
(1870) 03 CAL CK 0011

Calcutta High Court

Case No: None

Stewart and Others

APPELLANT

Vs

The Scinde, Punjab
and Delhi Railway
Company

RESPONDENT

Date of Decision: March 11, 1870

Judgement

Norman, Officiating C.J.

1. Now it appears to me to be admitted, by the form which these proceedings have taken, indeed by the questions put to Mr. Stewart, that Colonel Elphinstone was the Agent of the Company; and I think that, for the purposes of this case, I must assume that he was such an agent as could have been appointed by the Company under the 54th section of the Act of 1857. The case is remarkably bare of any evidence to show what was the authority actually possessed by Colonel Elphinstone. The plaintiffs had full notice by the written statement of the defendants that the authority of Colonel Elphinstone to enter into this contract was not admitted. In the 4th paragraph of the defendants' written statement this passage occurs: "Even if the alleged order be genuine, and assuming that Colonel Elphinstone had the power to bind the defendants, which is not admitted," that is to say, to the proof of which we put the plaintiffs. The defendants, therefore, distinctly gave notice by their written statement that they did not admit the authority of Colonel Elphinstone to make the contract now in dispute. If any doubt remained on the minds of the plaintiffs, whether the defendants intended at that time to deny Colonel Elphinstone's authority, it is plain that that doubt must have been removed, at or before the time when the plaintiff, Randolph Stewart, was examined in London. In answer to questions put to him by his own counsel, he says "Colonel Elphinstone signs as agent of the Company. He was the agent in India. There is no superior officer to him in India. I know the general idea there is, that he represents the Board. Mr. Andrew (who was Chairman of the Board of Directors of the Company) and I have had a conversation since, and he told me Colonel Elphinstone had no right to order these things." Now, in the ordinary course of the conduct of a case, if a person is suing a principal upon an order given by an agent, he is bound to show that

the agent had authority from the principal to give such order; but no evidence was given by the plaintiffs in this case as to the extent of Colonel Elphinstone's authority. On the other hand, it may be said that no evidence was given by the defendants showing what were the limits of Colonel Elphinstone's authority. No power of attorney to him from the Company; no instructions such as are contemplated by the Scinde Railway Company's Act have been given in evidence on the part of the defendants. I may, therefore, assume, that he was the agent of the Railway Company in India, an agent with powers as large as, in the ordinary course, could be conferred on him, under the 54th section of the Scinde Railway Company's Act of 1857.

2. The plaintiffs allege that the defendants through their agent, Colonel Elphinstone, contracted with the plaintiffs' firm in Calcutta for the supply by the plaintiffs of 60 sets of iron-work for low-sided railway waggons, the terms and conditions of which said contract are embodied in an order given by the said defendant Company, through their said agent, to the plaintiffs, in writing dated on or about the 10th January 1867, and which said order is in the words and figures following:

Punjab and Delhi Railway Company.

General Store Department.

Store Order No. 3.

Calcutta, January 10, 1866.

To Messrs. Walter Brothers.

"I have to request you to deliver, on account of this Company, at their Store Godown, Lahore, within--days, the following articles:" (There is then a description) "60 sets of iron-works for low-sided waggons," (and the rate is entered as) "Rs. 1,400 a set, exclusive of carriage from Calcutta." (It is stated that the waggons are required as) "Rolling stock, Punjab Railway." (Then follow the words,) "this order to be attached to the bill when submitted for payment."

(Sd.) N. Elphinstone, Agent.

3. Now if that document stood alone, we cannot but observe that it is certainly a most remarkable document. It would have been extraordinary that such an order should have been given by the agent of any Railway Company to any merchant. There is no description of the breadth of the gauge of the line on which the waggons are to be employed; no specification as to the length or height of the sides of the waggon; no specification of the weight which they were intended to be fitted to carry; no stipulation as to the quality of the iron-work, or as to the time at which the waggons were to be delivered; no security is taken from the plaintiffs for the performance of the contract. There are none of those stipulations, which, according to the ordinary course of

mercantile usages, one would expect to find in an order of this description, for the protection of the Scinde Railway Company. If this document stood alone, Mr. Stewart would not have known, I suppose, what sort of low-sided waggons were to be supplied.

4. But there comes another matter. In the 5th interrogatory, which was put to Mr. Stewart, he was asked "when, or about the time when the order was given, did you or your firm receive, and from whom, any other, and what paper, relating to the subject of the order? If you did, produce the paper, or state what has become of it"? To this his reply was "I received a specification which I produce, and which is now marked as exhibit No. 2." The specification is as follows:

Specification of Iron-work required for a Covered Goods Waggon for a Railway of 5-6 gauge.

Dimensions of Waggon--

16 ft. 8 in. long, out side body,

8 ft. 4 in. broad, out side body.

11 ft. 6 in. extreme height from rail.

5. Then there is a detailed specification of the iron-work for wheels, springs, scrolls, links, buffers, horse-plates, axle-boxes, break-work, roofing hinges, strong iron knees, iron roof sticks, and of the weight which the iron-work complete for each carriage was not to exceed.

6. If that specification had been a specification with reference to which the contract was made, the same description of goods, covered waggons and not low-sided waggons, would have been mentioned in the order. But either that specification relates to the order or not. If it relates to the order, it is clear that the action must fail on a ground which has not been argued before us, because the order is inconsistent with the specification, and it is, therefore, impossible to say what the contract really was. It is perfectly uncertain: the order is for low-sided waggons, and the plaintiffs have brought this suit upon a supposed contract for delivery by them of low-sided waggons. But the specification mentions covered waggons, and that Mr. Stewart understood it to be an order for covered waggons is plain from the evidence of the Engineer. Mr. Shanks was called as a witness by the plaintiffs. He says, "I am a Civil Engineer. I have been employed on railways; I went with an order to inspect iron for low-sided waggons at the Bonded Warehouse, about a month ago; there were sufficient wheels for 60 sets, there seemed to be iron for 60 sets of waggons. I examined them with the specification. I had a copy of the specification with me. When I examined the goods, they corresponded, except the goods specified in 2 pairs. These goods form no part of low-sided waggons. The specification is for goods (covered) waggons. They are different as to ends, sides, and roofs; all the parts of low-sided waggons were there. There appeared to be 60 sets; they do correspond with

the specification."

7. So that what the plaintiffs supplied, or were ready to supply, was not low-sided waggons, which they now say is the contract, but covered waggons in accordance with the specification. If this point, which appears on the face of the case, had been taken, my own impression is strong that we should have been bound to say that there is no contract whatever. It is utterly uncertain what Colonel Elphinstone contracted for, and the plaintiffs themselves do not appear to have known what the contract was till they went to their lawyers.

8. If, however, the contract was for low-sided waggons, and the specification is no part of the contract, I should be strongly disposed to hold that the contract, on the very face of it, is not one made in the ordinary course of business; and, therefore, not one which Colonel Elphinstone, as agent of the Railway Company, had authority to enter into, or by which the plaintiffs could have supposed that Colonel Elphinstone had a right to bind the defendants. This point, however, has not been argued before us, and I therefore pass from it.

9. I will now say a word as to the form of the contract. One of the grounds on which the decision of Mr. Justice Phear went, was that this was a contract, by which the Company were not bound, because it was not a contract under seal. Mr. Graham contended that the 97th section of the Companies' Clauses Consolidation Act of 1845 is embodied in the Scinde Railway Company's Act of 1857; and that by the 54th section of the last mentioned Act, it is provided that the Company may delegate to their agent in India, all or any of the powers of the Company and of the Directors and officers thereof. He argued that the power of the Directors to make contracts in writing not under seal as specified by the second clause of the 97th section of the Companies' Clauses Consolidation Act, 1845, might be delegated to the agent in India; and therefore that, with respect to any contract which, if made between private persons, would be required by law to be in writing and signed by the parties to be charged therewith, the powers to make such contracts might lawfully be exercised by the agent in India, by making a contract in writing signed by him under his own hand.

10. By the Scinde, Punjab, and Delhi Railway Act, as already pointed out, the Company are empowered to delegate to any person appointed u/s 54 all or any of the powers of the Company and of the Directors and officers thereof. Now the contract under consideration is one which, if made between private persons, is required by the Statute of Frauds to be in writing, signed by the parties to be charged therewith. Under the 8 & 9 Vict., c. 16, sec. 97, it might clearly have been made in writing signed by a committee of Directors or any two of them. I think if Colonel Elphinstone was duly empowered u/s 54, and I shall assume that he was so, the contract might have been valid, if duly signed by Colonel Elphinstone as agent. I am, therefore, not prepared to say that the suit should be dismissed on the ground that the contract was not under the seal of the Company, or any seal in use in India, as provided by the 18th section of the Scinde Railway Company's

Act of 1857. On the contrary, so far as the want of seal is concerned, I think that, in point of form, the contract is good.

11. The real question in this case--and it is a very important one--is whether the contract is one by which Colonel Elphinstone, as agent appointed to act on behalf of the Company in India would have power to bind the Company, assuming that he had the greatest powers contemplated under the 54th section of the Scinde Railway Act of 1857.

12. In Story on Agency, section 21, it is pointed out that "general agents are to be carefully distinguished from universal agents; that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an universal agency may potentially exist, but it must be of the very rarest occurrence. And indeed, it is difficult to conceive of the existence of such an agency practically, inasmuch as it would be to make such an agent the complete master, not merely *dux facti* but *dominus rerum* the complete disposer of all the rights and property of the principal. It is very certain that the law will not, from any "general expressions however broad, infer the existence of any such unusual agency: but it will rather construe them as restrained to the principal business of the party in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, for example, if a merchant about to go abroad for any purposes should delegate to an agent his full and entire authority to sell any of his personal property, or to buy any property for him or on his account, or to make any contracts, and also to do any other acts whatsoever, which he could, if personally present; this general language would be construed to apply only to buying or selling connected with his ordinary business as a merchant; and would not, at least without some more specific designation, be construed to apply to a sale of his household furniture, or his library, or the common utensils, provisions, and other necessities used in his family. Much less would it be construed to authorize any contracts to be made, which would be of an extraordinary character." In the 62nd section of the same work, it is said language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and, therefore, it is to be construed and limited accordingly." An instance is given in the 67th section: "A power of attorney by a principal to another person for him, and on his behalf to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require; and generally to do, negotiate, and transact the affairs and business of him (the principal) during his absence, as fully and effectually as if he were present and acting therein, has been held not to authorize the agent to accept bills drawn on him upon account of a partnership, in which the principal, was a partner, but only to accept bills drawn on him upon his individual account. The language of the instrument conferred an authority to accept bills for the principal, and on his behalf. No such power requisite as to partnership transactions; for the other partners might bind the firm by their acceptance, and therefore the words of the instrument might well be confined to their obvious meaning, namely an authority to accept in those cases where it was right for the principal

to accept in his individual capacity." The 68th section goes on "indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect;" and in section 70 it is said that principles very similar may be traced back to the Roman law; for, in that law, where the authority was express or special, the agent was bound to act within it; and where it was of a more general nature, still the agent could not bind the principal beyond the manifest scope of the objects to be accomplished by it."

13. To apply those principles to the present case. u/s 54, the agent is to be an agent to act on behalf of the Company in India and elsewhere. Colonel Elphinstone is the agent of the Company in India. Can it be said that a power to enter into a contract for the supply of railway waggons to the value of Rs. 84,000, to be manufactured in England, was necessary for the purpose of enabling Colonel Elphinstone to act on behalf of the Company in India? Can it be supposed to be within the scope of the agency of a person whose principal is a Company having a Board of Directors?

14. Now I must state that this contract is not even shown to be a contract with a firm which was in the habit of dealing in ironwork. Mr. Stewart admits that this was the first contract he had in iron-work. He says, that Colonel Elphinstone knew that he could not execute the contract for the iron-work in Calcutta and that it was necessary for him to do it in England. He says Colonel Elphinstone told me he was very hard pressed to "get ironwork; that the Board could not supply it fast enough, and I think he asked me if I could get some, because he said they had notice from the contractors that the Delhi line would be open directly, and they had not sufficient rolling-stock for it; that he was afraid the Government would censure them for the matter, and perhaps take over the line from the Company." He says, "I told him I thought I was in a very good position to get it as expeditiously as possible, because the cousin of my father, who was a great personal friend of my father, as well as his cousin, was head of the great firm of Sharp, Stewart, and Co., the locomotive builders. Nothing more passed that I remember; he then gave me the order about that time. I left soon after. He was in Calcutta at the time of giving the order."

15. Therefore it appears that, at the time that the order was given, the Board of Directors in England were supplying iron-work for the purposes of the Railway. The plaintiff had distinct notice that Colonel Elphinstone was not contracting here for the ironwork, but that the Board were supplying it. He knew, therefore, that Colonel Elphinstone had not been acting as the agent of the Company, for the purpose of getting supplies of iron-work. Colonel Elphinstone knew also that the railway-waggon work mentioned in the contract was to be supplied, not from any stock in India, but that the contract was to be executed in England; and that it would have been easy for him to have written to his principal in England who might have entered into a contract for the supply of the iron-work with a firm or firms in England. It cannot, in my opinion, be said, that it was in any way necessary for the purpose of the authority given to Colonel Elphinstone as agent in India that he should

have power to enter into a contract for ironwork of great value to be manufactured in London. There is no reason for opining that the Directors either expressly or impliedly delegated to their agent in India a power to enter into a contract, which they could have made themselves without his intervention, and with advantages which he in India would not possess, the execution of which they might have superintended, and the performance of which they themselves might have watched and enforced.

16. Bearing in mind always that it is necessary for one who seeks to charge a principal upon a contract by an agent to show that the agent had authority to bind the principal by such contract, it appears to me that the plaintiffs have not made out a prima facie case of authority on the part of Colonel Elphinstone to enter into the contract for the supply of this large quantity of waggons to be manufactured in England; and for this reason it appears to me that the plaintiff's case has wholly failed. They have wholly failed to sustain the burden of proof that is thrown upon them of showing that the Scinde, Punjab, and Delhi Railway are bound by the contract of Colonel Elphinstone in this matter. On that ground, I think that the decision of Mr. Justice Phear dismissing the suit is correct, and the appeal, therefore, in my opinion, ought to be dismissed with costs to be taxed on scale No. 2.

¹ 20 & 21 Vict., c. 160.--"An Act for authorizing the Scinde Railway Company to extend their operations, and for regulating the capital of the Company, and for other purposes. [25th August 1857.]"

² 8 & 9 Vict., c. 16, section 97.--"The power which may be granted to any such committee to make contracts, as well as the power of the Directors to make contracts on behalf of the Company may lawfully be exercised as follows:--

Paragraph 2.--"With respect to any contract which if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the Company in writing signed by the committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same."

³ 8 & 9 Vict., c. 16, s. 97, paragraph 3.--"With respect to any contract which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the Company by parol only without writing, and may vary and discharge the same."