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**(1919) 02 CAL CK 0031**

**Calcutta High Court**

**Case No:** None

Ramendra Nath Roy

APPELLANT

Vs

Brajendra Nath Dass and Others

RESPONDENT

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**Date of Decision:** Feb. 10, 1919

**Acts Referred:**

- Contract Act, 1872 - Section 99

**Citation:** 53 Ind. Cas. 986

**Hon'ble Judges:** Lancelot Sanderson, C.J; John Woodroffe, J

**Bench:** Division Bench

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### **Judgement**

Sanderson, C.J.

I have read the judgment of my learned brother with which I agree and I have little to add.

2. In my judgment the plaintiff was not a mere broker in the transaction in question.
3. The learned Judge who tried the case referred to a usage as being so well known that the Courts might almost take judicial notice of it; and further said it was admitted by both sides, but he did not find exactly what the usage is.
4. I think, however, that the real position of the plaintiff was that he was acting as a broker and paid by brokerage, but liable to both the seller and the purchaser as on a "principal" contract, and that, consequently, the plaintiff had a corresponding right to enforce the contract and was entitled to sue in respect thereof.
5. The learned Counsel for Messrs. Cartwright and Co. contended that this right to enforce the contract would not include the right of stoppage in transit, as that right belongs to an unpaid vendor only u/s 99 of the Contrast Act of 1872. In my judgment, having regard to the facts of this case, and especially the fact that the plaintiff was personally liable to his sellers for the price of the goods, he was really in the position of an unpaid vendor, and that he had the right of stoppage conferred

by the above-mentioned section.

6. In my judgment, there is no doubt the plaintiff appropriated the goods, represented by the documents which he handed to B. N. Dass, to the contract. On the 29th December 1913, when the plaintiff handed the documents to B. N. Dass he did so with the intention that B. N. Dass should deal with the goods, and, judging from the letter of the 28th December 1913, it must have been obvious that B. N. Dass was going to deal with the goods immediately. B. N. Dass did in fact deal with the goods on the 30th December 1913.

7. B. N. Dass assented to the appropriation by accepting the documents and dealing with and handing them to Messrs. Cartwright and Co. The alteration by B. N. Dass of the words "for payment" into "for examination" in the two receipts, dated the 29th December 1913, handed to him by the plaintiff and his letter of the 29th December 1913 to the plaintiff as to certain jute being booked "at owner's risk" were, in my judgment, merely for the purpose of gaining some time.

8. The fact that the plaintiff was paid by B. N. Dass Rs. 25,000 on the 3rd January 1914, on account, which was nearly half the total sum due in respect of all the goods, is material on the question of appropriation and assent thereto, and in my judgment there is no doubt that there was appropriation to the contract of the goods in question on the part of the plaintiff and assent on the part of B. N. Dass.

9. As to the question whether the appropriation was conditional upon B. N. Dass' promise to pay the price of the goods, I need add nothing to what my learned brother has said. But even assuming for the moment that the appropriation was conditional and was voidable by reason of the unfulfilled promise to pay, as urged on behalf of the plaintiff, he would have to prove that the circumstances under which B. N. Dass obtained possession of the documents, amounted to an offence on his part: Section 108, Exception (3).

10. The plaintiff must prove the offence and show that B. N. Dass had a criminal intent at the time he made the alleged promise of payment, and, in my judgment, the plaintiff has not discharged the onus which lies upon him in that respect.

11. I do not think it has been established that the plaintiff received the cheque for Rs. 25,000 on the 30th December 1913, and that it was post-dated the 3rd January 1914. There is, however, no doubt that the cheque was cashed on the 5th January 1914 in due course, and the payment of this large sum is a material fact in considering whether B. N. Dass was actuated by a criminal intent when he received the documents from the plaintiff.

12. There is a further difficulty in the way of the plaintiff, inasmuch as he seems by his evidence to have accepted the position of the sale by Dass to Cartwright and by Cartwright to the Mills, and his Solicitor's letters of the 10th January 1914 to Messrs. Cartwright and Co. and to B. N. Dass seem to me to be inconsistent with the position

that the plaintiff was exercising his alleged right to avoid the contract.

13. As regards the transactions between B. N. Dass and Cartwright, the learned Judge thought that H. C. Guha was probably acting in collusion with B. N. Dass but he was not satisfied that H. C. Guha was a party to any fraud by B. N. Dass upon the plaintiff.

14. If there was collusion between H. C. Guha and B. N. Dass, in my judgment, it was for the purpose of passing off the goods, represented by the documents, in performance of contracts with the Mills which had already been fulfilled, or for which the goods were not suitable, and thereby loss was caused to Messrs. Cartwright and Co., but I am by no means satisfied that H. C. Guha was in any way a party to the alleged fraud on the part of B. N. Dass upon the plaintiff.

15. In this Court the alleged right to stop in transit was insisted upon with respect to the goods included in bills of lading 13, 20, 29, 32 and railway receipt No. 9 only.

16. As regards railway receipt No. 9. The consignees in the railway receipt were the Lansdowne Jute Mills Co., and the evidence of Mr. Robertson, who was in Bird and Co. and who was appointed Receiver by the Court, was to the effect that the Lansdowne Mills got delivery of the goods on the 2nd January 1914, and the notice of stoppage in transit was not given until the 10th January 1914, so that it appears that in the case of these goods the transit was at an end before the notice of stoppage was given.

17. As regards the four bills of lading, I have already held that the plaintiff's position was such as entitled him as unpaid vendor to stop the goods in transit, and I think that the evidence shows that on the 10th January 1914 B. N. Dass was insolvent. The question arises whether the right of stoppage ceased by reason of the buyer, B. N. Dass, having obtained the bills of lading and having assigned them to a second buyer who was acting in good faith and who gave valuable consideration for them u/s 102 of the Contract Act.

18. The point which was strenuously argued on behalf of the plaintiff was that B. N. Dass, the buyer, had not "assigned" the bills of lading within the meaning of Section 102. On this part of the case no point was raised as regards the facts relating to the disposal of the goods, as found in the learned Judge's judgment, except as to the use of the word "excess" which, it was said, was not a correct way of describing the delivery; but this does not affect the question now under consideration, and I agree with the finding that there was no want of good faith either on the part of Cartwrights or on the part of the Mills and that valuable consideration was given. Reference was made to Section 101 and it was then contended that in order to come within Section 102, the first buyer must be the consignee named in the bill of lading, and that as the bills of lading in this case were made out in the names of the Mills or their Manager or Agents, and as B. N. Dass merely handed the documents to Cartwrights to fulfil supposed running contracts with the Mills, there was no

assignment within the meaning of the section.

19. It was contended that the only way in which the plaintiff's right to stop in transit could be defeated was by an "assignment," which meant an endorsement by the person in whose name the bills of lading were out and who was entitled to the control of the goods. It was urged that B. N. Dass was not entitled to the control of the goods, as the bills of lading were in the names of the ultimate buyers, viz., the Mills; that B. N. Dass could not assign by merely handing the bills of lading to the Mills or to Cartwrights on behalf of the Mills. It was admitted that if the bills of lading had been made out in the name of B. N. Dass and he had endorsed them to the Mills or to Cartwrights on behalf of the Mills, the plaintiff's right to stop in transit would have been at an end; but it was urged that as the bills of lading in this case were made out in the name of the Mills the right of stoppage in transit was not defeated, even though the handing over of the bills of lading by B. N. Dass to Cartwrights on behalf of the Mills would pass the property and though the result as regards the passing of the property would be the same as if the bills had been in B. N. Dass' name and he had endorsed them.

20. The bills of lading were made out in the name of the Mills at the request of B. N. Dass and on the facts of the case it must be taken, in my judgment, that the plaintiff handed over the bills of lading to B. N. Dass with the intention that he should sell and deliver the goods to the Mills, and all that was necessary for completing the delivery would be the handing over of the bills of lading to the Mills.

21. In my judgment, if we were to adopt the plaintiff's contention, we should be putting too narrow a construction upon the section, and under the circumstances of this case, the delivery of the bills of lading to Messrs. Cartwrights and Co. amounted to an assignment of the bills of lading within the meaning of the section.

22. For the above reasons, I agree that the appeal should be dismissed with costs.

Woodroffe, J.

23. The plaintiff is the son of a wealthy father, which seems to have been his misfortune, for it enabled him to start business as a broker before he had acquired the necessary experience. He made one venture by way of the transaction in suit and we are told that, owing to its unhappy results, it will be the last. He says he sold goods to a man named B. N. Dass. He then entrusted to the latter the documents of title before getting payment. Dass made them over to a third party (Messrs. Cartwright say they took them in good faith in supposed discharge of running contracts with the defendant Mills) and got the value of the goods. Fortunately for the plaintiff, the sum of Rs. 25,000, which represents nearly half the value of the goods, was paid by B. N. Dass. He then, however, went insolvent and the plaintiff now wants to remedy the position brought about by his imprudence in making over documents of title to goods without getting payment and in thus enabling the defendant B. N. Dass to deal, as regards the goods, with third parties. By this suit he

is seeking to make up for the loss which he has suffered through his own act.

24. A large number of questions have been argued, but substantially the case turns upon the question whether the documents were procured from the plaintiff by the fraud of B. N. Dass and whether the plaintiff has successfully protected himself from his act in handing over the documents by the exercise of a right of stoppage in transit.

25. A preliminary question arises as to the title on which the plaintiff sues. His Counsel contends that he was a principal in the contract with B. N. Dass and this seems to be the basis on which the plaint is drawn. The respondents who appear (that is the defendants other than B. N. Dass, who seems to have disappeared) contend that the plaintiff was a mere broker. The learned Judge has found that the contract was a principal contract; that is according to an usage, which he holds was both admitted and proved, a broker in a contract for an undisclosed principal is liable upon and may sue on the contract. Though a broker, he has thus, it is said, the liabilities and rights of a principal. The documents and facts are not free from confusion. But on the issues and findings, I have no difficulty in arriving at a conclusion on this point. If the plaintiff was a mere broker he cannot sue or be sued and the suit should have been dismissed on that ground. But there is no issue which in my opinion directly and necessarily raises this point, as regards which something may have been said during the trial. The learned Judge has held that the usage mentioned was admitted by both sides. The assumption of such an usage is not relevant if the plaintiff was a mere broker. Upon these considerations and facts of the case, I hold that the plaintiff was neither a mere broker nor a principal as contended for by the respondents and appellant respectively, but was a broker liable upon what is called a principal contract. I should here say that Mr. S. B. Das, who argued the case for the appellant, did so on the alternative assumption that he was either principal or a broker liable on a principal contract, and claimed that he was entitled to a decree on either assumption. Whether, however, he was one or the other has a bearing upon two questions in this suit, namely, the time when, and the person by whom, appropriation of goods to the contract was made and the question whether a broker liable upon a principal contract is entitled to exercise the rights of a vendor against goods in transit.

26. Then as to the question of appropriation, Did the property in the goods pass P This depends on whether there was an appropriation by one party, assented to by the other, through which the agreement or contract became executed. In my opinion the plaintiff could and did appropriate. There is, it is to be observed, no question of any other goods. The only goods which the plaintiff at any time sold were these goods. These had been selected, shipped and railed and consigned to the Mills to which B. N. Dass asked that they might be sent. The plaintiff's case is that he had purchased these goods from the upcountry sellers for the express purpose of fulfilling the contract with B. N. Dass. The latter had asked that these

goods should be consigned to the Mills. On the 29th December the documents of title were made over to the defendant B. N. Dass and were accepted and dealt with by him. There is no doubt that (apart from the question of a condition) the property in the goods passed at least on the 29th December. If the property in the goods passed, we are not concerned with the provisions of Exception (1) of Section 108 of the Contract Act.

27. The real question in this suit is, therefore, whether the appropriation by the plaintiff was conditional, namely, on a promise of payment as alleged in the plaint. If so and the condition was not fulfilled, there was no passing of the goods and the question of the applicability of Exception (1) above stated would have to be considered.

28. It is further contended that even if the property in the goods passed, it did so under a voidable contract procured by an offence and, therefore, the plaintiff is entitled to succeed under the provision? of Exception (3) of Section 108 of the Contract Act. It is not alleged that the contract originally entered into was voidable, but that there was an agreement by way of conditional appropriation which was voidable and that the circumstances which rendered the contract voidable amounted to an offence. The question under this Section is whether the alleged agreement was voidable as procured by an offence. It is denied that there was an offence; and it is further said that the alleged voidable contract was upon the evidence (namely, the plaintiff's Attorney's entries and letters) treated as subsisting. It is not necessary to enquire into this, if in fact no fraud has been established. In fact this case principally turns on the question whether there was a fraudulent offence by B.N. Dass and whether the plaintiff was entitled to exercise, and did effectually exercise, a vendor's right of stoppage in transit. I will deal with the former first.

29. The offence charged is cheating, namely, that the defendant B. N. Dass made a false representation that he was in a position to pay and would pay, but he was not in such a position and never intended to pay. There was, it is said, a mere fraudulent pretence to get hold of the goods without paying for them. Now, in the first place, it is to be noted, as affecting the whole of this part of the case, that the proof of what passed between the plaintiff and B. N. Dass on the 29th, when the alleged offence was committed, depends on the evidence of the plaintiff, and if this is not accepted, the case as to a fraudulent offence is not made out. But even if the account of what occurred on the 29th December is accepted, it becomes still necessary to enquire whether the facts proved show a criminal offence. It is, of course, possible that the defendant made a promise which was unfulfilled, and yet was not guilty of an offence. The learned Judge who tried the case has expressed himself as unable to accept the story which the plaintiff has told, considering it to be in several particulars at variance with contemporaneous documents. On the whole I see no sufficient reason to come to any other conclusion on grounds some of which I will mention. The evidence shows that the plaintiff was without the necessary business

experience. After his return from England, where he was sent for a business training, without learning overmuch, he met the defendant B. N. Dass who, he said, had the general reputation of being honest and a gentleman. He says (and it is clear) that he trusted him. This venture in suit was his first and last. He says that his own sellers (who sold him goods to meet Dass' contract) gave him credit. In fact the bills of lading and railway receipts were made over to the plaintiff by his sellers without any payment whatever. Further, according to the plaintiff, there was an arrangement with his sellers on the evening of the 29th, according to which the plaintiff was to re-pay them gradually. This, it is contended, so far from supporting a case of promise of immediate payment, rather points to the conclusion that he was giving the same credit as he had asked for and obtained. At any rate it is urged that there was no special reason why the plaintiff should press for immediate payment. On the previous day B. N. Dass wrote to the plaintiff as follows:

Calcutta, 28th December 1913.

Dear Mr. Roy, Herewith I am sending you three contract receipts. For God's sake kindly let me have the documents you have already got. You know fully that I want the documents not later than to-morrow morning, but if I get them today I might make out the Bill, etc., to-day or I shall be in terrible fix. If you so kindly send them to-morrow morning. Kindly treat this letter both urgent and important.

Yours sincerely

To

R.N. Roy.

B.N. Dass.

30. This letter must have indicated to the plaintiff that he wanted the documents to raise money from his buyer. On the evening of the 29th, the plaintiff took two receipts for the bills of lading there mentioned, in one of which the jute is treated as delivered. When these receipts were tendered no demand seems to have been made for the money which, it is said, was to have been paid at 10 a. m. According to the plaintiff's evidence, B. N. Dass had to "sign or pay." Nothing is done until the 3rd January when a sum of Rs. 25,000, which is nearly half the value of the goods, was paid. This is an important circumstance to be considered in adjudging the question whether the man, who paid this sum on the third January, had some five days previously a criminal intention not to pay, though professing his readiness to do so to get hold of the documents. The suggestion of learned Counsel for the appellant that this was a kind of "blind" does not easily establish itself. Although Exhibit N (letter by the plaintiff's Attorneys) does allege that the bills of lading were obtained by fraudulent misrepresentation, nothing is said in this letter nor in Exhibit 33-A (an entry of the Attorneys' dated the 9th January) as to the voidability of the contract. In fact in his evidence the plaintiff says "yes", in answer to the question: "Then you accepted the position of the sale by Dass to Cartwright and to the Mills?" The Attorney's entry of the 10th January notes that Dass and Co. were called upon for

payment of the balance of the amount due on a contract now said to be voidable. Similarly, on the 10th January 1914 the Attorneys wrote to B. N. Dass and Co., calling upon them to make immediate payment of the balance due to the plaintiff. Though some statements in Mr. Edward's letters are incorrect, I see no sufficient grounds for upholding the learned Judge's comments as regards his evidence, nor have the respondents relied on these. On the whole I am of opinion that no sufficient ground has been made out for coming to a different conclusion from that at which the learned Judge has arrived, on the question whether the documents were made over to Dass, under the circumstances alleged by the plaintiff. It is not necessary to hold, and I do not hold, that the plaintiff has said what he knows to be untrue on this matter. It is sufficient to say that the evidence of the plaintiff only is under the circumstances not enough. But even if it were enough to establish that there was an appropriation and handing over of the documents on a promise of payment, it would still have to be shown for the purposes of Exception (3) of Section 103, Contract Act, that the facts alleged amounted to an offence. No doubt there are some unfavourable circumstances, such as the general financial position of Dass, and the dishonouring of his cheques on the 9th January, and his insolvent condition from that date. But it is difficult to hold that it has been established that Dass had a criminal intent when he made the alleged promise of payment to the plaintiff, seeing that he paid shortly thereafter the large sum of Rs. 25,000, or nearly half the price of the goods which he is said to have swindled out of the plaintiff. I hold that the alleged offence has not been made out.

31. The last issue is as to the alleged right of stoppage in transit. As regards some goods, the right cannot admittedly be claimed. The claim is made as regards bills of lading Nos. 13, 20, 32, 29 and railway receipt No. 9. As regards this last Mr. Robertson says "that although the Mills bought from him as Receiver on the 6th March, the Mills actually got delivery on the 2nd January and it is thus submitted that as regards these goods the transit was at an end. As the learned Judge has held, Section 102 of the Contract Act applies. The argument of the respondent has been that the stop\* page in transit Section does not apply, for it is said that the plaintiff was not a seller, but at the most a broker personally liable and with personal right of suit under the usage relating to what are called "principal contracts." The oases, however, establish that a liberal meaning should be given to the term "vendor", which includes any person standing in the position of a vendor. The plaintiff paid a portion of the money he owed his sellers before the notice of stoppage was given and was liable in respect of the whole, I am of opinion, therefore, that a broker liable on a principal contract has authority to stop goods in transit.

32. If this were not so, a broker might be made liable and would yet be shorn of a right essential for his protection against a defaulting buyer. Assuming this, however, in the appellant's favour, the question is whether the right of stoppage did not cease under the provisions of Section 102 of the Contract Act, It is said that the



buyer did not "assign" the bill of lading within the meaning of (this Section and that assignment does not mean merely "handing over." It is the fact that the documents were not endorsed. Neither, however, Dass nor Roy could endorse them. The documents, however, were such that the Mills, being consignees, were entitled to take delivery without further endorsement. The documents other than No. 9 were in fact made over to the Mills before the date of the notice of stoppage in transit and were handed over to them in pursuance of a supposed running contract. They were not at first accepted by Messrs. Birkmyre and Co., who, however, entered into a new contract, as regards the goods on a date also before the above-mentioned date. Unless we take a very narrow and technical view, all that was necessary in the present case was the transfer, in the sense of handing over these documents, though it is conceded that if the documents had been made over to some person other than the consignee on the bills, the case might have been otherwise. It was further contended for the respondent that the plaintiff was estopped from denying that Dass had no right to deal with the bills of lading. It is not necessary to discuss that as, in my opinion, the plaintiff has not established his right of stoppage in transit. The appeal, therefore, fails on all the grounds taken and should, in my opinion, be dismissed with costs.