

(1917) 08 BOM CK 0007

Bombay High Court

Case No: None

Nensukhdas Shivnaraen

APPELLANT

Vs

Birdichand Anraj

RESPONDENT

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**Date of Decision:** Aug. 30, 1917**Acts Referred:**

- Contract Act, 1872 - Section 192, 238

**Citation:** AIR 1917 Bom 19 : 43 Ind. Cas. 699**Hon'ble Judges:** Basil Scott, C.J; Batchelor, J**Bench:** Division Bench

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**Judgement**

1. This is an appeal from a judgment of Beaman, J.
2. The following facts are undisputed.
3. The plaintiffs consigned 440 bales of Malkapur cotton from Malkapur to the defendants in Bombay for sale on commission, and the defendants advanced against the bales 80 to 85 per cent. of the then market value of the cotton. The railway receipts were handed to a firm of Muccadams, Damji Hirji and Co., who took delivery of the bales and stored them on their jetha at Colaba. Damji Hirji and Co. failed on the 30th of September 1913. At that date 300 of the plaintiffs' bales were accounted for by the defendants but the remaining 140 bales were missing and not accounted for. The defendants subsequently recovered 23 out of these 140 bales. The learned Judge finds, and it is not disputed, that Damji Hirji and Co.'s transactions were, towards the close of their business career, thoroughly fraudulent. The learned Judge remarks bales cannot be stolen and the only explanation given for the heavy loss of bales in Damji Hirji's charge is that he either with or without the connivance of his direct principal, the commission agent, sold a very large number of bales, falsified his accounts, and misappropriated the proceeds.

4. The only question in the case is, who their the defendants are liable to the plaintiffs for the acts and defaults of Damji Hirji and Co. ?

5. The learned Judge's summary of the evidence as to the relative rights and obligations of Muccadams and commission agents inter se has been accepted as correct It is as follows:

The business of a commission agent is virtually restricted to advancing up to the amount agreed upon the goods sent to Bombay and if he has no storage of his own employing a Muccadam upon the usual Muccadamage terms. It is the Muccadam who has the custody of the goods", who gives samples to intending purchasers, who concludes bargains and who finally weighs out and delivers the goods. When this is done he must send the weighment receipt direct to the commission agent. All goods sold in this manner are sold in the name of the commission agent and not of the owner. The commission agent on obtaining the weighment receipt calls for payment either the same or at the latest the following day. This money he credits against the advances, interest and so forth. He charges a very small amount, per cent. for commission and a very low interest on his advances, being somewhat under 6 per cent. per annum. It is his duty to apprise his up-country constituent of the fluctuations of the market and take his orders as to the minimum price at which he is content to have his goods sold. Finally, he has to make up the accounts. The Muccadam's liabilities are much larger, inasmuch as he has the custody of the goods and, as I have mentioned, has to look to all practical details as to their disposal. His bills for 8 annas per bale and other minor items of cartage are paid in the first instance by the commission agent and these are in turn charged to the up-country owner.

6. At the trial the plaintiffs' original contention was that the defendants as commission agents were insurers and they tried, unsuccessfully, to establish a custom to that effect. The defendants on the other hand contended that the plaintiffs were responsible for the defaults of the Muccadams as the custodians appointed by agreement with the defendants. The learned Judge held on the evidence that no such agreement was established and that the Muccadams were appointed by the defendants with the knowledge and approval of the plaintiffs.

7. The defendants further contended that they had discharged their duty as bailees having taken as much care of the goods as a prudent owner would. The plaintiffs attempted to negative this contention by evidence that at least 100 of the remaining 140 bales had in fact been sold and their proceeds received. As, however, this involved a charge of fraud against the defendants, and the plaintiffs had already expressly abandoned any such charge, the learned Judge refused to entertain the contention. The same evidence was, however, relied upon at a later stage to support a contention that the defendants had negligently permitted a sale by Damji Hirji "to Volkart Bros, of the 140 bales, the price being received by Damji Hirji through the neglect of the defendants. The learned Judge held that it was not proved that there

had been a sale of the plaintiffs' goods by Damji Hirji to Volkart Bros.

8. It has, we think, been satisfactorily demonstrated that the sale to Volkart Bros, of 155 bales was of bales held by the defendants at Damji Hirji's jetha for Baradin Bamruttan and not for the plaintiffs. That sale was, according to Darasha, negotiated on the 6th September. That the sale was on account of Bamdin is shown by Damji Hirji's book (Exhibit 33). The bales sold to Volkart were weighed out on the 9th September and were almost entirely paid for by Volkart Bros, on the 13th September (Exhibit E). The plaintiffs, however, only wrote instructions to their man in Bombay on the 8th September to get their remaining 140 bales sold at a prostable rate (Exhibit 1) approving of a sale at Rs. 255. The previous limit of price had been 260/65 (Exhibit G). Those instructions would not arrive in Bombay till the 9th. There is, therefore, no reason for supposing that their 140 bales were included in the bales weighed out for Volkart Bros, on that day. On the contrary the plaintiffs' Bombay man wrote to the plaintiffs on the 24th September that the 140 bales had not then been weighed out (Exhibit 11).

9. There is, however, evidence that the plaintiffs' bales had been sold or at all events that those on the spot believed that a bargain or bargains for their sale had been closed by Damji Hirji and Co. The plaintiffs writing to the defendants on the 8th September (Exhibit C) state that they had that day written to their man to sell the remaining 140 bales, which must have been sold, at a profit. The plaintiffs' Bombay man writing on the 9th September stated that the defendants' man told him 140 bales had been sold at Rs. 255 (see Exhibit K) On the 17th September, the plaintiffs wrote to defendants: "All our bales have according to two telegrams from our Bombay shop been sold through your commission agency." This was never contradicted by the defendants.

10. The letters above referred to are consistent with the evidence of the plaintiffs' Bombay servant, Laxmandas, that Rambus the defendants' man, told him that the remaining 140 bales had been sold. This witness also deposes that he gave Damji Hirji and Co. instructions for storing his master's bales, namely, that they should be kept separate and stored apart from the bales of others. He says he sometimes visited to see that they were stored separately. It is, therefore, improbable, though in the monsoon they would be removed to a godown from open jetha, that Damji Hirji and Co. had made away with the plaintiffs' bales before the 9th September, as Laxman-das would probably have noticed their absence at that time when he was full of care for the sale and weighing out of the bales. He then appears to have left Bombay and his place was taken by Harakchand. It would appear from Exhibit 11 that the plaintiffs' Bombay representative, as late as the 24th September, believed that the 140 bales were still in the godown of Damji Hirji and Co. ready to be weighed.

11. It seems certain, however, that they were no longer there on the 30th September.

12. Before discussing the law applicable to the conclusions above stated, it is necessary to find upon the important question whether Damji Hirji and Co. were appointed Muccadams by or by agreement with the plaintiffs. The defendants' witness, Laxmandas Harakchand, Secretary of the Marwari Chamber of Commerce, states that the Muccadam is chosen by the commission agent but sometimes the owners ask that a particular Muccadam be employed, but if the commission agent does not approve he need not employ that Muccadam. In view of this practice it would not be safe to infer from the letter of the plaintiffs' Bombay man of the 11th February (Exhibit A), stating in connection with the terms offered by the defendants for doing business for the plaintiffs, that Muccadami would remain with Damji Hirji and Co., anything more than an intimation of a decision which the defendants thought would please the plaintiffs and perhaps influence them in accepting the terms offered. The acceptance of these terms by the plaintiffs does not make them the principals of the Muccadams.

13. Damji Hirji and Co. must, therefore, be taken to be the lawfully appointed sub-agents of the defendants and the defendants are liable for the defaults of the Muccadams to the extent indicated in Chapter X of the Indian Contract Act. We will now consider how far that liability extends, It is contended for the plaintiffs that the defendants are liable for all acts of the Muccadams done in relation to the plaintiffs' goods from the time when the Muccadams first took charge of them till the 30th of September 1913, when it was found that 117 bales were missing.

14. u/s 182 an agent is a person employed to do an act for another, or to represent another in dealings with third persons, that is, the agent must be employed to do a particular act, or a particular class of acts, or to represent another in a particular class of dealings with third persons. u/s 188 an agent, having authority to do an act, that is, an act of the nature contemplated in Section 182, has authority to do every lawful thing which is necessary in order to do such act, and an agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business. u/s 190 an agent may employ a sub-agent where by the ordinary custom of trade, a sub agent may, or, from the nature of the agency, a sub-agent must, be employed. u/s 192 where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by, and responsible for, his "acts," as if he were an agent originally appointed by the principal. The "acts" for which the principal is responsible must be "acts" of the nature contemplated in Section 182, that is, acts of the class which he is employed to do and such auxiliary acts as are contemplated in Section 188. Section 192 further provides; "the agent is responsible to the principal for the acts of the sub-agent." There does not appear to be any reason why the acts," for which the agent as principal of the sub-agent is to be responsible to his own principal, should be "acts" falling under a more extended category than the facts" contemplated in Sections 182 and 188 and the first clause of Section 192. The concluding clause of Section 192 gives the agent's principal a

right of action against the sub-agent, only where in performing "acts" of the nature contemplated in the section the sub-agent has committed fraud or wilful wrong. Section 238 provides that where misrepresentations made or frauds committed by agents are committed in matters which do not fall within their authority the principals are not affected." The term principal" here would include an agent as principal of a subagent as well as the agent's principal.

15. The employment of the Muccadam appears to fall under two categories: employment for the purpose of storage, and employment for the purpose of effecting sale and delivery. The two classes of employment are not necessarily concurrent. Employment for storage begins as soon as the Muccadam gets delivery from the Railway. Employment for sale and delivery only begins when the commission agent gives the Muccadam instructions to find a buyer at a certain minimum price.

16. A fraudulent disposition by the Muccadam of cotton bales before he has been authorised to find a buyer for them would not be a fraud "in a matter within his authority;" but after he has been authorised to find a buyer, it would be a fraud " in a matter within his authority.

17. Whether such a fraudulent disposition by the Muccadam would be possible without the connivance or negligence of the commission agent is doubtful. There is evidence, however, in this case that the defendants in the month of September did not insist on the customary precaution of receiving the sale proceeds of bales sold for Ramdin Ramruttan direct from the buyer but permitted the recovery of the money in the first instance by the Muccadam. Nor is this the only instance in their business as commission agents of such neglect of the usual precaution.

18. There appears to us to be evidence that the fraudulent disposition of the plaintiffs" bales, 117 in number, took place after Damji Hirji and Co. had been authorised to find buyers for them. It has already been shown that authority must be taken to have been given by the defendants to Damji Hirji and Co. about the 9th of September for the sale of the remaining 140 bales of the plaintiffs.

19. The witness, Ambaram Vajeshankar, who was godown keeper to Damji Hirji and Co. in (sic), says he used to make reports in the evening stating what bales had gone out in the course of the day and his masters kept a book based on those reports which was called the balance book. In the balance book under date the 13th September appears an item of 72 hales of Malkapur cotton weighed out to Volkart Bros.--the plaintiffs" name being mentioned. It does not appear that these 72 bales were ever received by Volkart Bros. This appears to indicate that 72 of the plaintiffs" bales were disposed of, i.e., went out of the godown on the 13th September, though the buyer's name is not correct. To make up 117, the number of the missing bales, 45 would be needed. This figure appears in Exhibit 33, an entry in the Ankra book of Damji Hirji and Co. under date 20th September. These bales appear in Volkart's

documents, Exhibit E, as 46 bales of Malkapur cotton, though the Ankra book of Damji Hirji and Co. refers to them as 26 bales of Bhodwad Tarachand Shivakram and 199 of La. Ra. (Lakhichand Ramchand). Ambaram says Lakhichand was a commission agent in Bombay and thinks that Tarachand Shivakram must be an up-country owner. He does not know if the bales bore marks. Bhodwad, it may be mentioned, is the next station but one to Malkapur.

20. The document in Exhibit E relating to these 45 bales states them to belong to Nensukh Shivnarayan, the defendants, and Volkart Bros, on payment for these bales received from Damji Hirji and Co. a receipt purporting to be signed by the defendants' firm.

21. Having regard to the confusion produced by an examination of Damji Hirji's Ankra book, which shows in the case of Ramdin Ramruttan, one of the defendants' up-country constituents, 1,695 bales weighed out, which exceeds by 80 the number of bales received on their account (see Exhibit A12), while the number weighed in September to Volkarts under the contract of the 6th September greatly exceeds the 61 unsold bales spoken to by Mitharam, the Ankra book entry does not import accuracy and it seems probable that the 45 bales above referred to were really, as represented to Volkarts, bales consigned to the defendants. As the defendants only received Malkapur cotton from Ramdin and the plaintiffs", our conclusion must be that the 45 bales belonged to the plaintiffs. If so, this would show 117 bales disposed of by Damji Hirji and Co. in September after he received instructions to sell.

22. We think, therefore, that the fraudulent disposition by Damji Hirji and Co. of the plaintiffs' bales took place after the instructions to sell the 140 bales and therefore in a matter within Damji Hirji and Co.'s authority. The defendants, therefore, are liable. The particular act was not authorised, still, as the act was done in the course of employment which was authorised, the master is liable for the act of his servant: see *Citizens' Life Assurance Co. v. Brown* (1904) A.C. 423 : 73 L.J.P.C. 102 : 91 L.T. 739 : 20 T.L.R. 497 : 53 W.R. 176. The defendants probably hoped to succeed in their case that Damji Hirji and Co. had been appointed by the plaintiffs. Apart from this point there seems no reason why they should not have paid the plaintiffs for their losses in the same manner as they paid Ramdin Ramruttan and as Lakhichand Ramchand paid his up-country constituents who lost bales through Damji Hirji and Co.'s default.

23. Of the many English cases discussed at the hearing, *Jobson v. Palmer* (1893) 1 Ch. 71 : 62 L.J. Ch. 180 : 3 R. 173 : 67 L.T. 797 : 41 W.R. 264 appears to us to support the defendants' case. Having regard to the facts and the decision in that case it may be contended that any paid agent for sale who properly employs a sub-agent is not liable to his principal for the sub-agent's default, if the default is a fraudulent disposition for the benefit only of the sub-agent. There is nothing in the decision inconsistent with the general understanding up to 1912 of the law laid down in *Barwick v. English Joint Stock Bank* (1867) 2 Ex. 259 : 36 L.J. Ex. 147 : 16 L.T. 461 : 15

W.R. 877. It does not however, appear to be consistent with the law stated in *Lloyd v. Grace, Smith and Co.* (1912) A.C. 706 : 81 L.J.K.B. 1140 : 107 L.T. 531 : 56 S.J. 723 : 28 T.L.R. 547 or with the legal conclusions deducible from Chapter A of the Indian Contract Act.