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Moran and Company Ltd. Vs Anderson Wright Ltd.

Appeal from Original Order No. 19 of 1952

Court: Calcutta High Court

Date of Decision: Jan. 15, 1957

Acts Referred:

Arbitration Act, 1940 â€" 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

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. I earned

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.