(1924) 03 CAL CK 0013

Calcutta High Court

Case No: None

Mcleod and Company		APPELLANT
	Vs	
Ivan Jones and Company		RESPONDENT

Date of Decision: March 29, 1924

Citation: AIR 1926 Cal 189

Hon'ble Judges: Page, J

Bench: Single Bench

Judgement

Page, J.

This is a suit brought to recover damages for the breach of a contract to take delivery of and to pay for 4 Westcott cars, 12 Lexington cars and TO Nash cars sold by the plaintiffs to the defendants. In his opening address counsel for the plaintiffs stated that the plaintiffs'' relationship to the defendants in respect of the sale of these cars was partly that of agent to the principal and partly that of vendor to vendee. At the trial he applied for leave to amend the plaint by adding a claim in the alternative for an indemnity as agents, but I refused the application because in my opinion there was no reasonable ground for permitting an amendment of the claim at so late a stage in the proceedings, and also because, if the amendment were to be allowed, a new cause of action would be admitted which is now time barred. I do not wish it to be understood, however, that, in my opinion, the proposition which was propounded on behalf of the plaintiffs is one to which I should give my assent, No doubt circumstances may arise in which a person who enters into a contract of sale as agent, for example, as agent for an undisclosed principal, may be deemed to be either a principal or an agent vis a vis the other party to the contract of sale; but in the eye of the law, in my opinion, he cannot be regarded as filling at the same time both capacities. In effecting the contract of sale, he must needs have acted either as a principal or as an agent. Now the legal position of a commission agent Who sells or purchases goods for a foreign principal is well-known, and has been frequently defined. It may be that the agreement between a commission agent and the party for whom he is acting may, at the outset, be that between a principal and

his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. It has also been held that such a broker may possess a right in certain circumstances to stop the goods in transit. But in my opinion, after the contract of purchase has been effected, the relationship of the parties quoad the contract of sale ceases to be that of the principal and agent, and ripens into that of vendor and purchaser; though it may be necessary to refer to some other agreement; for example the prior agreement of agency in order to ascertain the terms and conditions of the contract of sale. If the law were to be otherwise, the result would be that, in so far as the agent was acting as vendor, he would be under no obligation to account to the other party to the contract in respect of any profit which he might have made through buying or selling the goods in question to that other party. On the other hand, in so far as he was acting as the agent of the principal he would be liable to account to his principal in respect of any profit in excess of the agreement commission which he might have made out of the transaction. Where goods are sold through A, A must either sell on his own account as principal or, as an agent for B and must create privity of contract between B and a third party: see Feise v. Wray [1802] 3 East 93; Ireland v. Livingstone [1872] 5 H.L. 395; Robinson v. Mollett [1875] 7 H.L. 802; Cassaboglon v. Gibbs [1883] 11 Q.B.D. 797; Ex parte Miles, In re Isaacs [1885] 15 Q.B.D. 39; and Paul Beier v. Chotalal Javerdas [1906] 30 Bom. 1. It is not uninteresting to observe that Lord Blackburn in his Book on Contracts of Sale, 3rd Edition, p. 352) states the position of a commission agent acting for a foreign principal to be as follows:

2. It seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name and on his own credit, it is rather too qualified a phrase to say merely, that he stands in the position of a seller quoad the consignee; if he is not a seller it is difficult to say who is, as there would be much difficulty in establishing any privity of contract between the foreign correspondent and the original seller. But there is very gradual progression through these cases in which the original seller has a right to elect between the liability of a factor and the consignee as principals up to those cases in which the factor, if liable, at all, is liable merely as a surety, and there may be consequently difficulty at times, in determining whether an agent can be said to be in the position of seller so as to give him the right to stop the goods in transit on his own account or not:" See further on this subject Siffken v. Wray [1805] 6 East 371.

3. As I have stated, it may he difficult to ascertain whether in any particular case the relationship between the parties is that of principal and agent or of vendor and vendee, but inevitably, in my opinion, it must be either the one or the other. I was referred to certain passages in the judgment of Mr. Justice Blackburn, as he then was, in Ireland v. Livingstone [1872] 5 H.L. 395, but, in my opinion, these passages when submitted to analysis, do not support the proposition that an agent can enter into a contract of sale or purchase for or with a foreign principal without creating the relationship of vendor and purchaser between the parties to the contract. In

Robinson v. Mollett [1875] 7 H.L. 802, Mr. Justice Blackburn, in impressing an opinion contrary to that of Mr. Justice Brett, a great master of Commercial Law, and other learned Judges appeared to think that an agent might purchase goods for his principal without himself being the vendor or creating privity of contract between his principal and a third person; but the opinion which that very learned Judge then expressed was dissented from, and, if I may venture to say so, rightly deprecated by other learned Judges and was treated as erroneous by the House of Lords. In this case, however, I will not yield to the temptation to discuss this question further because in my opinion it is clear that in relation to the sate of the motor cars in question in this case the allegation of the plaintiffs as set out in the plaint, that they were acting as principal is the correct inference to be drawn from the facts. It will be enough to say in respect of the cars which were sold by Nash to the plaintiffs and re-sold by them to the defendants that McLeod & Co., had contracted with Nash to take consignments of these cars before they had come into any contractual relationship whatever with the defendants; and I have no doubt that in effecting the contract of sale of these cars to the defendants the plaintiffs acted as principals, and not as agents. (His Lordship stated that the plaintiffs had given up their claim as regards the four Westcott cars after disposing of, the on evidence, plaintiff''s claim with regard to the 12 Lexington cars and 25 of the 70 Nash cars, and having discussed the evidence relating to the remaining cars, proceeded as follows) In so far as this is a claim for goods sold and delivered the onus is upon the plaintiffs to satisfy me that the goods tendered were goods which correspond with the description provided in the contract, and they have not done so. On the other hand, although, in my opinion, the plaint is not aptly drawn to raise this issue, I propose to consider one further matter, and it is a very important one, namely, that in respect of these 45 cars two drafts were accepted by the defendants, and having regard to the principles of law applicable to this matter and the observations of Baron Parke in Stephens v. Wilkinson [1831] B 2. and Ad. 320 and the case of Biddell Brothers v. Clemens Hoist Co. [1911] 1 K.B. 214 the purchaser of goods who has accepted a bill against documents is, in my opinion, under an obligation as the acceptor of a negotiable instrument to pay for the value of the instrument, according to its tenor, notwithstanding that at the time when the bill is duly presented for payment the goods may not have arrived at the place where they are to be delivered, and therefore, the purchaser had had no opportunity, before payment, of examining the goods. In my opinion, the position in law of such a purchaser is this: that although he is bound to honour the bill according to its tenor, the payment of the bill will not in any way prejudice his right subsequently to reject the goods if he is en-titled to do so under the contract after examination. But in a suit to recover the amount of the bill the onus is upon the defendant to prove that no consideration passed to him which would sanction the obligation under which he came through accepting the bill. Therefore, on the assumption that the plaintiffs are entitled in this suit as framed to sue upon the bills (though in my opinion, they are not so entitled) the onus is upon the defendants to satisfy me that there was a total failure of

consideration for their acceptance and payment of the bills, or in other words, they have to satisfy me that the goods as tendered were not in accordance with the contract. (His Lordship then discussed evidence, and proceeded). Under the circumstances I come to the conclusion and for the purpose of this case it must be taken that these 46 cars, which were tendered in partial fulfillment of the contract did not conform to the description provided in the contract, and, therefore, even if the suit may be regarded as a suit on the bills of that, the defendants have satisfied me that there was a total failure of consideration. That disposes of the case in respect of all the cars which were in question and, in my opinion, the plaintiffs have failed to make out their claim, and the suit must be dismissed with costs on Scale No. 2.