Privy Council Appeal No. 76 of 1924.

Hope Prudhomme and Company - - - - - - *Appellants*

v.

Hamel and Horley, Limited - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1925.

Present at the Hearing:

LORD WRENBURY.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD PHILLIMORE.]

The appellants who are the plaintiffs constitute a French firm of merchants carrying on business at Madras as exporters of ground nuts, castor seeds and other country produce.

The respondents, the defendant Company, are merchants in London who, from August, 1913, down to the date of the present suit, were intermediaries for the placing of the appellants' merchandise at European Continental ports, especially Marseilles.

The suit was brought for the price of a cargo of castor seeds sold by the appellants to the respondents. The respondents set up certain defences to some of the items in the appellants' claim, but there was no answer to the bulk of it, and their real ground for refusing to pay was that they had a counter-claim against the appellants for a larger amount in respect of the non-delivery of a cargo of ground nuts, which should have been despatched in December, 1916, or January, 1917, to Marseilles.

It was this counter-claim that formed and forms the real matter in dispute. The trial Judge decided against the counter-claim, but the High Court at Madras in its appellate jurisdiction

reversed this decision and gave judgment for the counter-claim—hence the present appeal.

The particular transaction over which the dispute arose began by a telegram of the 12th October, 1916, despatched by the respondents to the following effect :—

"Immediate reply bid ordinary three hundred December January 59. Hamel."

The expansion of this telegram is to be found in a paragraph of a letter of the same date, which reads as follows :—

"We are much obliged for your offer of 100 tons of ordinary at F. 59·50, for December/January shipment, c.i.f. Marseille, which offer we put before our friends, but regret to say that we have not been able to place at your price. On the other hand, we have succeeded in getting a counter-offer (but for 300 tons, instead of 100) at F. 59, which we are cabling you to-night and hope you will be able to accept. If you can do so and can offer us further quantities at the same price, we think we could place them or machine-decorticated kernels at Fs. 2 more."

The telegram in response was not produced at the trial, but there is no doubt that it was an acceptance dated the 14th, and on the same day the appellants wrote to the respondents as follows : —

"In accordance with the cables exchanged between us, we beg to confirm the following sale :—

Quantity.—300 tons (three hundred tons only).
Quality.—Groundnut kernels ordinary, usual quality.
Brand.—H.P.
Price at Frs. 59 per 100 kilos. (francs fifty-nine only).
C.F.I. per steamer from Kernels Ports to Marseilles.
Shipment.—December and/or January, 1916, and 17.
Buyer.—
Payment.—As usual.
Terms.—As usual.
Commission.—As arranged."

This letter was upon a printed form with such words as "quantity, quality, etc.," printed with spaces to be filled up in writing. What is especially to be noticed is that as against the word "buyer", there is a blank and against the word "Commission", the words "as arranged." The respondents on the 18th despatched the following note :—

"*Contract* (*Purchase*) *Note No.* 028.

Article.—Coromandel kernels new crop.
Quantity.—300 (three hundred) tons, packed in bags:
Quality.—As stipulated in Ref. 031.
Price.—Fcs. 59 (francs fifty-nine), less 1 per cent. per 100 kilos., cost, freight and insurance, including war risk, Marseilles.

Shipment.—From Coromandel Coast during December 1916 and/or January, 1917.

Payment.—As arranged.
Terms.—Marseilles C. Contract, 1909.
Your telegram of 14th October 1916.
Our telegram of 12th October 1916."

In compliance with this arrangement, the appellants took up space on the ss. "Seapool"; and if they could have kept this they would have been able to ship to Marseilles in accordance with the contract. But, it being in the middle of the war, the Government requisitioned the "Seapool," and the appellants did not succeed in procuring any other ship and failed to send the cargo forward.

The goods were the subject of a sale made on the 16th October by the respondents through a firm of Sydney Harvey and Co., of London at 61 francs per 100 kilos to the ultimate buyer, one Gravier, of Marseilles. Gravier took proceedings before the tribunal of commerce at Marseilles to recover damages from Sydney Harvey and Co. for non-delivery.

The appellants were informed of these proceedings by the respondents, but in general terms only, and supposed that they were proceedings either against themselves or against the respondents as their agents, and believing that they had a good defence under French law, namely, that they had been prevented from fulfilling this contract by *force majeure*, gave instructions for this defence to be raised: and, when it failed before the tribunal of first instance, they furnished papers and documents for the appeal which the respondents had already started to the Cour d'Appel at Aix. The defence of *force majeure* failed also in that Court, and the appellants were required by the respondents to pay the amount which Gravier had recovered from Sydney Harvey and Co., and for which the respondents were liable.

This is the outline of the action which was taken with regard to the proceedings in France, but it will be necessary for their Lordships to go into rather more detail later on in this judgment.

Till a late date the appellants were under the impression that the respondents had acted as their agents in the transaction and would make no profit out of it except a commission of 1 per cent., which would be deducted from the price of 59 francs per 100 kilos. But in fact the respondents had acted as principals, re-selling the stuff at a price of 61 francs per 100 kilos. to Gravier through Sydney Harvey and Co., who were in form the sellers to him, but were to have 1 per cent. commission; the result being that the respondents passed on their 1 per cent. commission which the appellants were going to allow them to Sydney Harvey and Co., and took for themselves a profit of 2 francs per 100 kilos. by their bargain with Gravier.

When the appellants found this out, they repudiated all liability; and, if the respondents were really agents, this repudiation was no doubt right, for, if they were agents, they were making an undisclosed profit and had no authority to sell as principals and therefore could not claim indemnity as agents from the appellants their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the appellants and themselves.

Hence the main contest in the case has been upon the question whether the respondents were entitled to treat themselves as buyers and sell for whatever profit they could get, or whether they were agents.

Both Courts in India have held that they were agents; but the appellate Court has considered that the appellants nevertheless fail, because they ratified and accepted the transaction. A consideration of this point will come later in their Lordships' judgment.

Notwithstanding the view taken by both Courts in India, the respondents have insisted, as they had a right to do, in an elaborate and useful argument, that in the legal sense of the word they were not agents but principals.

There is great force in the observations which were made to their Lordships upon the extension which modern business has given to the terms "agent" and "agency." In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured and favouring buyer, one who under an over-riding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the over-riding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

It would be quite possible that, in the present case, the position of the respondents, though frequently described by both parties as that of agents, was, notwithstanding, merely that of agents according to the modern business extension of the phrase, so that they would be entitled to treat themselves as buyers from the appellants and to sell at the best price they could get; in which case any damages which they would have to pay to the buyers from themselves on account of the non-delivery of the cargo would be damages which they in their turn could recover as damages from the appellants.

By virtue of a clause in one of the earlier documents, which will be mentioned shortly and which is in conformity with the usual practice in produce markets where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain.

Accepting these submissions from the respondents, their Lordships must now proceed to analyse the documents which constitute this contract, and for this purpose they are prepared to accept the respondents' submission that attention must not be limited to the four or five documents which constitute the contract No. 626, but that the initial letters by which the business between the appellants and respondents was originally started must also be considered.

In the first letter, August 29th, 1913, the respondents, after mentioning the source of their introduction, write as follows :—

" We understand you are largely interested in the export of groundnuts, both undecorticated and decorticated, and, further, that you are not represented in our market. . . .

" We are desirous of taking up the business as selling Agents, and would be pleased to hear whether you feel inclined to negotiate sales through us.

" We are selling fair quantities of Chinese and Bombay groundnut kernels, and we are, therefore, in touch with the best buyers.

" We would be interested in other articles exported from Madras, as Seeds, Ricemeal, Tanned Skins (Sheep and Goat) and Cow Hides.

" *Terms.*—We would open the usual D/P credit, through a first-class Bank, you drawing on us at 90 d/s 95 per cent. against c.i.f. sales, and 80 per cent. against value of consignments, less freight, and, in the latter case, our selling commission of 1½ per cent.

" We are agreeable to providing our own remuneration on c.i.f. transactions or, if preferred, we would do the selling for a commission of 1½ per cent., each side paying their own cable and incidental expenses. Balances *pro* or *con* to be settled by 3 d/s drafts. . . ."

The respondents replied on September 18th as follows :—

" We thank you for your offer to be our agents for groundnuts, both decorticated and undecorticated ; oil cakes ; castor seeds and other Indian produce and seed, and accept your proposals on the terms given below against each respective article.

* * * *

" We shall now go to details the principal terms and conditions for different articles we can offer you.

" *Groundnuts.*—This is always done on the fair average quality, and we accept your drawing terms of bill at 90 d/s for 95 per cent. against c.i.f. or c.f. sales with usual D/P credits, as it is customary to pay freight on delivered weight we shall deduct the same in our invoice also. . . .'

Then oil cakes and castor seeds are mentioned, and the letter proceeds :—

" For all these articles we would prefer to deal with you as principal to principal on c.i.f. or c.f. basis, as the case may be, and you fix your own remunerations, each party paying their own cable and incidental expenses. Balance of account to be adjusted *pro* and *con* by 3 d/s draft, as we accept to do business with you, and to meet your wishes we cable you as per copy enclosed, and trust we shall soon hear from you with a view to business."

There appears to be a letter of the 5th September which has not been produced, and then the respondents wrote again on the 19th September, the material parts of this letter being as follows :—

" We were pleased to receive your yesterday's cable notifying that you had written us full particulars respecting the business proposed in our letter of the 5th instant.

" We now await same with interest, and trust it will not be long before some mutually satisfactory business result between us.

* * * *

" *Conditions of sale* :—

For groundnuts in shell and groundnut kernels would be the usual Marseilles terms, which are doubtless familiar to you.

Other articles would usually be sold. . . .

" If desired, we will send you *pro forma* contracts.

" It is, of course, understood that, in the event of allowances for inferiority of quality, damages, late shipment or non-fulfilment of contract, same would be refunded by you on receipt of official award, should an amicable settlement be impossible. Kindly confirm. . . .

" Prices mentioned are net.

" *Consignments.*—We shall be interested to hear whether you can secure any parcels of Tanned Skins (Goat and Sheep) and Tanned Hides (Buffalo and Cow), Wool, Aloe Fibre, etc. etc., to send to our care for sale.

" The outlets are quite familiar to us. . . ."

Then comes a letter from the appellants to the respondents of the 10th October :—

" We thank you for your favour of the 18th ultimo, contents of which we have perused with interest.

" *Terms.*—Those enumerated appear to be in order."

Then terms as to castorseed are mentioned.

" *Prices.*—Your proposal that these should be c.i.f. or c. and f. nett is acceptable to us.

* * * *

" We would like to draw your attention to the fact that very often buyers will not bid full prices for cabling, they reserving a margin to protect themselves in the event of values weakening pending receipt of reply. We hope, therefore, that, should orders prove to be at impracticable prices, you will not ignore same, but respond, wherever possible, with best counter-offer.

" We would also ask you to support us with as many offers as possible. When you find it impossible to offer, we would advise quotations. These will enable us to keep buyers posted and help us to secure orders for cabling. . . ."

* * * *

There is also a letter from the appellants to the respondents of the 16th October containing the words—

" We of course agree that allowances, if any, imposed for inferiority of quality, damages, late shipment, or other causes, will be refunded by us on receipt of award, should an amicable settlement be impossible."

It is not necessary to mention any other documents at this stage.

Business began to be done, but it appears from a letter from the respondents of the 12th December that as a rule the prices asked were too high ; and when the documents in respect of another contract No. 424 came to the knowledge of the respondents, they discovered the reason why the prices had ruled so high, and in their letter of 12th December they expressed themselves as follows :—

" *Contract No.* 424.—For the 200 groundnut kernels, c. and f. Marseilles, at 15, February/March shipment, we notice you provide 1 per cent. commission for us. We had been under the impression, until receipt of the Contract Note referred to above, that prices were net, as proposed in your letter of 18th September and confirmed in ours of 10th October last.

" We have doubtless lost a good deal of business, as the difference in your and our prices has, on several occasions, represented the 1 per cent. commission. In order to avoid any misunderstanding in future, we have asked you to reserve us 1 per cent. commission on all transactions, and no doubt our request will have your attention.

"Subject to your approval, we propose the 1 per cent. commission on Contract No. 424 shall be divided between us, in view of the fact that we both had to cut our margin of profit in order to put the business through."

On the 12th December, the day that this letter was written, there is a telegram which is significant as to the general business relations of the parties :—

"25 tons.
"Please offer.
"Groundnuts in shell, Marseilles.
"100 tons January/February.
"Read price midway.
"12/3¾d. c. and f.
"Groundnuts in shell, Marseilles.
"100 tons February/March.
"Read price midway.
"12/3¾d. c. and f.
"Groundnuts in shell, Marseilles.
"100 tons March/April.
"Read price midway.
"12/3¾d. c. and f.
"The whole order to be executed or not at all.
"Please look after our commission.
"1 per cent.
"In future."

During all this time, letters, owing to the war, were much delayed in transit. That of December 12th was answered on the 31st December, 1913 :—

"*Contract No.* 424.—We note your remarks and are sorry to learn of the misunderstanding, which doubtless stood in the way of business. We note you are agreeable to forego half of the commission on the first transaction, *and* in future it is agreed that all our offers will include a commission for your good selves of 1 per cent."

Now, turning to the first letter, that of August 29th, 1913, it may be observed that c.i.f. sales are to be cases where the respondents had already found a purchaser, and consignment sales where they are to take their chance of finding one.

The paragraph beginning "We are agreeable" may be open to two constructions; but their Lordships are of opinion that it refers to c.i.f. transactions only and offers two alternatives in the case of c.i.f. transactions, viz. :—We will provide our own remuneration—which means we will buy from you and get what profit we can from our buyers; or, we will treat ourselves as agents and sell for you on a commission of 1½ per cent. It does not refer to consignment sales. The answer of the 18th September is to the effect that the appellants would prefer to deal as principal to principal, and let the respondents fix their own remuneration.

So far the documents, it is contended, appear to point to a relation of seller and buyer. But, notwithstanding, for some reason which is not explained, it is clear that the appellants were providing for a 1 per cent. commission, which would be an agency commission for the respondents, and that, when the discovery

was made, the respondents accepted the arrangement, so that the appellants would naturally believe that the respondents were selling at the price quoted by the appellants, taking their 1 per cent. out of the purchase money and remitting the rest.

Why the appellants had allowed them 1 per cent. only instead of 1½ per cent., and why the respondents were agreeable to accept this in future, is not explained. It may be that, as sales were hanging fire, the respondents were content with the smaller commission, just as they proposed to divide the 1 per cent. commission on contract No. 424.

As a result, however, in their Lordships' opinion, the documents antecedent to the particular contract in question support the general relation as being one of agency in the legal sense of the term and not one of sale and purchase.

It was suggested on behalf of the respondents that the 1 per cent. was to be considered as in the nature of a discount or special favour to the respondents as agents in the modern commercial sense only, leaving them still to make a profit as sellers. But, admitting that this would be a possible theory, their Lordships can find no trace of anything in the correspondence which would give it a foundation in fact.

Their Lordships now come to the consideration of the particular contract. The letter of the 14th October, 1916, from the appellants gives the price as francs 59, and under the head of the term "commission" the words "as arranged." The document of the 18th October, 1916, called "contract (purchase) note" gives the price as francs 59, less 1 per cent. per 100 kilos. That 1 per cent. is unquestionably the respondents' commission. The printed word "buyer" in the appellants' letter of the 14th October, 1916, is followed by a blank. It is common ground that the appellants did not at that time know to whom the respondents had sold, though, in fact, the respondents' contract with Sydney Harvey and Co. had been made on the 16th. These facts all point to "agency."

Counsel for the respondents drew their Lordships' attention to the contract for the sale of castor seeds, in which a similar form was filled up with the names of the respondents as buyers and a blank after the word commission; and he suggested that this was the real nature of the business, and that, if other contract notes had been printed in the record, they would be found to take the same shape; but if words mean anything, the distinction between the contract note in the case now under discussion and the castor seeds case and possibly others, shows that some business was done on one set of terms and other upon others. It is to be noticed that, in the castor seeds case, the price was not c.i.f., but f.o.b.

In the correspondence in this case as it was, up to the last moment, the respondents spoke of themselves as agents. Even after the appellants had seen a copy of the award of the tribunal of commerce and noticed that Gravier had bought at an increased

price, the respondents still wrote that they had acted as agents for the appellants. They did so as late as the 2nd December 1918, and it was not till the appellants on the 7th December took the point that, as agents, the respondents were not entitled to make secret profits, that they set up the case that they had always dealt as principals and not agents.

Their Lordships agree with both the Courts below that the respondents were in the strict sense agents, and that, unless they can show that the appellants, with knowledge of what they had done, adopted and ratified it, they have no case.

The appellate Court thought they had so ratified it. Their Lordships find this very difficult to understand. What motive could the appellants possibly have for adopting a contract which, at the time they are supposed to have so done, meant a certain loss.

First of all it is necessary to ascertain when the appellants got to know the facts. The Chief Justice relies on a letter of the respondents of the 22nd March, 1917, which, it is said, if carefully looked into, would show that there was a chain of buyers and sellers, and that there were buyers in London who in their turn were sellers at Marseilles, from which the appellants should have learnt that they were not and could not be directly parties to the proceedings before the tribunal of commerce.

It may be that they should have understood this and should have remembered it when they wrote the later letters. But this knowledge would not inform them that the respondents had acted as principals and were making a profit. This information only came out bit by bit; the sequence is as follows:—

On the 13th February, 1918, the respondents wrote to the appellants and sent them a copy of the award of the tribunal of commerce, which was dated the 22nd January. When this was received by the appellants does not precisely appear, but the first comment upon it is in a letter of the 16th April, in which they write as follows:—

"*SS. 'Seapool.'*

"We thank you for your remarks and for the copy of the arbitration award in this connection.

"On perusing the award, we are in the first place struck with the fact that we are no party to the proceedings, which are held in connection with Mr. Jules Gravier and Sydney Harvey and Co., who, we presume, were buyers from you of the 300 tons relating to our contract No. 626. We may say that this is the first and only information we have received to the effect that the arbitration proceedings were not between Mr. Jules Gravier and your good selves, for we were all along under the impression that Mr. Gravier had brought his claim against you; in fact, it was with this idea that we addressed him with a request that matter be settled out of Court. As the parcel was sold by you to Messrs. Sydney Harvey and Co., and as they resold the lot at a profit of Frs. 2, theirs is merely a contingent liability with which we have really no concern. . . .

"We therefore take it that, had the arbitration proceedings been held as between Mr. Gravier and ourselves or you as our agents, the arbitrators would have been in duty bound to give due consideration to the facts which

precluded the shipment of the lot sold, and that under such circumstances we would have been fully exonerated from all blame and responsibility in the matter.

"We are, however, quite ready and willing to give Messrs. Sydney Harvey and Co. every assistance we can to enable them to fight their case successfully, and with this end in view we beg to enclose certified documents connected with the case, as per details below, but, as we have already stated, Messrs. Sydney Harvey and Co.'s dispute with Mr. Jules Gravier is a contingent liability and we are no party to the same."

The respondents wrote back on the 29th May :—

"*SS. 'Seapool.'*

"We are much obliged for your favour of the 16th April and for the enclosures regarding the appeal on the above, which we have put forward to Messrs. Sydney Harvey and Co., asking them to post them down to the lawyer in Marseilles.

"Regarding what you write about the proceedings taken between Mr. Jules Gravier and Messrs. Sydney Harvey and Co., we were under the impression that, right away at the commencement, we told you that we had sold to Mr. Gravier through our brokers, Messrs. Sydney Harvey and Co., and are sorry if we omitted this.

"In any case, the trouble would have reverted back to you through ourselves as your agents, because, had Mr. Gravier taken proceedings against Messrs. Sydney Harvey and Co., they in their turn would have claimed their loss back from you, and it is usual in cases of this sort for there to be one case for the whole transaction.

"Regarding what you write about the profit of 2 francs, this is not a profit made by Messrs. Sydney Harvey and Co., who merely acted as brokers.

"We added the 2 francs to your figure in order to cover our expenses for Finance, Commission, etc., and to leave a small profit for ourselves as the 1 per cent. which you allow us we had to pay Messrs. Sydney Harvey and Co. as their brokerage.

"We hope that, with the documents in hand, the lawyer in Marseilles will be successful in the appeal, and we will advise you in due course of the result."

The critical letter in answer is that from the appellants of the 18th July :—

"*SS. 'Seapool.'*

"We note carefully your remarks on the position. Regarding the difference of Frs. 21, this had nothing to do with us, for we are dealing with you as agents, and we do not think it fair to ourselves that you yourselves should have appointed another medium to handle this business. However, we await results of the appeal, when we shall revert to this subject."

The Chief Justice thinks that this is a letter "urging" the respondents "to go on with the appeal" and accepting the position. Their Lordships do not find anything in it about urging an appeal. They consider that it is a reasonable letter, meaning this : "You have done something that you ought not to have done ; it may be, however, that on this particular occasion it will do us no harm, for we trust that the French Court of Appeal will accept the defence of *force majeure* ; so we will wait till that appeal is heard, and then we will take up the whole matter with you." This they subsequently did by desiring to know whether the respondents

had not on other occasions taken a secret profit to which they were not entitled.

It is said that they urged an appeal. That was in their letter of the 31st May, written before disclosure, when they approved of the measures which, as they were informed, had been taken to institute an appeal. As the respondents kept writing to them that they were liable, what more natural than that the appellants should get every ground of defence against Gravier's claim put forward ?

Coutts Trotter, J., thinks that their letter of December 7th showed that they elected to abide by the contract; but their Lordships take an opposite view. The appellants were protesting against the decision of the French Court of Appeal, refusing to agree to the respondents' offer to accept a rather smaller sum in settlement, taking the point that the respondents must have mismanaged the case to bring about such a result, and further plainly saying that the respondents as their agents were not entitled to make secret profits; and there the matter ends.

Their Lordships can find nothing to lead them to suppose that the appellants did such an absurd and purposeless thing as to ratify this action of their agents, when they already knew of its disastrous results.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the judgment of the Court of first instance be restored with costs here and below.

In the Privy Council.

HOPE PRUDHOMME AND COMPANY

v.

HAMEL AND HORLEY, LIMITED.

DELIVERED BY LORD PHILLIMORE,

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