

*Present:* De Sampayo J.

RAHIM *v.* DAVOODBHOY.

364—C. R. Colombo, 58,003.

*Indent for slate pencils by defendant through a commission agent from a foreign company—Action instituted by commission agent for damages for breach of contract.*

The defendant, through the plaintiff, a commission agent, indented for one hundred cases of slate pencils from a Japanese company, but refused acceptance of a portion of the consignment. The plaintiff sold the consignment by public auction, and instituted this action against the defendant for the balance due, after crediting him with the proceeds of the sale.

*Held*, that the plaintiff was not the proper party to sue.

THE facts are set out in the judgment of the Commissioner of Requests (W. Wadsworth, Esq.):—

In this case the plaintiff, a commission agent, sues the defendant, claiming the sum of Rs. 300, which he states he had to pay to the Bansei Trading Company, *alias* Howkoku Trading Company, being the difference between the value of a shipment of slate pencils and the nett amount realized by sale of the shipment on failure of defendant to take delivery of the shipment.

Defendant raises the preliminary question that plaintiff is not the proper party to sue, and that plaintiff cannot maintain the present action.

It is admitted plaintiff is only a commission agent, that he had no property in the shipment, that he was not liable for any loss, that money was not to be paid by him, that the goods were consigned to the defendant and not to the plaintiff, that the invoice was in the defendant's name, and that the bill of exchange in respect of it was drawn on the defendant.

It is also agreed that the bill of lading has no reference to the plaintiff, and that if the shipper declined to accept the indent sent by defendant, no contract at all would arise.

What, then, is the position of the plaintiff? He had no responsibility; no liability would attach to him. There was in fact no contract between plaintiff and defendant. Plaintiff's position may have been that of a mail box, but nothing more.

The contract was between the defendant and the shipper direct. The shipper—the principal—was disclosed. If any dispute arose as to non-acceptance of shipment, or as to any difference in price between the value of the shipment and that realized by sale of the goods, or, conversely, as to non-delivery by the shipper, the action would arise only as between the disclosed principal and the defendant.

But, says the plaintiff, he had to pay the difference, and therefore he has the right to claim. Why plaintiff paid, or why "he had to pay," does not transpire, nor is it necessary for me to go into that question.

So long as there was no contract, express or implied, between plaintiff and defendant, plaintiff cannot maintain this action. The defendant may have his own defence if the shipper sued him, or there may be an adjustment between the shipper and the defendant.

The present action is misconceived. I hold that plaintiff cannot maintain this action, and I dismiss it, with costs.

I might add that the issue of estoppel is indeed an ingenious one, but is not worth serious consideration.

The indent was as follows:—

Indent No. 514/16. Colombo, February 10, 1916.

From HASENALLY DAVOODBHoy, Colombo.

To BANSEI TRADING COMPANY.

Through the British Traders' Agency, Colombo.

Marks	Rate of Buying Commission to be charged on Invoice.	Shipment.
H D 514 Colombo	... Nil	... In 2 lots: 1st, soonest possible; 2nd, 60/90 days after.

500 cases each, 100 cartoons each. Cartoons 50 slate pencils.

Ref. No. 1,548, @ Rs. 15 per case, C. I. F. and C. Colombo.

Make up as usual, and label "Made in Japan."

Packing should be done very carefully.

Shipment.—In 2 lots: 1st, soonest possible; 2nd, 60/90 days after.

Draft at 30 days' sight D/P on Mr. Hassenally Davoodbhoy, 44, Fourth Cross street, Colombo.

Received March 9, 1916.

Answered: \_\_\_\_\_.

To \_\_\_\_\_.

772.

I/We agree to abide by the condition at the back of this order.

(Signature) H. DAVOODBHoy

Sealed: The British Traders' Agency, Colombo.

J. S. Jayawardene, for plaintiff, appellant.

Balasingham, for defendant, respondent.

December 19, 1917. DE SAMPAYO J.—

The appeal in this case involves a point of law. The plaintiff is a commission agent carrying on business in Colombo under the style of "The British Traders' Agency." On February 10, 1916, the defendant, through the plaintiff, indented for one hundred cases of slate pencil from a Japanese company, known as Bansei Trading Company, *alias* Howkoku Trading Company, to be forwarded in two shipments of fifty cases each. The goods ordered appear to have

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been shipped and duly arrived in Colombo. The defendant accepted delivery of one consignment, but refused to take delivery of the other. Consequently the fifty cases of pencils constituting the second consignment were sold by public auction at the instance of the plaintiff, and realized a sum of Rs. 600, leaving a balance sum of Rs. 300.26 still due in respect of that consignment to the Japanese company. The plaintiff's cause of action is that he has had to pay to the Japanese company this sum of Rs. 300.26, which he claims from the defendant in this action. I have here summarized the allegations in the plaint, and it is at once clear that the plaint discloses no cause of action. The statements made at the commencement of the trial and the issues formulated do not advance the matter. One of the issues stated was whether the plaintiff could maintain the action, as he was not the proper party to sue. The Commissioner decided this issue in favour of the defendant, and dismissed the action. I agree with the Commissioner that unless there was some contract, express or implied, whereby the defendant, in such circumstances as the present, made himself liable to the plaintiff for any sum the plaintiff might pay to the Japanese company, the plaintiff cannot sustain this claim. As I have pointed out, the plaintiff did not in any shape or form allege such a contract, nor did the plaintiff at the trial state there was any such contract and ask that an issue be stated on that point. The mere payment under some arrangement with the Japanese company of the sum involved in this action does not necessarily entitle the plaintiff to claim a refund from the defendant. If the defendant wrongly refused to take delivery of the goods, and to pay for them to the Japanese company, the company might have a good action against the defendant, but the plaintiff's position as commission agent, or, as the Commissioner puts it, "the mail box," is not sufficient to give a legal right to the plaintiff to make the present claim.

I think the judgment dismissing the action is right, and I dismiss the appeal, with costs.

*Appeal dismissed.*

