(1957) 01 CAL CK 0001

Calcutta High Court

Case No: Appeal from Original Order No. 19 of 1952

Moran and Company Ltd.		APPELLANT
	Vs	
Anderson Wright Ltd.		RESPONDENT

Date of Decision: Jan. 15, 1957

Acts Referred:

- Arbitration Act, 1940 - Section 33, 34

Citation: (1958) 2 ILR (Cal) 73

Hon'ble Judges: Chakravartti, C.J; Sarlcar, J

Bench: Division Bench

Advocate: H.N. Sanyal, A.K. Sen and S. Tibrewal, for the Appellant; K.P. Khaitan and B. Das, for the Respondent

Final Decision: Allowed

Judgement

Chakravartti, C.J.
I have had the advantage of being able to read in advance the judgment prepared by my learned brother which he is about to deliver. As I agree with him in his conclusion and generally with his reasons, it would be redundant on my part to add a judgment of my own, if it was merely to duplicate what he was going to say. But one reason makes it necessary that I should not be content to concur with my learned brother in silence. In the judgment by which the case has been remanded to us for the determination of a further point, the Supreme Court has observed that, on the previous occasion, I "did in a manner consider that point also" and in the course of the discussion, it has quoted a passage from my previous judgment with approval. I did not really decide that point but, on the other hand, expressly refrained from doing so, which the Supreme Court has noted. Still, I consider it necessary to explain what I meant by the observation approved of by the Supreme Court, lest it should be thought that therein I had expressed a view from which I was now resiling without giving any reasons.

2. The question before us in the appeal was whether the Appellant''s suit could legally be stayed u/s 34 of the Arbitration Act, as directed by the learned trial Judge. The arbitration agreement in the present case is contained in the terms of the contract of purchase and sale. The only dispute raised by the Appellant''s suit was as to whether it was a party to the contract and that dispute necessarily involved the question as to whether it was a party to the arbitration agreement, since the agreement is contained in the contract as one of its terms. Among the questions which, on an application u/s 34, must be decided in the applicant''s favour if an order for stay is to be made, one is whether he and the Plaintiff in the suit were parties to the arbitration agreement and another is whether the dispute in the suit is in respect of any matter agreed to be referred. In the present case, the subject-matter of the dispute in the suit was not a question, independent, as it ordinarily is, of the question as to whether the Plaintiff in the suit was a party to the arbitration agreement but it is that very question, being identical with the question as to whether he was a party to the principal contract. We held that since that question could in no event be a question for decision by arbitrators, it could not be a "matter agreed to be referred" and therefore the suit could not possibly be stayed. In that view, we considered it unnecessary to decide further whether the Appellant was in fact a party to the arbitration agreement, because even if a single one of the conditions laid down in Section 34 was found to be not satisfied in a case, no order for stay could be made. The fact that the dispute in the suit involved the question as to whether the Appellant was a party to the arbitration agreement was, in our view, sufficient to preclude a stay, irrespective of whether it was actually a party or not. I added that the Court undoubtedly had jurisdiction to decide on an application u/s 34 whether the Plaintiff in the suit was a party to the arbitration agreement, even if it involved deciding whether he was a party to the contract repudiated in the suit, but at the same time the Court might properly refrain from doling so in a case where it appeared that the suit could in no event be stayed, because some other requisite of Section 34 was wanting and where, to decide the point would be virtually to decide the main or perhaps the only issue in the suit which did not seem to have been dishonestly or frivolously raised. In our opinion, the case before us was of the latter type.

3. The Supreme Court has, however, held that on the facts of this case it was necessary for us to decide whether the Appellant was a party to the arbitration agreement, because that, in the Supreme Court''s view, would have a material bearing on the decision of the other question on which we rested our judgments, viz., whether the dispute in the suit was within the ambit of the arbitration clause. It has therefore directed us to decide the point and then dismiss or allow the appeal according as our finding is in the affirmative or the negative. Our present task is to carry out that direction.

4. The Supreme Court has described the dispute in the suit as a dispute as to whether the Appellant "did incur any liability in "terms of the contracts evidenced by

the two Bought Notes to "which it was a signatory, no matter in whatever capacity." The contracts referred to are obviously the contracts of purchase and sale. In terms of the dispute as described by the Supreme Court, the question involved in it is whether by signing the Bought Notes, the Appellant became a party to the principal contracts so as to be bound by all their terms. If it did become a party to the contract, it undoubtedly became a party to the arbitration agreement. The observation I made in my previous judgment which the Supreme Court has quoted with approval was that, as then advised, I was inclined to agree that if the person whose concern with the agreement was in question, was a signatory to the contract and formally a contracting party, that would be sufficient to enable the Court to hold for the purposes of Section 34 that he was a party to the agreement. To that observation I adhere. But the observation contemplated a signatory to the principal contract in which the agreement was contained. It did not mean or imply that if a broker was a signatory to a Bought or a Sold Note, he would ipso facto be a signatory to the contract of purchase and sale and a party thereto, at least formally, and would be a party to the arbitration agreement contained therein within the meaning of Section 34. As applied to Bought and Sold Notes, the observation meant that if from such a Note signed by the broker it appeared that he had signed it as the buyer or the seller or signed it in a form which made his signature a signature to the principal contract as of a party thereto, he could be held to be a party to the arbitration agreement for the purposes of Section 34, irrespective of the effect of his signature as regards his liability under the contract. A broker, for example, may sign the contract, describing himself as a broker or may sign it expressly on behalf of a disclosed principal. In such cases, the question of his personal liability under the contract may be a controversial question, but since he has signed the contract, he may be held to be a party to the arbitration agreement, contained therein, for the purposes of Section 34 and the question, being a question of the construction of the contract, may be within the jurisdiction of the arbitrators. What the broker has signed must, however, be the contract of purchase and sale itself.

5. In the present case, the brokers have signed two Bought Notes. Whether by signing them, they signed the contract of purchase and sale must be ascertained from the terms of the Notes and the form of their signatures. Below their signature at the bottom of the Notes, they added the word Brokers'', but the addition of that word would by no means be conclusive that they did not intend to bind and did not in fact bind themselves to the obligations under the contracts, if it appeared otherwise from the Notes that they were doing so. The terms of the Notes, however, appear to be decisive in their favour. All that they said to the buyers by the Notes was this: "We have this "day bought by your order and on your account from our "Principals" and then they added a specification of the goods purchased and the terms and conditions of the purchase. Notes so expressed could only mean that the brokers were informing the buyers that they had carried out their instructions to find a seller of certain goods and buy the goods from them on the buyers'' account

and that they had done so by arranging a purchase of the goods from a third party. It is true that the terms and conditions of the purchase were set out in the Notes, but the insertion of those particulars in the Notes only meant that the brokers were informing the buyers of the terms and conditions on which the goods had been purchased for them and on which the seller agreed to sell. The inclusion of the terms and conditions of the purchase does not make the Notes contracts of purchase and sale between the buyers and the brokers, as appears to have been argued before the Supreme Court. In the case of Southwell v. Bowditch (18756) 1 C.P.D. 374, Denman, J., as he then was, said in the Court of Common Pleas that the broker''s setting out in the Sold Note every particular of the contract entered into showed that he intended to make himself liable, but Pollock, B, pointed out in the Court of Appeal that those particulars would be as necessary between principals contracting through a broker as between principals contracting immediately with each other. It seems to be hardly arguable that a recital of the terms and conditions of the purchase and sale in a Bought or Sold Note makes the Note the contract of purchase and sale between the buyer or the seller and the broker. Taking Bought Notes, setting out the conditions of sale, as the Notes in the present case were, what the broker says by them to the buyer is: "I, your "broker, have carried out my contract with you to buy goods on "your account by making a contract for you with a third party "for your purchase of the goods from him and the following are ''the terms and conditions of that contract." By so saying and by signing a Bought Note containing such a statement, he does not make himself a party to the contract of purchase and sale. When he says to the buyer that he has bought by his order and on his account from his, the broker''s, principals, he does not say that he has himself gold to the buyer. No more does the fact that no brokerage is charged, as was the fact in the present case, indicate that the broker was himself the seller.

6. In the case of Robinson v. Mollet (1874) L.R. 7 Eng. and Ir. Appeals, 802, the language of the Bought Notes was: "We have this day bought for your account "200 tons net" of tallow and the brokers sued the buyer for breach of contract on the ground that he had refused to accept delivery of tallow tendered by themselves which they claimed they were entitled to do under a usage among brokers in the London tallow trade. Letters addressed to the buyer and accompanying the notes set out the terms of the contract of purchase in the minutest detail. In the Court of Common Pleas, the Lord Chief Justice held that if the usage was introduced, as he thought it could be, the brokers having signed the, notes sent to the buyer and not having disclosed the name of any principal and in fact having none, must be taken to have intimated to the buyer that they had personally sold to him. Speaking for a unanimous House of Lords, Lord Chelmsford said that he was at a loss to see how the Notes could give the information which the Lord Chief Justice had found in them. "These were sent", observed the noble and learned Lord, "to inform the Appellant "(i.e., the buyer) that his orders to buy tallow for him had been "obeyed. How could the Appellant understand that the orders "given, ''buy for me'' had been

interpreted ''sell to me'' and "and had been so executed? Nor would the bought notes disclose "to the Appellant that the Respondents had no principals for the "particular contracts evidenced by the bought notes. ''Bought "for you'' would rather intimate that the Respondents had "contracted with an independent seller, some third person, and "not that they had bought of themselves for the Appellant." Thus the Note was construed as a mere intimation; and although there was no express statement that the broker had purchased from a third party, the intimation was construed to mean, not that the brokers had bought the goods of themselves, but only that they had performed the broker''s duty of finding a seller and making a contract of purchase with him. The Note, therefore, neither constituted a contract of purchase and sale between the buyer and the brokers, nor conveyed information of such a contract.

7. The only contract between the broker and the buyer or seller evidenced by a Note of the above character is a contract of employment. That the Note is in the form of an intimation would not by itself show that the broker was not making himself liable as the buyer or seller, because it may well be that, in making the contract between two principals, he makes it in writing in a form by which he declares himself also to be liable as a contracting party; and if the Note signed by him and sent to the buyer or the seller informs him by its terms that he, the broker, was accepting personal liability, he will not be entitled to be treated as no more than a broker, although whether his. liability is a liability under the contract or an independent liability may be a question. Or, if the broker says by his Note to the seller that he has himself bought the goods or tells the buyer that he has himself sold to him, a question may arise as to whether he could be allowed to do so, because that gave him an interest against his duty; but if the buyer or the seller accepts the Note and the Note contains the terms and conditions of the transaction, it may obviously be taken as the contract and the broker''s signature therein will mean that he has made himself a party thereto. We are not troubled by any such question in the present case. The Bought Notes here do not tell the buyer anything more than that the brokers have, as directed by him, made a contract with a third party on his account for the purchase of the goods from him on the terms and conditions annexed. In Patiram Banerjee v. Kanknarrah Company, Ltd. ILR (1914) Cal. 1950 where the Bought Note was in identical terms and similarly signed, an award was made against the broker at the instance of the buyers, but in a suit by the broker to set aside the award, it was held by the Appeal Court on a construction of the Note that the contract, if any, between the broker and the buyers which it evidenced, was a contract not of sale, but of employment and that the employment was to negotiate a sale as an intermediary and not to sell on behalf of another person. The decision turned on the language of the Note as also the well-understood functions of a broker and not, as was contended before the Supreme Court, on certain special principles imported from England and wrongly applied. In my view, the same must be the decision in the present case. By signing the Bought Note, the brokers did not make themselves

sellers of the goods and what they signed was not a contract of purchase and sale as between the buyers and themselves.

8. Nor did the Bought Notes amount to the brokers saying to the buyers that they had sold the goods to them as agents for their seller-principals. "Bought by your order and on your "account from our principals" does not mean "sold to you as "agents for our third-party principals." The normal function of a broker, even if he be a common broker employed by both parties, is to find a buyer and a seller and bring about a contract between them, acting as their intermediary, and he is not either the buyer or the seller, nor an agent for the purchase or the sale. He is only a negotiator. He may in a case go beyond that position and make himself a party to the contract of purchase or sale or an agent of his principal to buy or sell, but whether he has done so will depend on what he himself says in the Bought or the Sold Note and how he signs it. There is nothing in the Bought Notes in the present case to show that the brokers had entered into a contract of sale with the buyers as an agent for and on behalf of the seller. The same view was taken of a similarly expressed Bought Note in the case of Patiram Banerjee v. Kanknarrah Company, Ltd. ILR (1914) Cal. 1950 and the matter will be found discussed in Pollock and Mullah''s Contract Act, Seventh Edition, pp. 609-10. If that view is right, as I venture to think it is, Section 230 of the Contract Act will not apply, as held in Patiram''s case and we need not consider whether, where a broker enters into a contract as an agent for an undisclosed principal and thereby makes himself prima facie bound by it, he is a party to the contract and therefore a party to the arbitration agreement contained therein. The description of the third-party sellers as "our principals" only means that the writers were acting as brokers for the sellers as well.

9. Indeed, if a common broker who has done nothing to abandon his normal position of an intermediary, employed only to negotiate a purchase and sale, is treated as an agent for his principals for entering into the contract, an odd position will result. The seller has employed him to find a purchaser who will buy for the highest price and the buyer has employed him to find a seller who will sell the cheapest and each has commissioned him to make the best possible bargain on his behalf. If he merely brings together the two contracting parties, leaving it to them to make the contract on the terms proposed or not to make it, he is faced with no conflict of duty. But if, even before he sends the Bought and Sold Notes, he is taken to have already entered into the contract on behalf of his respective principals, the buyer and the seller will be combined in him at a stage of the transaction when the principals are not even aware of it and it is difficult to see how at all he could serve loyally both his masters. The more rational view is that except where the language of the Bought and Sold Notes shows otherwise, they are only intimations by the broker of a proposed contract negotiated by him which he sends to his principals, together with a statement of the terms and conditions and that it is only on the acceptance of the Notes by both the principals that a contract is made between them. If, however, the principals authorise the broker not only to find a seller and a

buyer respectively and negotiate a contract with the person found but also to enter into the contract as their agent or if, even without such authority, the broker does enter into the contract, a question of his liability thereunder may arise. But where the Bought or the Sold Note does not show that the broker has gone beyond the limits of his employment as an intermediary and a negotiator, no question can arise, on the basis of his signature on the Note, of his having entered into the contract of sale, either as a principal or as an agent and of thus being bound by its terms. It is true that where the Bought Note does not disclose the name of the seller and the Sold Note does not disclose the name of the buyer, the principals will be doing business somewhat in the dark and will have no known person against whom they may enforce the rights and remedies under the contract. It is perhaps for that reason that a custom of the broker''s liability has grown up at certain places. Such a custom was pleaded in the present case, but its existence was denied and thereafter no evidence of its existence was given. The result is that the case falls to be decided purely on the Bought Notes and those Notes, by themselves, do not make the brokers parties to the contract and do not bind them to its terms.

10. A number of English cases were cited at the Bar. None of them was concerned with the broker''s liability to be taken to arbitration. They are only useful as decisions on the construction of contract notes sent by brokers and also, when the broker was held liable on the basis of a custom, on the nature of that liability. To mention only two of the cases, in Fleet Murton (1871) L.R. 7 Q.B. 126, where the Sold Note said "We have this day sold for "your account to our principal", the court held that, on the language of the Note, the broker could not be held liable under the contract, but pressed by the authority of Hwmfrey v. Dale (1858) 27 L.J. (Q.B.) 390, it held the broker liable under a custom to the effect that if a broker did not disclose the principal on the contract, he was personally liable. Blackburn, J., however, observed that he found it difficult to make out how custom could make the broker liable as the purchaser, when he had not in fact contracted as such. The learned Judge thought that the proper basis for charging the broker would be to charge him as a del credere agent and not as a party to the contract. In Southwell v. Bowditch Supra, the Sold Note said, "I have this day sold by your ''order and for your account to my principals" and no custom was pleaded or proved. The Court of Appeal held that no custom, enlarging the meaning of the Note or adding a term to the contract, having been proved, the natural meaning of the words of the Bought Note must prevail and, on those words, the broker was not liable upon the contract. The Notes in these cases were sold Notes, but the language in which they were expressed was analogous and the decisions are useful as showing that by signing a Note, so expressed, the broker does not sign the contract for sale, nor reports having done so.

11. I have already held that in view of the language of the Bought Notes in the present case and the character in which the brokers are shown by them to have acted, Section 230 of the Contract Act does not apply. It was contended before us

that even where the broker could be shown to have entered into the contract as an agent for purchase or sale and consequently the section applied, the effect of the presumption arising under it would be not to make the broker a party to the principal contract, thus binding him to all its terms, including the arbitration clause, but the ''effect would be to authorise the assumption of a separate contract, adding to the terms of the agency of employment, under which the agent was given the right to enforce the contract and he, on his part, undertook the liability under it. Such a conduct, it was said, would not contain any arbitration clause and, further, it being a statutory contract, there would not be any agreement in writing which an arbitration agreement must be by virtue of its definition. In support of this argument, reference was made to Robinson v. M,ollet (1874) L.R. 7 Eng. and Ir. Rep. 803 at p. 819, and Narikar v. Austin De Mel Limited (1945) A.C. 108. in which it was held that a custom giving a broker the right to enforce the contract brought about by him or making him liable under it, attached not to the principal contract, but to the contract of employment. Similarly it was said, "the contract to the "contrary", which is to be presumed u/s 230 of the Contract Act, would not attach to or enlarge the principal contract, but would only add some special incidents to the employment contract. The question is not free from difficulty, because if the ''contract to the contrary'' is to attach to the main contract as a part thereof, its effect would be to add a party thereto in the person of the agent or broker, but then, taking the contract in the present case, many of the terms, including the arbitration clause, which speaks of two parties, will become inappropriate. It is, however, not necessary to consider the question in the present case, firstly because Section 230 does not apply and secondly because we are considering a very narrow question. What we are considering is not the liability of the brokers in respect of the dealings under the contract, but their liability to be taken to arbitration under the terms of the arbitration clause, where their liability under the contract will be decided. Section 230 applies only when an agent has entered into a contract on behalf of his principal and therefore in a case of a broker where the section applies, he must have entered into the contract as an agent. If he has done so, he has signed the principal contract of purchase and sale and is formally a party thereto and therefore whether he is liable under the contract by reason of his signature is a question of the construction of the contract. The broker is, in such a case, a signatory to the contract and formally a contracting party and therefore on the principle I ventured to lay down in my previous judgment which the Supreme Court has approved of, the broker is, for the purposes of Section 34 of the Arbitration Act, a party to the arbitration agreement. Accordingly, if Section 230 applies, it is not necessary to consider for the purposes of Section 34, if the "contract to the contrary" attaches to the principal contract or the contract of employment.

12. Some reference is needed to two decisions of this Court cited at the Bar. A third decision, Gubboy v. Avetoom ILR (1890) Cal. 449, was also cited, but I do not think it is really relevant. The Sold Note in that case said "Sold this day by order and for

account of E.E. "Gubboy, to my principal", it was signed at the bottom by the broker, with the word "Broker" added after his signature; and it was endorsed "A.T.A. for principal", the letters being the initials of the broker. No question of arbitration was raised in the case, but in a suit by Gubboy against the broker, the latter was held liable by applying Section 230 of the Contract Act. As Jenkins, C.J., pointed out in the course of the argument in Patiram Banerjee''s case, the whole decision turned on the construction of the endorsement and it was the endorsement and not the Note itself which showed that the broker had in fact acted as an agent for the purchaser in finalising the contract by acceptance. The present case is not one where the broker has so acted and where Section 230 applies. In the remaining two cases, the question of the broker''s liability to be taken to arbitration arose. Both, however, were decided by reference to a usage of the trade. In Joy Lall Company v. Monmotha Nath Mallick (1916) 20 C.W.N. 365, the Bought Note, as we have ascertained from the Paper Book, said, "I have "this day bought by your order and on your account from our "principals." The buyers not having taken delivery, the brokers took the matter to arbitration and an award against the buyers was made. In an application by the buyers for setting aside the award, Chaudhuri, J., held that Section 230 of the Contract Act did not apply, as it did not appear that disclosure of the names of the principals had ever been asked for, but since a custom had been set up under which the broker was in such transactions liable along with the principal, such custom did not contradict the contract and the Arbitrators had jurisdiction to decide whether such a custom existed and whether it was known to the buyers. There is no discussion in the case as to the basis on which, even if the brokers were liable under the contract, they could refer their dispute with the buyers to arbitration and it seems to have been assumed that if the brokers were liable in respect of dealings under the contract by the force of a usage, they had all the rights and liabilities provided for in the contract. The matter was specifically raised and decided in the next case, Jitmull Girdhari Lal v. Ram Gopal Bohitrann ILR (1922) Cal. 12. The exact terms of the contract notes do not appear, but it is stated in the judgment that the Note sent to the Seller stated that the goods had been sold "to our principals" and the Note sent to the Buyer said that they had been bought "from our principals". The sellers made a reference to arbitration and the arbitrators made an award against the brokers in favour of the sellers and an award against the buyers in favour of the brokers. In a suit by the buyers for setting aside the award, Rankin, J., as he then was, found that there was a custom under which, where Notes were passed in the form used in the case, the broker was liable to both parties in addition to the principals and that he was liable, whether the names of the principals were disclosed or not. That custom, it was observed, supplied "the contract to the contrary" and the aid of Section 230 of the Contract Act was not required. The learned Judge then referred to the class of cases where it had been held that the liability of the broker under a custom was attached by the custom to his contract of employment and not to the contract of sale and observed that the logic of that view was a sensible one. But he also thought that if brokers were entitled to enforce the

contract under the special custom and were also liable under the contract, but were not bound by the arbitration clause, they would have larger rights than the buyers and the sellers. On the other hand, if under the special custom the parties looked to the brokers for the performance of the contract and the brokers, on their part, were entitled to enforce a contract entered into by some one else, the arbitration clause could properly be taken as including the brokers as well, as had been done in the case decided by Chaudhuri, J. It is obvious that, according to that view, the broker''s liability under a custom attaches to the contract of sale and is not a collateral liability, extraneous to the contract and imposed by the accepted usage in the trade. These decisions, however, are of no assistance in the present case, since no custom adding to the rights and liabilities of brokers has been proved. Apart from any special custom, brokers are only intermediaries and when the Bought and Sold Notes do not show that they have acted otherwise than as negotiators, their position, as Rankin, J. himself pointed out, was as laid down in Patiram Banerjee''s case. They are not parties to the contract and therefore not parties to the arbitration agreement so that there can be no question of their being liable to be taken to arbitration for the decision of disputes under the contract.

13. On behalf of the buyers it was contended that the language used in the Bought Notes in the present case was the language of a concluded contract and therefore the contract was constituted by the Notes. It was conceded that, ordinarily, Bought and Sold Notes were passed as steps in the negotiations for a sale and also that even when they were so passed, the language of a concluded contract was generally used as a matter of convenience. But it was next argued, if the language of a concluded contract was used in a case and in an application u/s 34 of the Arbitration Act it was pleaded that the Notes constituted the contract and that the contract was with the broker, it would be for the broker to prove by evidence that he had used the language of a concluded contract only for the sake of convenience. In the present case, the buyers had said in their application that they had bought or agreed to buy "from "the Respondents", i.e., the brokers, and the brokers had given no evidence that they were mere negotiators, although the language of a concluded contract had been used in the Bought Notes. The Bought Notes, signed by the brokers, were therefore to be taken as constituting a contract of purchase and sale between the buyers and the brokers and therefore the brokers were parties to the arbitration agreement set out in the Bought Notes.

14. I do not think this argument of the buyers is sound. The Bought Notes, although they use the expression "have bought", also say "from our principals" which cannot mean "from "ourselves"; and the expressions "have bought" or "have sold", when accompanied by the expression "for you" in Bought or Sold Notes, have always been interpreted as meaning and are understood to mean "have made a contract of purchase or sale on "your behalf with a third party" and not that "we ourselves "have sold to you or bought from you." The contract, so made, is finalised by the buyer and the seller retaining the notes which, by themselves, do not constitute

concluded contracts, not to speak of concluded contracts with the broker. See, Benjamin on Sale, Eighth Ed., p. 277.

15. The learned Counsel for the buyers lastly contended that, in any event, where the Bought or the Sold Note was expressed in the language of a concluded contract, the broker who had signed such a note must be taken to be a party to the contract and, therefore, a party to the arbitration agreement for the purposes of Section 34, if it was pleaded that the Note constituted a concluded contract with him. So far as the present case is concerned, the factual basis of that contention is negatived by the very language of the Notes which makes it perfectly clear that even assuming that they represent concluded contracts which they do not-the contract is not with the brokers and it was not a contract with themselves that they signed. But the argument of the learned Counsel really meant that "party to the arbitration "agreement", as contemplated by Section 34, included an alleged party. My learned brother has dealt with that argument and I agree with him for the reasons he has given that it is wholly untenable.

16. The present case falls to be decided solely on the Bought Notes. For the reasons given above, I hold that the Bought Notes by themselves do not constitute the contract of sale. By signing them, the brokers did not sign the contract of sale, either as a contract by themselves as sellers or as a contract by some third party sellers, of whom they were agents for sale, but they merely signed a letter of intimation to the buyers to the effect that, as instructed by them, they had found a seller and made a contract with him for their account and on their behalf on the terms and conditions which were being set out in the letter. They were thus not signatories to the contract, nor contracting parties, even formally, and what they signed was not the contract of sale at all, not to speak of such a contract with themselves. They were thus not parties to the arbitration agreement included among the terms and conditions of sale.

17. The result of that finding is that the appeal must be allowed with costs for the present hearing and the Respondent''s application u/s 34 dismissed, as proposed by my learned brother.

18. Certified for two counsels.

Sarkae, J.

19. This matter has come back to this Court on remand from the Supreme Court. We have been directed by the Supreme Court to decide the question framed by it and to dispose off the appeal in the manner indicated, according as our answer to the question is one way or the other.

20. The matter arises out of an application for stay of a suit u/s 34 of the Arbitration Act. The application was made, by Anderson Wright Ltd., the Respondent in this appeal. The Respondent''s case in the petition for stay was this:

By two different contracts contained in and/or evidenced by two contract notes in writing both dated July 7, 1950 and executed by the Appellant Moran and Company, Ltd. and delivered by it to the Respondent, the Respondent bought or agreed to buy from the Appellant certain quantities of hessian cloth on the terms mentioned in the contract notes. One of these terms contained an arbitration agreement. Part of the goods under these contract notes was not delivered to the Respondent. The Respondent thereupon called upon the Appellant to make delivery but the latter denied that it had any liability under the contract notes to deliver any goods. The Respondent then claimed damages from the Appellant for breach of contract and this claim also the Appellant repudiated. The Appellant after rejecting the Respondent''s claim for damages filed a suit against it.

21. In these circumstances the Respondent made the application for a stay of the suit on the ground that its entire subject matter was covered by the arbitration agreement contained in the contract notes and it was willing to go to arbitration.

22. The application for stay was opposed by the Appellant who contended that it had only acted as intermediary and broker and as such had passed the documents described by the Respondent as contract notes, to the latter. It stated that the alleged contract notes were really bought notes and did not constitute any contract between it and the Respondent. It also stated that it had duly delivered corresponding sold notes to one Gewarchand Danchand and thus by the bought and sold notes so delivered by it to the Respondent and Gewarchand Danchand respectively, contracts were made between these two in which the Respondent was the buyer and Gewarchand Danchand, the seller and to which it was not itself a party. The Appellant also contended that at all material times, the Respondent was aware that the Appellant''s principals referred to in the bought notes, were Gewarchand Danchand. The Appellant further said that its suit was only for a declaration that it was not a party to the alleged contracts and therefore the dispute raised in the suit was not a dispute which could be covered by any arbitration clauses contained in them, however wide the terms of the clauses may be. The Appellant submitted that the suit could not be stayed both because it was not a party to the arbitration agreement and because the dispute raised by the suit was outside the agreement.

23. The application for stay was heard by S.R. Das Gupta, J. and he held that the dispute raised by the suit was not whether there was any contract between the Appellant and the Respondent but whether the Appellant, who admittedly passed the bought notes to the Respondent, could be made liable under the contract thereby constituted by reason of the fact that it had described itself as broker. The answer to the question which arose on such dispute depended, according to the learned Judge, upon the interpretation of the bought notes themselves and therefore the dispute raised by such a question was within the arbitration clause. In this view of the matter he allowed the application and ordered a stay of the suit.

24. From that order the Appellant appealed. The appeal was heard by a Bench of this Court consisting of my Lord the Chief Justice and myself. We took the view that the only matter in dispute in the suit was whether the Appellant was a party to the contracts alleged. We were of opinion that such a dispute did not arise out of the alleged contracts nor relate to it and was not therefore within the arbitration clauses contained in them. We accordingly allowed the appeal and directed that the suit would not be stayed. We however did not decide the other point raised by the Appellant namely, whether it was a party to the alleged contracts because we felt that if the suit did not raise any dispute covered by the arbitration clause, it could not be stayed whether the Appellant was a party to the contracts or not. My Lord the Chief Justice however did to a certain extent discuss the question whether the Appellant was a party to the alleged contracts but he did not think it fit to make a pronouncement on it.

25. The Respondent then went up in appeal to the Supreme Court. Their Lordships of the Supreme Court held,

We think that on the facts of this case it was necessary for the learned Judges of the appellate bench to decide the question as to whether or not the Plaintiff in the suit which the applicant wants to stay was a party to the arbitration agreement. This would have a material bearing on the decision of the other question upon which the learned Judges rested their judgments.

26. They also said,

As we have said already, it is incumbent upon the court when invited to stay a suit u/s 34 of the Arbitration Act to decide first of all whether there is a binding agreement for arbitration between the parties to the suit, So far as the present case is concerned if it is held that the arbitration agreement and the contract containing it were between the parties to the suit, the dispute in the present case would be one relating to the rights and liabilities of the parties on the basis of the contract itself and would come within the purview of the arbitration clause worded as it is in the widest terms, in accordance with the principle enunciated by this Court in A.M. Mair and Co. Vs. Gordhandass Sagarmull, . If on the other hand it is held that the Plaintiff was not a party to the agreement, the application for stay must necessarily be dismissed.

27. In this view of the matter the Supreme Court made the following order:

We, therefore, allow the appeal and set aside the judgments of both the courts below. The matter will go back to the appellate bench of the Calcutta High Court which will decide as an issue in the proceeding u/s 34 of the Arbitration Act the question whether the Respondent was or was not a party to the arbitration agreement. If the court is of opinion that the Respondent was in fact a party, the suit shall be stayed and the Appellant will be allowed to proceed by way of arbitration in accordance with the arbitration clause. If on the other hand the finding is adverse to

the Appellant, the application will be dismissed.

28. It is under this order that we are hearing the matter again. Our only duty now is to find out if the Appellant is a party to the arbitration agreements. The arbitration agreements referred to are the arbitration clauses in the contracts mentioned in the petition for stay. We have therefore to decide whether the Appellant is a party to these contracts.

29. The Respondent''s case, as I have earlier said, is that the contracts are contained in and/or evidenced by the written contract notes copies of which are annexed to the petition for stay. We have therefore to look at the written contract notes to find out who the parties to them were.

30. The contract notes are in substantially identical terms and they commence thus,

Messrs. Anderson Wright Ltd.

Dear Sirs,

We have this day Bought by your order and on your account from our Principals.

31. Then follow the particulars of goods, their price, the time of delivery and other terms including the arbitration clause. The notes are signed at the end by the Appellant as brokers.

32. The Respondent contends that by these documents the Appellant, not for itself but as agent for a principal whom it did not disclose, made the contracts with the Respondent to sell goods to the latter. It is said that the Respondent is therefore personally bound by the contracts u/s 230 of the Contract Act and is hence a party to them. That section so far as is material is in these terms:

33. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

34. Such a contract shall be presumed to exist in the following cases:

(1)...

(2) Where the agent does not disclose the name of his principal;

(3)...

35. Do the contract notes in this case amount to contracts by the Appellant as agent for undisclosed principals, with the Respondent? That is the question that we have to decide and, in my view, it is completely covered by the judgment of this Court in Patiram Banerji v. Kanknarrah Company Ltd. Supra, and with that judgment I am in absolute agreement. There a contract note in form identical with those before us, was delivered by Patiram Banerjee to Jardine Skinner and Company who were the managing agents of Kanknarrah Company Ltd. The goods not having been delivered

Jardine Skinner and Company referred the resulting dispute to arbitration under the arbitration clause in the contract note and thereupon an award came to be made in their favour against Patiram Banerjee. The latter then filed a suit to set aside the award on the ground that he was not a party to the contract containing the arbitration clause. There were other grounds but with them I am not concerned. Kanknarrah Company Ltd. was made a party to the suit apparently because Jardine Skinner and Company had been acting as its agents. The suit was dismissed by the trial Court but was allowed on appeal. The bench hearing the appeal consisted of Jenkins, C.J. and Woodroffe, J. Jenkins, C.J., observed at pp. 1062-3 of the report earlier mentioned,

36. The bought note is no doubt signed by the Plaintiff and prima facie that would bind him, but it would only bind him to that which is expressed in the document.

37. If the document be examined it does not purport to be a sale by the Plaintiff even as an agent: it is an intimation that Messrs. Jardine Skinner and Company''s order has been carried out by a purchase made by the Plaintiff on their account, not from himself but from some one else.

38. The note may be an admission of the Plaintiff''s employment by Messrs. Jardine Skinner and Company to buy on their behalf, but the contract (if any) as between the Plaintiff and them, which it evidences, is a contract not of sale but of employment.

39. This employment was to negotiate a sale and to be an intermediary, not to sell on behalf of another.

40. Woodroffe, J., said that prima facie a broker did not make himself liable and whether he had in any case done so or not depended on the terms of the contract. Then proceeding to consider the terms of the contract before him he observed (p. 1067),

41. I should have had no difficulty as to this had it not been for the case of Gubboy v. Avetoom Supra, on which the Respondent relies and which is very similar to the case before us. I felt some difficulty on this point during the hearing, but as the learned Chief Justice is of opinion that this case does not stand in our way and his decision is in accord with the natural justice of the case, I do not dissent from the order he would pass.

42. Both the learned Judges came to the conclusion that the document before them did not use any language which would show that a contract was thereby made by Patiram Banerjee either for himself or as agent for an undisclosed principal, with the Kanknarrah Company Ltd. or Jardine Skinner and Company The language used in the documents that we have to consider is as earlier stated identical with the language in the document in Patiram Banerjee'''s case. I find it impossible on that language to arrive at any conclusion other than that at which Jenkins, C.J. and Woodroffe, J., arrived. The contract notes here, as the one in Patiram Bamerjee''s

case, only give an intimation to the Respondent that the Appellant had at the former''s request and on its account made a contract with another. It says, I your agent have made a contract for you with another. Hence it only gives an information. It does not say, "I have as agent for another made a contract with yon." If it had, then there may have been a contract made with the Respondent and if the party for whom the Appellant made the contract with the Respondent was not disclosed the Appellant may have been liable on the contract u/s 230 of the Contract Act. A comparison of the two forms mentioned just now helps to appreciate the correct interpretation to be put on each. This I now proceed to do.

43. Before making the comparison I wish to say a few words about brokers. That the Appellant was a broker in the transaction in this case is clear from the word "brokers" appended to its signature on the notes. That the Appellant was a broker employed by the Respondent is also clear from the trend of the documents. I do not think that all this is disputed. That however does not decide the question before us. Whether it was a broker or not, if it bad in fact made contracts with the Respondent it would be liable. Whether it had done so or not depends on the language of the documents it delivered to the Respondent. The documents used in this case are of a variety well known among traders and are called brokers notes. Brokers notes are of two forms, namely, bought notes and sold notes. The documents in this case are bought notes. The position of a broker and the nature of his notes are very well put in the words of Woodroffe, J., in Patiram Banerjee''s case. He said (pp. 1065-66).

44. We must look to the terms of Section 230 of the Contract Act. The first question is whether the Appellant, who is a broker, is as such an agent. I think a broker is an agent. For what purpose he is an Agnes is another question. Primarily and for some purposes he is the agent of the party by whom he was originally employed, He is also generally the agent of each of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this difference that the broker being employed by person who have opposite interests, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business books and gives to each party a copy of the entry or a note or a memorandum of the transaction which as given to the seller is the sold note, and as given to the buyer is the bought note. Prima facie a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of a broker, his contract is one of employment between him arid the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may however make himself a party to the contract of sale or purchase for he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the

agent of his principal to buy or sell.

45. When a broker has passed bought and sold notes to the persons who respectively employed him to find a seller and a buyer he has made a contract between the two. That is according to a well-established custom of the trade: See Cowie v. Remfry (1846) 3 M.I.A. 448. This custom has long ago passed into the region of law.

46. In actual practice two varieties of bought and sold notes are found current. There may be other varieties but with these I need not now concern myself. One of these two is the variety that we have in this suites. In this variety only an intimation is given by the broker to one of his employers and cannot by the language used make a contract between the two. There is no attempt here to express or obtain an identity of view on any matter. It only gives the information that what the informer had been required to do has been done. The other variety is of the type which by its language makes a contract between the broker and his employer to whom the note is delivered. This is the case referred to by Woodroffe, J., by the words,

47. A broker may however make himself a party to the contract of sale or purchase for he can go beyond his position of mere negotiator or agent to negotiate and by the teems of the contract make himself the agent of his principal to buy or sell.

48. The expression "by the terms of the contract" is important. It shows that the broker can make himself a party to the sale or purchase by using appropriate language in his note. To put it from the other end, he does not make himself a party to the sale or purchase unless he has done so by his note.

49. The variety of a broker''s note by which the broker makes himself a party to the contract of sale or purchase concluded by him between his two principals may be illustrated by the note which came up for consideration of the Supreme Court in A.M. Mair and Company v. Gordhandass Sagarmull Supra., referred to in the judgment of the Supreme Court in this case. There the note delivered by the brokers A. M. Mair & Company to Gordhandass Sagarmull ran thus: "We have this day sold by your order and "for your account to the undersigned" and was signed by the brokers with the word "brokers" appended to their signature. The brokers there contended that Gordhandass Sagarmull had no right to obtain an award against them on the basis of the arbitration clause contained in the note as they "were not parties "to the contract in their own right as principals but entered into the contract only as agent of Bengal Jute Mill Company." The Supreme Court negatived this contention and held that to say this was not to say that the note never made a contract between the brokers and Gordhandass Sagarmull. The brokers there could not contend that the note did not amount to a contract between them in any capacity and Gordhandass Sagarmull, for the note said that there was a contract for sale by Gordhandas Sagarmull to the undersigned that is, the brokers themselves. The same type of a broker''s note was considered in Nando Lal Roy v. Gurwpada

Haldar I.L.R.(1924) Cal. 588, There the note delivered by Nando Lai Roy, the broker, to Gurupada Haider, a constituent of his, read thus: "Sold this day by order and for account of "Babu Gurupada Haldar to selves for principals" and was signed by Nando Lal Roy over the words "brokers". The arguments there proceeded on the basis that by the document Nando Lal Roy had entered into a contract on behalf of an undisclosed principal, and the question that was canvassed was whether in those circumstances Nando Lal Roy could personally enforce the contract. That question could not arise unless the note by its words made a contract between the broker in his capacity as agent and the party to whom the note was delivered. I refer these cases only for the purpose of showing that the broker may frame his note in such a manner as to make a contract between himself, may be as agent, and the party to whom he delivers the note. Whether the broker would be liable on such a contract is another question. With such a question I am not concerned now.

50. Drawing attention to this distinction between the two forms of brokers notes, Jenkins, C.J., in Patiram Bannerjee''s case referred to the observations of Mellish, L. J., in Southwell v. Bowditch Supra, where the later said,

51. Now there is, I think, a material difference between the words ''sold for you to my principals'' and ''bought of you for my principals.'' The rule of law, no doubt, is that if the principal is undisclosed, the broker saying "bought of you for my principals" is liable, but this contract says "sold for you to my principals", i.e., I, your broker, have made a contract for my principals the buyers.

52. The learned Chief Justice then proceeded to observe,

53. I have already pointed out that the note in this case is in the second of these wo forms, and on its true construction I hold that the Plaintiff was no more than an intermediary, and was not an agent for sale, to whom the provisions of Section 230 of the Contract Act applies, so as to make him liable as an agent who has not disclosed his principal''s name.

54. When the note says "bought of you for my principals" or "sold to you for my principals", it undoubtedly says I the broker have bought of you or sold to you as agent of my principals. If the broker says he has bought of one or sold to one he has made a contract with the latter. If he has made such a contract then only can the question whether he can personally enforce it or is personally bound by it, arise. If he has not made a contract at all no question of his personal right or liability on it arises. He does not make a contract if he says "I have this day bought by your order and on your account from "our principals" because he then says to one that at the latter''s request lie has made a contract with another. That is the case here.

55. It is true Woodroffe, J., felt some difficulty about Gubboy v. Avetoom Supra, but he was disposed to agree with what Jenkins, C.J., said about it. Jenkins, C.J., said,

56. In a word the court there on the construction of the document before them came to the conclusion that a particular relation was established: this cannot bind us in our construction of a different document written under wholly different circumstances.

57. With this view I agree. I have only to add that if the two cases can not be distinguished then there would be two conflicting views on the point. I would then prefer to follow Patiram Banerjee''s case, which is the later case and directly binding on us and which considers the point with which I am now dealing and gives reasons for the view taken. Perhaps it would not be incorrect to say that learned Counsel appearing for the Respondent in this appeal did not place any special reliance on Gubboy v. Avetoom Supra.

58. The learned Counsel for the Respondent dealt with Patiram Banerjee''s case from two points of view. He first sought to distinguish that case on the ground that there the broker had acted strictly as an intermediary as he had only introduced the contracting parties to each other and had concluded no contract between them but left it to them to make the contract by another document or other documents or verbally. There, it was said, no question of Section 230 arose as no contract had been made. The learned Counsel contended that this view of the matter appeared at p. 1062 of the report. I find nothing at this page or anywhere else in the report to support this view. On the other hand I find at p. 1081 of the report that the court held that the broker had delivered the corresponding sold note to K.D. Shaha. The two notes undoubtedly made a contract between the two principal parties. Furthermore, whether the broker had made a contract between the two principal parties had nothing to do with the question that the court had there to try. That question was whether the bought note delivered by Patiram Banerjee to Jardine Skinner and Company made a contract between the two. I am leaving out of consideration for the sake of simplicity, Kanknarrah and Company Ltd. whose agents Jardine Skinner and Company were. That question could not have depended on whether a binding contract had been made between the two principal parties but had to be decided on the terms of the bought note itself. The learned Judges held on a construction of the bought note alone that it did not make any contract between Patiram Banerjee and Jardine Skinner and Company Indeed it is impossible that the construction of the bought note could have been one way if there had been a contract made between the two principals and another if there had been no such contract made. Again if a contract had been made between the two principals that would not have necessarily made the broker a party to it.

59. It was then said that Patiram Banerjee''s case must have been wrongly decided if it was not decided on the basis that no concluded contract had there been made between the two principals. I have said that the decision had nothing to do with the basis alleged. I have also to say that no reasons whatever were given for the contention that Patiram Banerjee''s case had been wrongly decided. It however

appears from the judgment of the Supreme Court that it had there been argued that Patiram Banerjee''s case "was wrongly decided being based upon "English authorities which have no application to India." That argument however was not repeated before us. The only English authority cited in Patiram Banerjee''s case was Southwell v. Bowditch Supra That again was by Jenkins, C.J., alone. Woodroffe, J., did not feel the necessity of citing any authority whatsoever. He simply said that he felt no difficulty at all except what was caused by Gubboy v. Avetoom Supra I do not think that it is right to say that Patiram Banerjee''s. case was based on any English authority. The question that the court there set out to solve was the construction of a document. It is well known, as Jenkins, C.J., himself took pains to point out, on such a question an authority is of little value. The learned Chief Justice referred to Southwell v. Boneditch Supra for two purposes. First, to show that the prima facie position of a broker was as an intermediary. That is so in our country also and that is not disputed. That case had nothing to do with a broker''s prima facie position in the abstract but with the position of the broken on the facts of it. Jenkins, C. J., referred to a broker''s prima facie position to explain by contrast a broker''s special position. Secondly he cited Southwell v. Bowditch Supra as setting out the two forms of brokers notes under one of which the broker made himself a party to the contract and under the other, he did not. Whether on any particular note the broker has made himself a party to a contract is a question of the meaning of the English words used in the note if it happens to be in the English language. English words have of course the same meaning in England as in India. To this extent therefore it is impossible to say that Southwell v. Bowditch Supra has no application to India. I do not find that Southwell v. Bowditch Supra was relied upon as laying down any principle of law at all. I have already said that the question in Patiram Banerjee''s case as in the case before us is essentially one of construction of documents. On that no question of the application of peculiar rules of English law, arises. I wish to say here to dispel any misconception that may arise from the lengthy discussion by me of Patiram Banerjee''s case, that quite apart from the authority of that case I would have come to the same conclusion entirely on my own purely as a matter of construction of the contract notes that have been put forward here and in doing that I would not have required any support from any English case or law.

60. Learned Counsel for the Respondent said that where a broker acts as a mere intermediary, his bought note is in the form. "I have secured a seller for you". It was said when such a form is used no contract is made. I am not aware that a bought note is ever in this form. Learned Counsel did not produce any evidence or authority to show that documents in the form spoken to by him are called bought notes in the trade. Learned Counsel then proceeded to point out that the bought note in this case said, "We have this day Bought" and therefore admitted that a coincided contract had been made. It was contended that the broker having admitted the making of a concluded contract could not now deny its existence. I confess I do not follow this argument. The Appellant no doubt says that it did make a contract but it

says that the contract it made was between the Respondent and Gewanchand Danchand. Again it does not say that the bought note alone made the contract. What it says is that the bought and sold note together made the contract between the two principals. The bought note of course mentions a concluded contract but it also shows that that contract is between the Respondent through the Appellant as its agent and the other principal of the Appellant not named in the note but who, the Appellant says is Gewanchand Danchand. The Appellant is no doubt bound by what the bought note says but to no more. Since the bought note mentions only a contract between the Respondent and another principal of the Appellant there is nothing in it to prevent the Appellant from contending that the document made no contract between it and the Respondent. As I have already said the bought note neither makes nor evidences any contract between these. By it the Appellant may have admitted to have been employed as broker by the Respondent but even that does not make the bought note a contract of sale or purchase between them.

61. This leads me to a similar argument on behalf of the Respondent. Learned Counsel for the Respondent drew attention to an endorsement at the end of the bought note reading, ''Brokerage Nil per cent." and contended that this showed that there was an agreement by the Appellant not to charge any brokerage from the Respondent. So it was said that here was a contract between the two and if part of the document formed a contract between them the whole must also make a similar contract. I am wholly unable to agree. There is nothing to prevent one document from containing a contract and also something else. Whether any part of a document contains a contract depends on the language used in that part. If the language used there does not make a contract it can no more do so because the language of another part makes a contract. Furthermore the question of brokerage relates not to the contract of sale and purchase which a broker brings about but to the contract on which the broker was employed to bring about the contract of sale and purchase. The bought note is not that contract of employment: it is a document brought into being by virtue of that employment: by it the broker says that it had done what it had been employed to do. The endorsement about the brokerage is an only admission by the Appellant that the contract by which it had been employed as broker did not provide for any brokerage being paid to it for the work done under the employment.

62. It was also contended on behalf of the Respondent that nothing turned on the language of the contract notes in this case. It was said that mercantile documents were often insensible or at least did not by the language used express the true intention of the parties but the law merchant however gave the documents certain meanings which the language employed did not convey, so that the true intention of the merchants who used the documents might be given effect to. As instances of such documents mention was made of bills of sale and marine insurance policies. It was said that brokers notes belonged to this class of documents and they were understood by law merchant as making contracts of sale or purchase as the case

might be, between the broker and the party to whom he delivered the note. I am not aware that bills of sale or the other documents mentioned are understood by the law merchant in a manner not justified by the language used. In any case with these documents I have nothing to do here. So far as a brokers note is concerned I am not aware that they have ever been understood as making a contract of sale or purchase between the broker delivering the note and the party to whom it is delivered unless the language used justified such meaning being ascribed to it. Learned Counsel was unable to produce any authority in support of his contention which he undoubtedly would have been able to do if he was right. On the other hand, the authorities are against such a view and Southwell v. Bowditch Supra and Patiram Banerjee''s case Supra are some of such authorities. There are many others but it is not necessary to multiply authorities. This contention on behalf of the Respondent is, in my view, wholly untenable. Incidentally I wish to note that learned Counsel found it necessary to rely on English law and in fact he read extensively from Benjamin on Sale for law merchant is a purely English concept, and thereby indicated that the principles of English law are of help though it seems to have been contended before the Supreme Court that the English authorities had no application, apparently because the law in India was different from that in England.

63. I will now deal with an argument which was advanced on behalf of the Respondent when the appeal was heard by us on the first occasion but which was not repeated this time. This argument was, I think, noticed in the judgment of the Supreme Court. It was dealt with by counsel for the Appellant in anticipation of its being raised this time also on behalf of the Respondent, which, as I have said, was not done. The Supreme Court has held that "if the person whose concern with the "agreement is in question is a signatory to the contract and "formally a contracting party, that will be sufficient to enable ""the court to hold for the purposes of Section 34 that he is a party to "the agreement." This observation is binding on me. In order "formally a contracting party" there undoubtedly must first be a that the Appellant may be "a signatory to the contract and contract in writing which it signed. I am unable to hold, for reasons already mentioned, that the bought notes which the Appellant in this case signed were at all contracts between the Appellant and the Respondent. I hence come to the conclusion that there was no such contract which the Appellant signed and therefore none to which it was even formally a party. Another point argued before us on behalf of the Respondent on the earlier occasion when we heard the appeal was this: The expression "party to an arbitration agreement" occurs both in Sections 33 and 34 of the Arbitration Act and therefore it must have the same meaning in both places and as it has been held that in Section 33 the expression includes a person who is alleged to be a party though he may not be actually a party to the agreement (see, Chaturbhuj Mohanlal v. Bhicam Chand Chororia Sons (1948) 53 C.W.N. 410), in Section 34 also a "party to an arbitration agreement" includes any person who is alleged by another to be a party to an arbitration agreement. It was therefore said that as the Appellant was alleged by the

Respondent to be a party to the arbitration agreement, he was such a party within the meaning of Section 34. The reason for the decision in Chaturbhuj''s case was that otherwise Section 33 would have no meaning for it allows "a party to an arbitration agreement" to challenge its existence and such existence must be both its legal and factual existence. To allow a person who is actually a party to an arbitration agreement to challenge the existence of that agreement would be absurd and so in Section 33 the expression "party to an arbitration agreement" must be understood as including a person alleged to be a party to an arbitration agreement for such a person can certainly challenge the existence of the arbitration agreement.

64. Now there is no reason to give such an extended meaning to the expression "party to an arbitration agreement" in Section 34. Indeed such a meaning would result in absurdity. It would then have to be held that if the Defendant alleged that the Plaintiff was a party to an arbitration agreement and applied for the stay of the Plaintiff''s suit, the court would have no option but to stay the suit. Since in such a case, the arbitrators could not decide whether the Plaintiff was a party to the arbitration agreement or not, the result would be that the Plaintiff would be forced to go to arbitration under an agreement to which he never might have been a party. I am therefore unable to hold that the expression means the same thing in both the sections.

65. I will now mention an argument of learned Counsel for the Appellant which, in the view I have taken, does not really arise. It was said that even if the notes in this case be read as contracts made by the Appellant as agent for an undisclosed principal, with the Respondent, contracts by which the Appellant would be personally bound by reason of Section 230 of the Contract Act, the Appellant did not thereby become a party to those contracts and the only point before us was whether it was such a party. In support of this contention learned Counsel relied on Narikar v. Austin De Mel Ltd. Supra. There a broker, the Defendant in the suit, sought to counterclaim against the Plaintiff''s claim, which was admitted, certain damages which he alleged he had suffered on account of the Plaintiff''s breach of a contract which the Defendant had as the Plaintiff''s broker, made for him with an undisclosed principal. The Defendant contended that the custom of the market allowed a broker to enforce the contract against his principal. The court of the first instance held that as the contract had been made by the broker as agent, it could not sue on the contract and the custom alleged could not alter the intrinsic nature of the contract. On appeal the Supreme Court of Ceylon reversed this decision. On a further appeal the Judicial Committee upheld the decision of the Supreme Court and observed,

66. The fallacy underlying the judgment of the learned District Judge lies in the assumption that the Respondent was suing on a contract made by his principal. This was not the case; he was suing in his own name under a special power conferred on

him by his contract of employment.

67. So it would appear that it was held in this case that the broker''s right to sue was appended by custom to his contract of employment as a broker and was not by custom sought to be made a term of the contract which he in the course of his employment as broker brought about between two principals. Learned Counsel also referred to observations to a similar effect, though not acted upon, made by Blackburn, J., in Fleet v. Murton Supra, and Rankin, J., in Jitmull Girdhari Lal v. Ram Gopal Bohitram Supra, Robinson v. Mollett Supra, was also referred to but that does not carry the matter much further. All these cases also turned on custom giving the broker a right to sue or making him liable to be sued.

68. Now it seems to me that these cases are not of much help. The observations were made on the basis that a right or liability in the broker was attached by custom to his contract of employment and not to the. contract that he made in the course of such employment. Hence those observations turned on the particular custom in view and cannot be of general application.

69. Furthermore, I find it difficult to agree that an observation made on the basis of a custom can be applied in deciding whether an agent personally bound by a contract made by him as agent for an undisclosed principal by reason of Section 230 of the Contract Act and the present argument of learned Counsel for the Appellant arises only if the agent is so bound is a party to that contract. As I have already held that in this case Section 230 does not apply, I will only indicate how the argument strikes me without giving a final decision on it. It does not seem to me possible that if an agent is personally bound by a contract by reason of Section 230, he can say that he is not a party to that contract. The reason is that Section 230 is confined to contracts entered into by an agent on behalf of his principal. So it has as its basis the fact that the agent has entered into a contract. It therefore assumes a case where the agent is a party to a contract, for when one enters into a contract, he is necessarily a party to it. The section then proceeds to say that in spite of his so being a party to the contract he has no right or liability on it. It seems to me that if he was not a party to the contract it was wholly unnecessary to say that he had no right or liability on it, for if he was not a party he of course had none. The section further proceeds to say that if an agent in entering into a contract with any one on behalf of his principal has not disclosed the name of that principal he would be deemed to have further contracted that he could personally enforce the contract that he. made as agent and that he would be personally bound by it. This further contract arises out of a statutory presumption and would appear to be between the agent in his personal capacity and the party with whom he entered into the other contract as agent. It may be that this further contract does not make the agent a party to the contract which he entered into with another as agent. But this in my view makes no difference for this further contract does not arise unless the agent has already made a contract with another as agent, that is, unless he is already a party to the latter

contract. It seems to me that no question u/s 230 arises unless the agent is already a party to the contract under which he is by the section in certain circumstances, given all rights and saddled with all liabilities. I therefore think that a person held under 230 to be personally bound by a contract made by him as agent, must be a party to the contract. I however wish to repeat that I do not decide this point here as it does not arise in view of my conclusion that the notes before us were not contracts between the Appellant and the Respondent.

70. I think I ought now to mention another point of which there may be said to be a hint in the petition but which was not argued at the bar. The question is whether there is any custom in the market under which the Appellant may be said to have become a party to the contract. No question of custom appears to have been raised before the Supreme Court. Therefore I do not think that the Supreme Court wanted us to go into the question of custom in deciding whether the Appellant was a party to the alleged contracts. In my earlier judgment I had said that the Appellant''s suit did not raise any question of custom and so, even if a dispute as to custom was within the arbitration agreement that would be no reason for staying the suit. I still adhere to that view. The Supreme Court did not express any disapproval of it. It may be that that was so because the question was not raised before it. I feel that if it was intended to rely on custom as making the Appellant a party to the contract it should have been raised which it was not.

71. All that was said in the petition about the custom was that under it the Appellant was liable on the contracts. It was not said that the custom made the Appellant a party to the contracts. The custom so alleged was disputed by the Appellant in its affidavit in answer to the petition. So a distinct question as to the custom arose on the pleadings. It was therefore for the Respondent to have proved the custom. Far from doing that, no custom was at all relied on by counsel for the Respondent as making the Appellant a party to the contracts. It is impossible in these circumstances to hold that by custom the Appellant became a party to the contracts. If the custom had been proved the further question as to whether the custom attached to the contract of employment as broker as was held in the case from Ceylon already referred to, or to the contract (if any) which the Appellant as broker made for an undisclosed principal, would have fallen to be decided.

72. Very early in this judgment I have noticed that the Appellant contended that this is not in any event a case in which it made any contract for an undisclosed principal for its case is that at all material times the Respondent was aware that the Appellants principals were Gewarchand Danchand. The Respondent denies any such knowledge. I mention this aspect of the matter only to say that it is not necessary to go into the question. If the principals were not disclosed the Appellant would be liable but not otherwise. Now this question of liability is not for us but for the arbitrators. All that we have to find is whether the Appellant was a party to the contracts. If it was not a party no other question arises for according to the direction

of the Supreme Court, the suit must then go on. If it was a party then only can the question of its liability arise and as I have said, that will be a question for the arbitrators to decide.

73. I have therefore come to the conclusion that the Appellant was'' not a party to the arbitration agreements. The appeal will therefore be allowed and the application for stay of the suit dismissed. The Appellant will get the costs of the present hearing before us. Certified for two counsels.