Mad L. T. 249. What is the real nature of the relationship created between the plaintiff and the Government of Assam under the so-called agreement of agency Ex. C-1. Before analysing this agreement, it is necessary to state the essential characteristic of an agency in law. Section 182 of the Contract Act defines an agent as "a person employed to do any act for another or to represent another in dealings with third person." The section defines a principal as "the person for whom such act is done or who is so represented." According to this definition, an agent never acts on his own behalf but always on behalf of another. He either represents his principal in any transaction or dealing with a third person, or performs any act for the principal. In either case, the act of the agent will be deemed in law to be not own but of the

principal. The crucial test of the status of an agent is that his acts bind the plaintiff.

7. I shall now examine the agreement Ex. C-l in the light of this test. I have scrutinised its various clauses but have found nothing to indicate that the plaintiff was appointed to represent the Government of Assam in its dealings with third persons. In fact there was no third person in existence or contemplated by the parties at the time of the agreement, whereas "an agent primarily means a person employed for the purpose of placing the principal in contractual or other relations with a third party and it is essential to an agency of this character that a third party should be in existence or contemplated. "Halsbury, ibid, 146. The agreement Ex. C-l does not suggest, even by implication, that the plaintiff was to represent the Assam Government in any transaction or dealings with any other party or parties. No such parties were mentioned in the agreement or in contemplation of the signatories to the agreement. The conduct of the plaintiff after the agreement shows that he never functioned as the agent of the Assam Government. He entered into the agreement of sale of yarn with John and Co. in his own name and on his own behalf; he paid the price from his own pocket and did not debit it to the Assam Government; he regarded himself as the owner of the goods and filed this suit in his own name. He might have been advised, when things went wrong, that the Assam Government had described him as their agent and were therefore liable to reimburse him for the loss suffered by him in the discharge of his obligations under the agreement. He is entitled to our sympathy, but he cannot in the circumstances ask this Court to make the Government liable for his losses.

8. Mr. Misra contended that even if the plaintiff was not employed under the agreement to represent the Assam Government in dealings with third persons, he was appointed "for the purpose of procuring yarn" for the Assam Government and thus employed" to do any act for another" and this made him an agent u/s 182. I am unable to agree.

9. The words "for the purpose of procuring yarn for the month of August and September 1948" in the preamble of the agreement must be read in the context of the entire agreement and the circumstances in which it was made. Due to shortage, the Central Government had rationed the supply of cotton yarn and the most convenient method of rationing was selected namely, to limit the quota for each province and leave its distribution within the province to the provincial government concerned. The Assam Government decided to appoint local dealers who were authorised to purchase the entire quota of yarn reserved for Assam and re-sell it to consumers within the province. The plaintiff was the dealer selected for this purpose for July and August, 1948, under terms and conditions mentioned in the agreement C-3. But though he was described as an agent, a wrong description, he was not supposed to do any act for the Assam Government. Whenever he purchased the yarn under a permit issued by the Textile Commissioner he was purchaser, and whenever he sold any yarn to a consumer within Assam he was the seller. For

example, in the agreement to purchase yarn from John and Co. the plaintiff and not the Assam government was the buyer. The very claim for damages against Sethiya and Co. for conversion is an implied admission of this, for the plaintiff cannot sue Sethiya and Co. for conversion unless he regards himself as owner of 152 bales of goods not delivered to him, and he cannot regard himself as owner unless he is the purchaser.

10. After a careful analysis of the agreement Exhibit C, I am of the opinion that it is really a license conferring upon the plaintiff the exclusive right to purchase yarn and sell it to consumers within the province of Assam. Though the plaintiff is called an agent, he was no more an agent in law than a licensee under a permit to sell intoxicating liquor subject to terms and conditions specified in the permit.

11. Mr. Misra then argued that the plaintiff agreed to perform the job of purchasing and selling yarn at the request of the Assam Government and as he did this job for that government, he acted as their agent u/s 182 of the Contract Act, and is entitled to be indemnified against the consequence of all lawful acts done by him in the exercise of the authority conferred on him. Counsel pointed out that under Clause 10 of the agreement Exhibit-C the plaintiff was required to comply with all directions and orders which might "he given to the agent by the government or any officer authorised in this behalf in terms of the conditions set forth" in the agreement He further pointed out that he was hound to obey the instructions in the order of the Textile Commissioner requiring him to make payment to the seller (John & Co.) within ten days. Counsel argued that if he had not made payment in advance to John and Co., he would have incurred penalties under the Agreement Exhibit C-2, including forfeiture of security. For these reasons, according to counsel, the Assam Government is hound to indemnify him against the consequence of his lawful act of making payment of the sale price within ten days of the release order.

12. There are several answers to this argument. First. it is based on a misapprehension of the words "a person employed to do an act for another" in Section 182 of the Contract Act. There is a distinction between a person employed In do an act for another and a person who does an act at the bidding if another. In the first place the act done is not that of the person employed but of him who employs him in the second, the act is that of the person himself Again, in the first case, the person employed is an agent of the employer, in the second, he merely acts at the request of another. Then again in the first case, u/s 222 the person is entitled to be indemnified against the consequences of all lawful acts done by him in the exercise of his authority as an agent, in the latter, he is entitled to be indemnified only if there is a contract of indemnity to this effect. If the plaintiff had been employed to purchase and sell cotton yarn on behalf of the Government of Assam, or asked by them to distribute yarn, belonging to the Government, he would have been their agent u/s 182 of the Contract Act and entitled to be indemnified for the consequences of all lawful acts done by him But the plaintiff, under the agreement,

was to purchase yarn from others and sell it to consumers in Assam The utmost he can claim is that he entered into a transaction of sale with John & Co at the bidding of the Government of Assam. But there was no undertaking by that Government, either under the agreement exhibit C-1 or any other to indemnify the plaintiff against loss The terms of the agreement made by him with the Assam Government may he hard and the plaintiff may have made a bad bargain, but he cannot claim indemnity from the Government for any breach of agreement by John and Co.

13. Moreover, even the direction to pay the price of bales within ten days did not take away his right to demand delivery of goods at the time of payment if the plaintiff gave up a valuable right under the Sale of Goods Act and made payment in advance he cannot hold the Assam Government responsible if the goods were not delivered. For these reasons I am of the opinion that the plaintiff did not become the agent of the Assam Government nor is he entitled to any reimbursement from the Assam Government for any loss suffered by him for the non-delivery of 152 bales to him, though 1 cannot help sympathising with him. His claim against that Government fails.

14. In my opinion this appeal must be dismissed.

Asthana, J.

15. This is a plaintiff''s appeal from the judgment and decree of the learned Additional Civil Judge of Agra. The plaintiffs, a registered partnership firm, carried on business in Calcutta and Assam and was appointed yarn procuring agent by the Govt. of Assam in the year 1948. It appears that at that time the manufacture, sale and supply of cotton yarn was controlled by the Government of India in exercise of its powers under the Defence of India Act for which purpose it had issued Cotton Yarn and Cloth Control Order. In exercise of his powers under the said Order the Textile Commissioner at Bombay, at the request of Government of Assam passed an order known as Release Order dated 30-8-1949 directing the John Mill Company Limited Agra, to sell and deliver 600 bales of yarn of particular variety, being quota for the month of August 1948, to the plaintiff at a price not exceeding the maximum ex-factory price specified by the Textile Commissioner and asking the plaintiff to pay the price within ten days of the release order and to take delivery as early as possible but not later than seven days thereafter The plaintiff alleged that on the receipt of release order it contacted the John Mills Company of Agra who on 2nd September 1948 telegraphically requested the plaintiff to arrange payment of Rs. 3. 84. 750/6/, for delivery of 600 bales of yarn and the plaintiff thereupon remitted telegraphically the said sum to the John Mill Company through the Allahabad Rank Limited It transpired that there was a shortage of Rs. 9/- in the price and the sales-tax had to be paid which was demanded by the John Mills and which amount the plaintiff further paid According to the plaintiff a sum of Rs. 12032-11-6 was paid as Sales-tax by it. The plaintiff thus paid Rs. 396783-1-6 on account of the full price of 600 bales of yarn including taxes to the John Mills Company. Agra. By a letter dated

11th September 1948 the plaintiff was informed by the John Mills that they had intimated their financier M/s Sethiya & Company carrying on business in Belanganj, Agra, to arrange despatch of 600 bales, but in spite of various letters and telegrams and repeated requests by the plaintiff the John Mills Agra and its financier delivered only 448 bales and failed to deliver the remaining 152 bales Thus according to the plaintiff against full price of Rupees 396783/1/6 goods worth Rs. 288733/5, only were supplied The plaintiff having failed to obtain delivery of the remaining 152 bales or the refund of the balance of Rs. 108049/13/6 from the John Mills & Company or M/s Sethiya & Company asked the Government of Assam to compensate the plaintiff as its principal for the loss suffered by it in carrying out the contract of agency. The Government of Assam repudiated its liability and refused the plaintiff''s demand. The plaintiff through one of its partners Seth Loon Karan thereupon filed the suit which has given rise to this appeal against John & Company and its partners M/s Sethiya & Company, the financiers of John & Company, Seth Sugan Chand one of the partners of Sethiya & Company, the Union of India and the State of Assam for the recovery of Rs. 138720/12/6. Later on the plaintiff got its plaint amended and added in the relief as an alternative that the suit be decreed for the above said sum against such of the defendants as may be found liable or in the alternative the defendants or such of them as may be found liable be ordered to deliver 152 bales of yarn of 18 counts and Rs. 30671/- be awarded as damages. The John & Company and its three partners. Mr. Murice L. John, Mr. Ivan E. John and Mrs. Doris John Marzano. defendants 1 to 4 were impleaded as defendants first set in the plaint. M/s Sethiya & Company carrying on business at Belanganj Agra through Seth Loon Karan Sethiya (not to be confused with Seth Loon Karan through whom the plaintiff sued) was impleaded as defendant No 5. Seth Suganchand was impleaded as defendant No. 6, Union of India as defendant No. 7 and the State of Bombay as defendant No. 8. the defendants numbers 5 to 8 were described as defendants second set in the plaint. The plaintiff''s case as disclosed in the plaint besides fixing the liability on the defendant first set, was that the defendants second set could not escape the liability to the plaintiff on the following amongst other grounds: (a) Because the sum of Rs. 3,84.750/6/-remitted by the plaintiff was received by the defendant second set with full knowledge that it represented the price of 600 bales to be delivered to the plaintiff and so appropriated by the defendant second set. (b) Because the 152 bales to be delivered to the plaintiff have already been shown as sold by the defendants second set and the second set have already debited the defendants first set with his commission, (c) Because the defendants second set admitted that freezing process regarding 152 bales out of the bales of yarn in his possession are being taken by the Collector against him. It was also pleaded that the defendants second set being financiers of the defendants first set and the entire products of John Mills came into their possession and the sum of Rs. 396783/1/6 paid by the plaintiff specifically on account of the price of 600 bales having been appropriated by the defendants second set with full knowledge that the said sum represented the price of 600 bales thus the defendants second set held out to the

plaintiff that they were responsible for the delivery of 600 bales. It was further pleaded that the defendants first set and the defendants second set were in collusion and the delay in delivery and non-delivery of 152 bales occurred due to the preconceived plan of the defendants of putting off the delivery to the plaintiff. It was also pleaded that the defendants first set themselves intimated the plaintiff that the defendant second set were responsible for the delivery of the bales and that those bales had already been delivered by the defendants first set to the defendants second set and that the amount of money received as price from the plaintiff by the defendants first set was also sent to the defendant second set. The plaintiff''s case further was that the defendants first set and second set, illegally and wrongfully did not deliver bales for a long time in spite of letters and telegrams and representations and ultimately failed to deliver 152 bales, the plaintiff had been put to heavy loss on account of breach of contract and claimed Rs. 10000/- as damages for the late delivery of 448 bales and non-delivery of 152 bales, in addition to the refund of the balance price. A further sum as damages was claimed by the plaintiff as godown rent and insurance charges etc. A sum of Rs. 18,000/- was claimed as interest at the rate of 1 p.c. per month on the amount due. As against Seth Suganchand defendant No. 6 it was pleaded that he was a partner in the firm of Sethiya and Company and as such was liable It would be seen from the above pleadings that by the use of the defendants second set in the relevant paragraphs of the plaint the plaintiff meant defendants 5 and 6 only and not 7 and 8. Thus the description in the plaint of defendants 5 to 8 as defendants second set seems to be inaccurate. The case of the plaintiff against defendants numbers 7 and 8 has been pleaded in paragraphs 16-A, 16-B and 16-C as a result of amendment of the plaint. It is not very clear from these pleadings what the case of the plaintiff against the Union of India was. It appears that the plaintiff alleged that ii paid the sum of Rs. 384756-6-0 to the defendants first set on the bidding and orders of defendants numbers 7 and 8 and they were liable to indemnify the plaintiff for all the losses that the plaintiff had suffered in the transaction by reason of the full delivery not having been made to them by the defendants first set or by the defendants second set. In the alternative it was pleaded by the plaintiff that there was a contract for the supply of 600 bales of yarn to the plaintiff on one side and defendants numbers 7 and 8 on the other and the defendants 7 and 8 were responsible for the breach thereof and were liable to reimburse the plaintiff for all the losses occasioned by the said breach of contract. The requisite plea that notices u/s 80 were served on the defendants numbers 7 and 8 was also taken.

16. The defence of the defendants numbers 1 to 4 who filed a joint written statement, in the main, was that it was for Sethiya and Company, their financier, to deliver the 600 bales to the plaintiff and the defendants first set paid the amount of Rs. 384756 to Seth Loon Karan Sethiya, partner of Sethiya and Company, as the price of 600 bales to be delivered to the plaintiff out of the stock produced by the John Mills which was delivered to the Sethiya & Company. It was also pleaded that Sethiya

& Company also acted as the despatching agent of the plaintiff. Thus the case of the defendants first set in short was that they were not liable to the plaintiff inasmuch as the price was paid to the defendant second set and the 600 bales of cotton yarns were to be taken delivery of by the plaintiff from the defendants second set.

17. On behalf of defendant No. 5, Seth Loon Karan Sethiya filed a written statement. He denied the allegations in the plaint so far as they concerned the defendant No. 5. It was denied that any intimation was received from defendant first set to arrange despatch of 600 bales, to the plaintiff It was pleaded that it were the defendants first set who were liable to deliver the 600 bales to the plaintiff they being the contracting parties and the defendant No. 5 had nothing to do with the transaction. It was further pleaded that the defendant No. 5 being financier any amount paid by the defendants first set who owed a large amount of money was in the nature of reducing their debt and not as price of any particular quantity of bales It was denied that any amount was received by the defendant No. 5 with the knowledge that it represented the price of 600 bales to be delivered to the plaintiff It was further denied that defendant No. 5 ever held out any assurance of any kind to the plaintiff for delivery of any bales to it. It was also denied that defendant No. 5 was under any liability or obligation to deliver any bales to the plaintiff. It was pleaded that Seth Susan chand was not a partner of Sethiya & Company and he had been unnecessarily irnpleaded.

18. The defence of Seth Suganchand defendant No. 6 was that he was neither the financier of the plaintiff nor a partner in the firm of Sethiya & Company of which Seth Loon Karan alone was the sole proprietor and that no liability could be fastened on him.

19. The defence of the Union of India in the main was that the Textile Commissioner to the Government of India acted under the provisions of the Cotton Textile Order of 1948 being responsible for the equitable distribution of the products of the mills in the various areas of the country. The Union of India did not incur any liability to indemnify the plaintiff if in pursuance of the release order of the Textile Commissioner it failed to obtain the requisite quantity of yarn from John Mills and it was denied that the plaintiff paid any amount to the defendants first set on the bidding and orders of the Union of India who was not liable to indemnify the plaintiff for any loss caused to him in the said transaction. It was further pleaded that there was no contractual relationship between the plaintiff and the Union of India and the plaintiff''s claim against the Union of India was misconceived who was not responsible for the plaintiff''s failure to obtain the delivery of 152 bales of yarn from any of the other defendants

20. In a written statement filed on behalf of defendant No. 8, the State of Assam, It was pleaded that the plaint did not disclose any cause of action against the Government of Assam. It was pleaded that under the terms of the agreement between the Government of Assam and the plaintiff dated 18-10-1948, the

Government of Assam appointed the plaintiff as a procuring agent and under the terms of the agreement no liability of any kind for the loss suffered by the plaintiff in procuring yarn could be fastened on the Government of Assam as the plaintiff was to make the purchases on its own responsibility. It was further pleaded that the Government of Assam had no financial interest in the transaction between the plaintiff and John and Company or any other defendant and was in no way concerned with the actual delivery of the bales to the plaintiff by the mills. It was denied that the Government of Assam ever requested or directed the Textile Commissioner, Bombay to direct the John Mills Company to deliver 600 bales of yarn to the plaintiff. It was pleaded that the Government of Assam simply communicated the name of the plaintiff to the Textile Commissioner as the State nominee for lifting the State quota of yarn and sell the same in Assam on such terms and conditions as were specified in the agreement that the name of the plaintiff as its nominee and the agency thus created was subject to the terms and conditions set forth in the agreement.

21. The learned Civil Judge who tried the suit decreed it for a sum of Rs. 1,80,272 only with proportionate cost against defendants first set, that is, John Mills Company and its three partners, defendants 1 to 4 The plaintiffs'' claim as against defendants numbers 5 to 8 was dismissed. The plaintiff has now filed this appeal against all the defendants and in effect wants that the suit as brought be decreed against the defendants number 5 to 8 also and as against defendants 1 to 4 the decree be modified and the plaintiff''s claim in full be decreed against them.

22. Sri S. N. Misra, learned counsel for the appellant, at the outset stated that he would not press the appeal against the heirs of Seth Suganchand who have been brought on record as respondents and against the Union of India. He has pressed this appeal against Messrs. Sethiya and Company, defendant-respondent No. 5, and the State of Assam, defendant respondent No 8.

23. As far as the liability of Sethiya & Company, defendant-respondent No. 5, was concerned, Sri Misra the learned counsel for the plaintiff-appellant, made three submissions. He contended that (1) Sethiya & Company was liable for having converted the goods of the plaintiff, (2) Sethiya and Company were agents of the John Mills and under a legal liability to deliver the goods to the plaintiff as agents of John Mills, (3) alternatively, if it were found that Sethiya and Company were the agent of the plaintiffs, then it misappropriated the goods as agents. Sri A. K. Kirty, appearing for Sethiya & Company, contended that no plea having been raised in the plaint fastening any liability on Sethiya and Company on the grounds of conversion, the plaintiff appellant were not entitled to raise a new ground in appeal. He further contended that on the evidence in the case it was not established that any specific goods were appropriated to the contract and handed over to Sethiya and Company for delivery to the plaintiffs. He also contended that Sethiya and Company neither were the agents of the John Mills nor of the plaintiff and there being no privity of

contract between the plaintiff and Sethiya and Company the plaintiffs were not entitled in law to claim any damages or refund of any sum or the delivery of any bales of yarn from Sethiya & Company. It was further submitted by Sri Kirty that there was collusion between the plaintiffs and the defendant first set in order to make Sethiya and Company responsible for the breach of contract occasioned by the wrongful act of the defendants first set.

24. For the purpose of determining the liability of Sethiya and Company, if any, it is necessary to understand clearly the legal relationship between John Mills and Sethiya and Company. Admittedly Sethiya and Company were the financiers of John Mills. There is an agreement dated 6-7-1948 between the partners of John and Company and Messrs Sethiya and Company laying down terms on the basis of which the advances of money were to be made by Sethiya and Company on the security of the cotton yarn produced by the John Mills. Ex. B-18 is the copy of the relevant document on record. By Clause 5 of this agreement the partners of the John Mills bound themselves to deliver all cotton yarn manufactured in the mills and to place them in possession of Sethiya and Company. By Clause 6 of the agreement Sethiya and Company bound themselves to effect deliveries of the goods in their possession to persons authorised by the partners on receipt of the payment of the price. Then Clause 13 of the agreement provided that Sethiya and Company would have a floating charge and a prior charge for all monies due to them for the time-being including the amount due to them on the date of the agreement and all money which the financiers may choose to advance under the agreement on all business assets including stores etc. of the partners and would be the pledgee of the yarn and cotton bales pledged to them under Clause 3 on which the financiers would be entitled to exercise the rights of the pledgee. It has come in evidence that John Mills owed a large sum of money running into several lacs to Sethiya and Company. It is not disputed that cotton yarn manufactured by John Mills and delivered to Sethia and Company was retained by the latter as a pledgee. It was submitted by Sri Misra that the arrangement evidenced by the financial agreement left no scope for John Mills or its partners to sell the cotton yarn manufactured by the mills directly to any customer on receipt of payment of the price and it was Sethiya and Company who were bound to effect the deliveries on the direction of the partners on receipt of the payment of the price. Thus it was contended that Sethiya and Company were constituted as delivery agents of the John Mills. It was pointed out that it has been proved that the full price of 600 bales remitted by the plaintiff to John Mills was paid to Sethiya and Company by John Mills with the direction that 600 bales be delivered to the plaintiff and further that plaintiffs were informed by John Mills to take delivery from Sethiya and Company. The receipt of a sum of Rs. 3,84,750-6-0 and another sum of Rs. 12,032-11-6 for payment of Sales Tax in the accounts of Sethiya and Company has been established. But the case, of the Sethiya and Company is that those sums though paid by John Mills to it and receipted for in its account were paid by John Mills as debtors towards their debt

without informing it that it was the price of 600 bales with the sales tax dues and further without any direction by the John Mills for delivery of 600 bales to the plaintiff. The learned Judge of the Court below has held that it has not been established that the Sethiya and Company were directed to deliver 600 bales of yarn to the plaintiff against the receipt of rupees three lacs and odd credited to the account of Sethiya and Company by the plaintiff. This finding of fact has been challenged.

24-a. Sri Misra relying on Clause 6 of the finance agreement (Ex. B-18) contended that Sethiya and Company were bound to affect deliveries of 600 bales to the plaintiff on being asked by the partners of John Mills, the price having already paid and received by Sethiya and Company through John and Company and thus in law Sethiya and Company became an agent of the John Mill to effect the delivery to the plaintiff. Sri Kirty disputes this and contended that the agreement does not constitute the Sethiya and Company as a delivery agent of John Mills and Clause (6) itself and as well read with other clauses of the agreement did not bind Sethiya and Company to do so. He pointed out that under the agreement Sethiya and Company could retain stock of cotton yarn up to 98 per cent of the value of the advance and could refuse to deliver the cotton yarn pledged with them by John Mills even if asked by the latter in order to keep the security intact. It was submitted that there was no contract for agency in this respect between Sethiya and Company and John Mills. There seems to be force in this contention of Sri Kirty. However, even assuming that Sri Misra''s argument is tenable it has to be proved before Clause (6) of the agreement can be applied that John Mills or its partners had instructed Sethiya and Company to deliver 600 bales against payment of the price to the plaintiff. Reliance has been placed on a letter dated 11-9-1948 (Ex. A-28) written by Captain M. L. John, partner of John and Company to Sethiya and Company requesting them to deliver 600 bales of 16 and 18 counts to the plaintiff out of the bales of yarn pledged with it. The receipt of this letter has been denied by Loon Karan Sethiya, the sole proprietor of Sethiya and Company To prove this letter and its despatch to Sethiya and Company Smt. D. Marzano, one of the partners, was produced as a witness. The learned Judge rejected Ex. A-28 as being inadmissible being a copy of the copy. Me has also disbelieved Smt. Marzano as she admitted that she was not present when this letter was signed by M. L. John and that she had never read the contents of the original document. Ex. A-31, an entry in the peon book of John and Company was relied upon by the plaintiff as corroborative evidence as a proof of the fact that the letter in question was sent by John Mills and was received by Loon Karan Sethiya. An initialled signature in acknowledgment of the receipt of the letter was claimed to be that of Loon Karan Sethiya which the latter did not admit. It was stated by Smt. Marzano that the letter in question was sent through a peon named Gordha. Gordha has not been produced as a witness. The learned Judge of the Court below held that the initials in the peon book against the entry (Ex. A-31) were not established to be that of Loon Karan Sethiya. He has disbelieved the evidence of

Smt. Marzano, which was to the effect that it were the initials of Loon Karan Sethiya. This is then all the evidence on this part of the case. No good reasons have been shown by the learned counsel for the appellant why the finding of the learned Judge of the court below in this regard be interfered with It was strenuously urged by Sri Misra that Loon Karan Sethiya ought not to he believed when he stated in the witness box that no such instructions were received by him It was pointed out that Loon Karan Sethiya bad falsely stated that he did not come to know of the transaction between John Mills and the plaintiff till the suit giving rise to this appeal was filed. It does appear that Loon Karan Sethiya did not speak the truth when be said so. There is good evidence on the record showing that the release order passed by the Textile Commissioner in favour of the plaintiff for the sale of 600 bales was seen by Loon Karan soon after its receipt by John Mills as he had accompanied Mrs. Marzano when she went to meet the Civil Supplies authorities for release of the bales for delivery. The evidence on record showed that it was Loon Karan Sethiya who look the release order and other similar orders in favour of third persons from the office of John Mills for the purpose of showing it to the Civil Supplies authorities and then deposited the same back in the office of the John Mills and Company. On this basis it was submitted that when the money sent by the plaintiff was credited to the account of Sethiya and Company and Sethiya and Company charged 1 per cent commission on sales thereof the latter must be attributed with the knowledge that it represented the price of 600 bales which were directed to be sold to the plaintiff by John Mills and which John Mills were bound to deliver to the plaintiff. On the other hand the case of Sethiya and Company was that it never delivered any bales to the plaintiff and neither the plaintiff nor the partners of the John Mills ever asked them to deliver the same. It may be that Loon Karan Sethiya took up the extreme position of denying every knowledge of the transaction between John Mills and the plaintiff but that does not absolve the plaintiff from proving that Sethiya and Company were asked by John Mills and Company to deliver 600 bales to the plaintiff on the receipt of Rs. 3,84750-6-0. Thus there is no force in the contention of the learned counsel for the appellant that Sethiya and Company as delivery agents of John Mills were bound in law to deliver the bales of yarn to the plaintiff on behalf of John Mills.

25. Sri Misra then tried to make an argument based on a letter dated 11-9-1948 Ex. 6 sent by M. L. John, a partner of John and Company to the plaintiff''s Bombay Office referring to a telegram of the plaintiff and acknowledging the receipt of Rs. 3,84,750-6-0 as full price of 600 bales and further informing the plaintiff that the John Mills had intimated their financiers. Sethiya and Company to take delivery of the yarn on plaintiff''s behalf and arrange despatches and the plaintiff was to correspond with Sethiya and Company, that thus Sethiya and Company were constituted as the agent of the plaintiff and they were under a duly to the plaintiff to deliver the bales. This submission of the learned counsel has hardly any lenability. It was the own case of the plaintiffs that they bad appointed a local agent for taking delivery of the bales from the John Mills by name Tansukhrai Sriniwas. No document

had been produced that they ever corresponded with Sethiya and Company constituting them as their agent. Be that as it may, it is not possible to hold on the basis of exhibit 6 that Selhiya and Company became the agent of the plaintiff for receiving delivery of 600 bales for the simple reason that John and Company could not in law appoint an agent for the plaintiff The case of the plaintiff, therefore, against Sethiya and Company as being their agent and bound to deliver the 600 bales received by them from John and Company under the contract has no legs to stand for.

26. The next argument of Sri Misra to fasten legal liability on Sethiya and Company was that since John Mills and Company received the full price for the 600 bales of yarn the properly in goods passed to the plaintiff and Sethiya and Company having been directed by John Mills and Company to deliver 600 bales of cotton yarn in their possession to the plaintiff specific goods were appropriated to the contract and while Selhiya and Company delivered 448 bales but by refusing to deliver the balance of 152 bales it was guilty of conversion of the plaintiff''s goods and was liable to refund the equivalent price or deliver them. As observed above Sethiya and Company denied that they ever delivered any bales to the plaintiff. On behalf of the plaintiffs Khemchand and Radhey Shyam were produced to prove that 448 bales were delivered by Sethiya and Company in the months of October and November 1948, Khemchand P. W. 1 Was the manager of the plaintiff''s firm. According to his statement he was sent to Agra to take delivery of the goods within two or three days of the payment of the money but no delivery was made till 14th of October 1948. He stated that he had gone to the John Mills for taking the delivery and was told to go to Sethiya and Company for the purpose and when he went to Loon Karan Sethiya, the financier, he put him off. He further stated that he got delivery of 448 bales from Sethiya and Company between 15th October to November 1948 and paid Rs. 12,032-11-0 by way of sales-tax. In his cross-examination he stated that he came to Agra eight or ten times. He also admitted that the plaintiff had appointed local agents for taking deliveries. It was elicited from him that in October he got delivery of certain bales from Sethiya and Company from a godown opposite the John Mills. He was confronted with the letter of the plaintiff to John Mills dated 4-10-1948 (Ex. 7) complaining that their local agents Tansukhrai Sriniwas had written to them that out of 600 bales of cotton only 143 bales of yarn have been delivered and 457 bales were not delivered despite the local agent''s request and asking John Mills to deliver the remaining 457 bales. He admitted that it was written on the basis of the advice from the local agents and explained that he had no personal knowledge and whatever he knew about the delivery of those bales was as told by Tansukhrai Sriniwas. He further explained that as Sethiya and Company were the financier of the John Mills and always gave assurance that they would give delivery, hence no action was taken against them. He further admitted that except the letter dated 11th September 1948 (Ex. 6) no other letter was received from John Mills asking the plaintiff to take delivery from Sethiya and Company. He was further confronted that

a notice in November 1948 was given by the plaintiff to John Mills and not to Sethiya and Company and explained it away by saying that the plaintiffs took John Mills and Sethiya and Company as one, hence no telegraphic notice was given to Sethiya and Company. He further admitted in cross-examination that till the drafting of the plaint in the suit it was not known to the plaintiff correctly whether or not John Mills gave 600 bales to Sethiya and Company together with the money and further admitted that till the writing of the plaint the plaintiff did not agree that Sethiya and Company was responsible for giving delivery. It was elicited from the witness that accounts were maintained and the account relating to 600 bales stood in the name of John and Company and evasively further staled that he could not say whether or not there was any Khata of Sethiya and Company in the plaintiff''s account. When further pressed in the course of examination the witness stated, to repeat his words. "I believe that Johns sold away 600 bales to Sethiya" At a later stage in the cross-examination the witness stated that his statement that he got 448 bales till November 1948 was wrong. The learned Judge of the Court below did not put any reliance on the statement of this witness for the reason that he stated to have taken delivery from the godown in front of the John Mills when there was no such godown of Sethiya & Company in front of the John Mills. As this witness has admitted that he had no personal knowledge of the deliveries of the 448 bales but had acted on the advice of the local agents of the plaintiff it would be unsafe to rely on the statement of this witness in the absence of any corroborative documentary evidence. The next witness is Radhey Shyam P. W. 2 who claimed to have taken the deliveries of the 448 bales on behalf of Tansukhrai Sriniwas, the local agent of the plaintiff He stated that the delivery of the 448 bales started from October 1948 and was completed in three months. He asserted that the delivery was taken from Seth Loon Karan. He also stated that at first the bales were demanded from John Mills but he was informed that the bales were given to financier Sethiya and would be delivered by him who gave 448 bales and the balance of 152 bales was not delivered by him though he continued to make promises for their delivery. In cross-examination this witness admitted that he had written several letters to the plaintiff stating therein that he had received deliveries from Sethiya and further admitted that written receipts to Sethiya and Company were given when the deliveries were taken. It appears that the original ''rokar bahi'' of the firm Tansukhrai Sriniwas was summoned and this witness was asked to explain certain entries of October, November and December 1948 wherein there was a mention of the number of bales lifted by the local agents of the plaintiff from John Mills and the payment of the cartage thereof. He also admitted that he never told the plaintiff that Loon Karan was the proprietor of Sethiya and Company. He further stated in cross-examination that he had written many times to John Mills that Sethiya and Company made promises but did not deliver goods. He claimed to have written two or four such letters. The witness could not explain the entries in the Rokar and the plaintiff did not take care to produce letters which this witness is stated to have sent to the plaintiff and to John Mills in order to corroborate him. Sri Misra strongly relied on a letter dated 19-1-1949 (Ex.

15) from John and Company to Seth Loon Karan Sethiya and on a letter dated 22-1-1949 (Ex. 16) from Tansukhrai Sriniwas to John and Company and submitted that these documents corroborated the statements of the plaintiff''s witness. The letter exhibit 15 shows that Ivan P. John a partner of John and Company, asked Seth Loon Karan. Sethiya to deliver the remaining 152 bales to Messrs. Tansukhrai Sriniwas, the local commission agent of the plaintiff. Much was tried to be made out by the use of the word "remaining 152 bales" in this letter in order to support the plaintiff''s case that 448 bales were also delivered by Sethiya and Company. Ex. 16 a letter from Tansukhrai Sriniwas to John and Company makes a complaint that in accordance with the letter of the 19th instant they had called on Messrs. Sethiya and Company several times but no delivery was made. From these letters no necessary inference follows that 448 bales were delivered by Sethiya and Company. These letters may have had some value in this regard if prior to 19-1-1949 the plaintiff''s local agent had written to John Mills and Company complaining that their financier had not delivered the full complement of 600 bales and a balance of 152 remained. There is no such evidence on record. Loon Karan Sethiya in his evidence before the Court tried to make out a case that he had gone in his son''s marriage to Calcutta and his shop remained closed from 19th January 1949 to 22nd January 1949 and further tried to show that the letter dated 21-1-1949 was typed on the typewriter of John and Company and not that of Tansukhrai Sriniwas But his evidence in this respect does not inspire confidence. The fact, however, remains that these letters do not improve the plaintiff''s case which must rest on the credibility of his witness who claimed to have taken delivery from Sethiya and Company of the 448 bales and as held above their evidence in this respect does inspire confidence Sri Misra for the appellant then sought reliance on the contractors'' pass-book and the gate-pass books of John Mills as establishing the plaintiff''s case that 600 bales were appropriated towards contract and passed out of the gate mills The relevant contractor''s pass-books were proved by Radha Nandan who was the Head Clerk at John Mills and appeared as a witness for the defendant first set. He stated that the bales manufactured by John Mills till 1948 were sent to Sethiya and Company and if some money concerning bales came direct to Johns he sent the amount to Sethiya and Company with the direction that against this amount a certain number of bales be given to a particular person and in case Sethiya received money directly he obtained a pro forma from Johns and gave goods to the contractor He also testified that a pro forma was prepared and sent to the contractors who sent money direct to Johns intimating to them that certain number of bales had been released in their favour. According to this witness the gate passbook was different from the contractor''s passbook and the gate passbook contained the name of that person to whom the goods were given when the goods were sent out of the mill. This witness further stated that as all the goods manufactured by John Mills were sent to Sethiya and Company there were no stocks of goods in John Mills out of which delivery could be given to any one. It was elicited from this witness in cross-examination that the order for delivery was sometimes sent along with the pro forma and sometimes

a day earlier or later; that no goods could pass out of the mill without the gate passbook which was kept separate but admitted nothing was written on it showing that it was gate passbook. It was further elicited from the witness that after the cotton yarn became a controlled commodity there was an agreement with Sethiya and "Sethiya Pass-book" began to be written in connection with the goods which were given to Sethiya and Company and ''contractors passbooks'' began to be written against such goods as were to be given to the contractors. Proforms were sent to some purchasers and were not sent to some other purchasers. It was further elicited that the goods which were delivered by Sethiya and Company the book contained an entry ''through Sethiya and Company''. A definite question was asked to this witness to the effect that when John Mills sent any amount to Sethiya Company and in lieu thereof did not want delivery of any goods it used to be written ''credit to our accounts'', he answered that he could not tell and that the accountant would be able to tell that. This witness contradicted Radhey Nandan that two separate kinds of passbooks were maintained in John Mills for the delivery of cotton yarn. A perusal of the gate passbooks which were filed as evidence and the relevant entries in it do not bear out that 600 specified bales were given to Sethiya and Company with instructions to deliver the same to the plaintiff. The entries in the gate passbooks produced show that they were prepared in the name of the plaintiff. There is no endorsement in those passes that the delivery was to be through Sethiya and Company. There is great conflict of evidence on the point as to what the real system was and there is also conflict in evidence as to whether contractors passbooks and gate passbooks were different as also whether after the controls were imposed the delivery was being made direct by John Mills to the purchasers nominated by the Textile Commissioner Smt. Marzano who appeared as a witness and tried to prove that 600 bales which were the subject-matter of the release order in favour of the plaintiff were actually given to Sethiya and Company for delivery to the plaintiff can hardly be relied upon as she confessed that she had no personal knowledge about these affairs. In fact the documents which have been produced by the parties concerning the transaction between John Mills and plaintiff have either been signed by Captain Ivan E. John or Captain M. L . John, the other two partners. A large number of documents have been filed in the form of statements of the quantity of cotton yarn manufactured and in stock in various months, but no definite inference can be drawn from those documents one way or the other on the state of other evidence on the record. Loon Karan Sethiya tried to show that the cotton yarn of the requisite quality which was the subject-matter of the release order in favour of the plaintiff was not in stock with him in September and October and he was not in a position to deliver the same from his godowns.

27. The crucial question, however, which has to be determined is whether any specific bales of yarn were appropriated to the contract and then kept in custody of Loon Karan Sethiya for delivery to the plaintiff. On the evidence on record even if the plaintiff''s evidence to the effect that 448 bales out of the pledged stock were

delivered by Sethiya and Company at the direction of John Mills were believed it would not in law prove the case of the plaintiff that Sethiya and Company had detained any specific goods belonging to the plaintiff and converted the same for their purpose. In fact the present suit is confined to 162 bales. It has to be shown by the plaintiff that Sethiya and Company detained 152 bales belonging to the plaintiffs. In this view of the matter the question whether 448 bales were actually delivered by Sethiya and Company or John Mills becomes immaterial as far as the crucial question of appropriation of 152 bales to the contract is concerned but may be in the nature of corroborative evidence that Sethiya as financier of John Mills under the terms of the finance agreement had delivered those bales out of the stock pledged with him. At best the system which can be culled out from the evidence on record followed by the partners of the John and Company and their financier Sethiya and Company was that all the goods manufactured were sent to Sethiya and Company as security for the debt owed by John Mills to their financier and from time to time on the direction of the partners of the John Mills and against payment of price Sethiya and Company released the requisite quantity of yarn for delivery to the purchasers who contracted to buy it from John Mills. There is nothing in this system to show that the Sethiya and Company after they received direction from John and the price retained specific goods of the purchaser. Sethiya and Company must always have had a large quantity of cotton yarn in their godown as pledge. It cannot be then said that when any direction was sent from John and Company and price was paid to Sethiya and Company for a certain number of bale of yarns then at that moment there was appropriation of any specified number of bale of yarns in the stock in possession of Sethiya and Company Indeed realising this difficulty Sri Misra was at pains to establish that as far as the plaintiff was concerned the specific yarns of bales under the gale passes were sent to Sethiya and Company earmarked for delivery to the plaintiff. This the learned counsel has failed to prove. The case set up by the plaintiff is inconsistent with the system which has been tried to be proved by it.

28. It was also urged that in any case in the letter dated 19th January 1949 (Ex. 15) there was definite direction to Sethiya and Company to deliver 152 bales and Sethiya and Company were bound to deliver the same having received the price. Again the question whether Sethiya and Company were bound to deliver it or not under their agreement with John and Company is immaterial for the purpose of finding out whether the 152 bales mentioned in that letter were specific bales already appropriated to the contract and kept with Sethiya and Company. For this there is no warrant on the evidence on record. The evidence of the plaintiff does not make out any case that the 152 bales remaining undelivered had been appropriated to the contract before the same were kept in possession of Sethiya and Company by John Mills. As far Sethiya and Company is concerned, no such legal relationship has been established between it and the plaintiff so as to put them under any liability for the non-delivery of the 152 bales to the plaintiff.

29. Lastly Sri Misra urged that Loon Karan Sethiya ought not to be allowed to unduly enrich himself by keeping the money and not delivering the goods. Again this submission of the learned counsel does not carry the plaintiff''s case any further against Sethiya and Company for unless on some legal principles a liability arises the plaintiff cannot claim any relief against Sethiya and Company. Moreover, Sethiya and Company in the circumstances of the case can hardly be blamed that they were unduly enriching themselves or for any dishonest conduct on its part by not delivering 152 bales to the plaintiff. John and Company at the earliest stage on 11th September 1948 wrote to their bankers (Ex. B-7) that the amount received from the plaintiff be paid to the Bank of Bikaner Ltd. for credit to their financier''s account Messrs. Sethiya and Company. By another letter of the same date (Ex. B-8) John and Company informed Sethiya and Company that they should collect the amount from the Allahabad Bank Ltd. and credit the same to the Mills ''finance'' account with them. In these two letters there is absolutely no mention that the amount was the price of 600 bales to be delivered by Sethiya and Company to the plaintiff. It is a clear payment by John Mills to reduce their debt by directing that the amount should be credited to their ''finance'' account with the financier. In contrast there are two letters on the record (Ex. B-10 and Ex. B-11) addressed to Sethiya and Company by the John Mills in which it was clearly intimated that certain amount was to be credited or debited to the account of the mills on account of the price of certain number of bales. On this basis it was suggested for the respondent that had Rs. 3,84,750-6-0 been the price of 600 bales delivered to Sethiya and Company the letter would have been in the form as Ex. B-10 Ex. B-11. There seems to be great amount of tenability in it. The case of Sethiya and Company that the money paid by the plaintiff to John and Company was in turn paid by John and Company to Sethiya and Company towards the reduction of the outstandings against the John and Company and not the price of 600 bales delivered to them appears to be true. The fact that the accounts of Sethiya and Company show that they charged 1 per cent commission on the sale of 600 bales is not a matter which in any way materially changes the legal position for the benefit of the plaintiff. By charging such a commission at best the Sethiya and Company have admitted the sale of 600 bales by John and Company but that does not mean that they are liable to the plaintiff for its conversion.

30. For reasons above the plaintiff has not been able to make out any case against Sethiya and Company defendant-respondent No. 2 and the finding of the Court below does not call for any interference. The plaintiff also claims damages from 8th defendant-respondent, the Government of Assam This claim has been considered and rejected by my learned brother in a separate judgment. I agree with his conclusions.

BY THE COURT : The appeal is dismissed. Counsel for the appellant submitted that in the circumstances of this case neither the fifth defendant M/s Sethiya and Co. nor the State of Assam should be awarded costs. He pointed out that the Assam

Government had described him as their agent not only in the agreement but to the Textile Commissioner, and they were morally, if not legally, responsible for having misled the appellant. As regards Sethiya, Mr. Misra pointed out that Loon Karan Sethiya (defendant) had made statements which were untrue a fact admitted by his counsel and he was under a moral obligation to deliver the goods though he had escaped legal liability for lack of proof, and his conduct was reprehensible. There is some substance in counsel''s submission and we direct the fifth defendant Sethiya and Co., and the eighth defendant the State of Assam to bear their own costs throughout.