

1931

Present : Maartensz A.J.

MULLER *et al.* v. FERNANDO.

52—C. R. Colombo, 54,900

*Sale of goods—Action by brokers for breach of contract—Bought note—Note or memorandum in writing—Ordinance No. 11 of 1896, s. 4.*

Plaintiffs, who are produce brokers sent their clerk with samples of rubber they had for sale with a bidding sheet to prospective buyers. The clerk entered in the sheet the prices offered by the buyers, including those of the defendant's attorney.

On the same day the plaintiffs posted the bought note to the defendant.

*Held* (in an action brought by the plaintiffs for breach of contract), that they could not rely on the bidding sheet or the bought note to constitute a note or memorandum within the meaning of section 4 of the Sale of Goods Ordinance.

**A** PPEAL from a judgment of the Commissioner of Requests, Colombo.

*N. Nadarajah*, for defendant, appellant.

*Gratiaen* (with him *Amarasekera*), for plaintiffs, respondents.

September 30, 1931. MAARTENSZ A.J.—

This was an action for the recovery of a sum of Rs. 223.70, the damages sustained by plaintiffs by reason of the defendant's failure to take delivery of and pay for certain lots of rubber which the plaintiffs alleged the defendant had contracted to buy from them.

The action was tried on several issues of law and fact. The defendant appeals from the learned Commissioner's finding in favour of the plaintiffs.

The learned Commissioner held on the issues of fact that the defendant on or about May 27, 1929, contracted to buy the lots of rubber in question from the plaintiffs unconditionally, and that the plaintiffs had suffered damages to the extent claimed.

I see no reason to dissent from the findings on the facts.

The appeal was strongly pressed on the issues of law. The issues are as follows:—

- (4) Was there a memorandum of the alleged sale?
- (5) If not, can plaintiffs maintain this action?
- (8) Did the plaintiffs act as brokers or agents in this matter?
- (9) If so, can they maintain this action?
- (10) In any event can the plaintiffs maintain this action as they were agents for the sellers?

It was contended by the appellant that the bidding sheet P 1 and the letter P 11 from the defendant to the President of the Rubber Buyers' Association, which the learned Commissioner said, "may well be regarded as furnishing a memorandum of the contract to satisfy section 4 of the Sale of Goods Ordinance", did not constitute a memorandum in writing of the contract as P 11 did not set out the terms of the contract on which the plaintiffs were suing.

It was also contended that the Commissioner was wrong in holding that the sale was a sale by auction and that the plaintiffs were in the position of auctioneers and therefore entitled to maintain the action.

These contentions necessitate an examination of the circumstances in which the contract was made. They are as follows:—On May 27, 1929, the plaintiffs, who are produce brokers, sent their clerk Miranda with samples of the lots of rubber they had for sale with the bidding sheet P 1 to prospective buyers. Miranda entered in this sheet the prices offered by the buyers, including those of the defendant's attorney, S. B. Fernando; his bids are shown in P 1 under the head "M. A." They were made at 2 or 2.30 P.M.

At 4.10 P.M. Miranda informed S. B. Fernando that his bids were accepted.

Miranda's evidence is that S. B. Fernando's bids were made unconditionally and that he did not repudiate the contract but said in a half-hearted hesitating manner that he would take the rubber. On the same day, he posted to Fernando the bought note P 3 which is as follows:—

"Dear Sir,

We beg to inform purchase made by us this day on your account of the following lots of rubber at the price named for each lot as under" (next follow details of the lots of rubber purchased) "as per samples handed buyers and delivered in good merchantable condition at our stores. Payment as per Chamber of Commerce Conditions of Sale of Rubber.

Yours faithfully,  
Muller & Cooray, Brokers."

Below this note P 3 is a confirmation form to be signed by the buyer as follows:—"Received contract No. R 29/777 to 783 dated May 27, 1929, for 9,451 lb. of rubber which I/we hereby confirm."

S. B. Fernando by document P 4 dated May 28, 1929, refused to confirm the contract.

S. B. Fernando's evidence is that he told Miranda that "it must be closed before the Singapore telegram came in" that is, that his offers must be accepted before the cablegram from Singapore arrived with the price ruling there, and that immediately after the Singapore telegram arrived he rang up the plaintiffs and cancelled the contract, which had not been confirmed before the cablegram arrived. He admitted writing letter P 11 to the President of the Rubber Buyers' Association. In this letter he stated the terms on which he agreed to buy the rubber.

The learned Commissioner has rejected the evidence of S. B. Fernando and held that the offer was an unconditional one. But the rejection of his evidence is not based upon the letter P 11 which clearly sets out that the offers were made subject to the condition that they were accepted before the arrival of the cablegram from Singapore.

P 11 is therefore not a note or memorandum in writing signed by the defendant or his agent of the contract as sued on by the plaintiffs.

It was held in the case of *Mohamed Ezak v. Marikar*<sup>1</sup> that a letter written subsequent to the conclusion of the contract by the proctors of the purchaser which refers to the terms of the contract would be a sufficient note or memorandum in writing of the contract to satisfy the provisions of section 4 of the Sale of Goods Ordinance, No. 11 of 1896. Bertram C.J. observed in his judgment that a letter to a third party has been held to be enough (*Gibson v. Holland*<sup>2</sup>).

The letter P 11 would be sufficient as a note or memorandum if it embodied the terms of the contract. The letter P 11 "must therefore, either expressly or by necessary implication, contain:—

- (1) the names of or description sufficient to identify the parties in their respective characters;
- (2) the goods sold;
- (3) the price, if a price was agreed upon;
- (4) all other substantial terms of the contract not being such as are merely implied by law or usage"—*Halsbury's Laws of England*, Vol. 25, s. 248, pp. 135 and 136.

P 11 contains the names of the parties and, read with the bidding sheet, may be said to contain the goods sold and the price agreed on. It does not in my opinion contain all other substantial terms of the contract as sued on. The contract as sued on is an unconditional contract of sale, whereas the letter P 11 is a memorandum or writing of a conditional sale.

In the case of *Mohamed Ezak v. Marikar* (*supra*) there was a dispute as to the place of delivery. According to the seller delivery was to be made at the seller's stores, according to the buyer at the buyer's stores.

In the proctors' letters relied on as a memorandum or note in writing of the contract it was asserted that delivery was to be made at the buyer's stores. Bertram C.J. said:—"If these letters are to be admitted as constituting the memorandum, that term would also have to be accepted. It is not open to the respondent (the seller) to pray in aid the letters as showing the memorandum, and to repudiate one of the terms which the memorandum so constituted contains."

It was accordingly held that the letters did not constitute a note or memorandum in writing of the contract. *The ratio decidendi* is clearly applicable to the letter P 11 and I hold that it does not constitute a note or memorandum in writing of the contract as required by section 4 of the Ordinance.

On behalf of the respondent it was contended that P 11 was not essential to his case, as the note P 3 was in law a note or memorandum in writing signed by the defendant's agent.

I am unable to accept this contention. Where there is no entry of the terms of the contract in a broker's book—there is no evidence of such an entry in this case—bought and sold notes, if they correspond with one another are sufficient to constitute a contract in writing, or are a good memorandum of a verbal contract (*Halsbury*, Vol. 25, s. 259, pp. 140, 141).

<sup>1</sup> (1919) 21 N. L. R. 289.

<sup>2</sup> (1865) L. R. 1 C. P. 1.

Messrs. Muller & Cooray cannot, however, I think, plead P 3 as a note or memorandum in writing as they are suing the defendant themselves. In my opinion it is only the principal, that is the buyer or seller, who can rely on a bought or sold note as a note or memorandum in writing of the contract. I was not referred to any authority on the point as regards brokers. I was referred to two cases in which the plaintiffs were auctioneers.

In the case of *Farebrother v. Simmons*<sup>1</sup> it was held, (I read the headnote) "that the agent contemplated by the 17th section of the Statute of Frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute".

Section 17 of the Statute of Frauds has been repealed and re-enacted as section 4 of the Sale of Goods Act, 1893, with certain verbal alterations. It corresponds to section 4 of the Sale of Goods Ordinance, No. 11 of 1896.

In the other case of *Bird v. Boulter*<sup>2</sup> it was held, that "in assumpsit by an auctioneer against a purchaser, for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorized, within section 17 of the Statute of Frauds. For the clerk is not identified with the auctioneer (who sues), and in the business which he performs, of entering the names, &c., he is impliedly authorized by the persons attending the sale, to be their agent."

The latter case is distinguishable from the present case and the case of *Farebrother v. Simmons* (*supra*), as on the facts the purchaser constituted the clerk his agent and the entry made by him was relied on as a note or memorandum in writing of the contract by a person "not identified" with the auctioneer who sued.

The note P 3 is signed "Muller & Cooray," who are the other contracting parties, and on the principle laid down in *Farebrother v. Simmons* (*supra*) it cannot be relied on as a note or memorandum in writing of the contract they seek to enforce.

It seems to me that no authority can be found on the question whether the brokers themselves can rely on a bought or sold note as a note or memorandum in writing of the contract because they have no right to sue.

In the case of *Sharman v. Brandt*<sup>3</sup> a broker signed a contract note, professedly as agent for an undisclosed principal. He was in fact acting on his own behalf, but the other contracting party was not aware of that. Held, that he could not sue on the contract, because there was no memorandum thereof to satisfy the 17th section of the Statute of Frauds (I quote from *Bowstead on Agency* p. 434 as I am on circuit and the reports are not available).

<sup>1</sup> (1822) 5 B. & Ald. 333.

<sup>2</sup> (1833) 4 B. & Ad. 443.

<sup>3</sup> (1871) L. R. 6 Q. B. 720.

---

In that case some of the judges laid down that the broker had no right to sue because no contract had been made with him ; *a fortiori* a broker would have no right to sue who was in fact only acting as agent.

It was argued that the plaintiffs were acting as auctioneers, as bids were received from prospective buyers by the clerk going round to them. I cannot accept this argument. The second plaintiff in his evidence described himself and his partner as brokers and the note P 3 is in the form of a sold note usually sent by brokers. It was not proved, as in the case of *John & Co. v. De Mel*<sup>1</sup>, that the plaintiffs carry on business as auctioneers as well as brokers. The fact that plaintiffs' clerk went round to prospective buyers privately asking them to make offers cannot possibly render the sale a sale by auction.

I am accordingly of opinion that the plaintiffs had no right of action and that there was no note or memorandum in writing of the contract they sought to enforce.

I allow the appeal and dismiss plaintiffs' action with costs in both Courts.

*Appeal allowed.*

---