

1943

*Present : Hearne and de Kretser JJ.*DENIS, *et al.*, Appellants, and WARREN, *et al.*, Respondents.

201—D. C. Colombo, 14,426

Principal and agent—Obligation of agent to pay over moneys to principal—Absence of express or implied authority to the contrary—Liability for interest.

An agent is under an obligation, in the absence of an express or implied authority to the contrary, to pay over to his principal on request, moneys received in the course of the agency to the use of the principal.

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request.

A PPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment.

H. V. Perera, K.C. (with him *Ananda Pereira*), for defendants, appellants.

E. F. N. Gratiaen (with him *I. Misso*), for plaintiffs, respondents.

Cur. adv. vult.

September 16, 1943. HEARNE J.—

The plaintiffs are the owners of Nagrak estate in Ceylon. John K. Gilliat & Co., Ltd., hereinafter called Gilliats, are the mortgagees of the property. The plaintiffs had executed four mortgage bonds in their favour—(1) Bond No. 1,230 dated November 20, 1936, (2) Bond No. 2,202 dated July 5, 1937, (3) Bond No. 1,265 dated February 28, 1938, and (4) Bond No. 2,329 dated December 7, 1939. Action was filed on bond No. 1,265 and judgment obtained.

The property charged in the four bonds included the plantation and premises, the buildings thereon and all the crops and produce thereof.

In all the bonds the plaintiffs undertook "so long as any monies are due by them" to ship or cause to be shipped to the mortgagees for sale by the latter *the whole of the crops and produce.*

They also agreed "that they shall and will at the direction of the mortgagees but at the expense of the mortgagors appoint such person, firm or company as the mortgagees may from time to time nominate

¹ (1940) A. C. 190.

to act as agents of the mortgagors with respect to the mortgaged premises and shall and will also at the direction of the mortgagees remove and cancel the appointment of such agents and appoint another or others in their place”.

The plaintiffs appointed the defendants as their agents by a writing (P 1) dated November 20, 1936. The latter were authorised (P 1 reads “You shall have the powers”) to manage and control the working, cultivation and maintenance of the estate and the gathering and curing of the crops and produce and “to ship the whole of the crops and produce to John K. Gilliat & Co., Ltd., for sale or to such person or persons as they may from time to time direct”. This seems to imply that it was in the contemplation of Gilliat, so far as the plaintiffs were aware, to require the whole of the crops and produce to be *shipped* to them or to a nominee of theirs. Para 2 (c) of P 1, however, reads “we shall pay you (the defendants) a commission of one per cent. on the gross proceeds of sales of all crops and produce if effected *in Ceylon*”.

The primary mortgage was dated November 20, 1936, and the secondary mortgage July 5, 1937. Prior to the execution of the latter, viz., on March 1, 1937, the plaintiffs wrote to Gilliat a letter marked P 4: “In consideration of your providing, up to the maximum limit of £2,000 (including interest) at any one time outstanding and the necessary finance for (a) running the estate, (b) carrying out such of the recommendations contained in Mr. Irvine Stewart’s report of the 18th January, 1937, as you think proper, (c) paying the first mortgage interest, (d) paying to the undersigned Mr. E. Warren the sum of £300 down and £60 monthly from the 1st March, 1937, we agree as follows:—

- (1) To leave the management of the estate in your hands as long as any money is owing to you hereunder ;
- (2) To authorise you to retain the proceeds of sales of tea towards the above purposes or in reduction of any sums that may be owing to you hereunder ;
- (3) To repay you any sum that may be owing to you hereunder immediately upon the first mortgage being discharged or becoming payable or enforceable ;
- (4) To take forthwith the necessary steps to give you by way of security for any sums that may be owing to you hereunder a second mortgage on the Nagrak estate for £2,000 or alternatively to increase your shares under the first mortgage from £5,000 to £7,000.”

It is to be noted that the plaintiffs were to receive in addition to £300 down a sum of £60 per month from March 1, 1937. It is not stated for what period the monthly payment of £60 was to run.

In D 9 which was written by the plaintiffs to Gilliat prior to the execution of the fourth mortgage, viz., on August 18, 1939, they say, “We hereby agree to grant you a further mortgage on our Nagrak estate for the sum of £2,000 to cover, up to the limit of that sum, such further advances as you have made or may make to us or to either of us and any other expenses on upkeep or improvement of the estate as may not be covered by the existing mortgages already executed in your favour.

We authorise you to arrange for this further mortgage to be drawn up accordingly and we undertake to instruct our attorney in Ceylon to sign on our behalf. In consideration of the execution of this further mortgage you undertake, subject to the limit mentioned above, to pay to Barclay's Bank for Mr. D. E. Warren's account the lump sum of £200 and a monthly allowance to Mr. D. E. Warren of £50 for twenty months."

Two days later, i.e., on August 20, 1939, they write: "It is of course understood that should money be available after the expiration of the 20 months you will continue to credit my a/c with a monthly £60 as has been done up to the present." This is D 10. In D 11 dated August 22, 1939, Gilliats wrote: "We are in agreement with the last paragraph of your letter of the 20th instant and will request Messrs. Cumberbatch & Co. to cable us upon completion of the business."

The plaintiffs are resident in England and were not available to give evidence. It would, however, appear from the evidence of Mr. Beaumont, a partner of Cumberbatch & Co., the defendants, that from March, 1942, Gilliats had discontinued monthly payments to the plaintiffs. Giving evidence in April, 1943, he agreed that the payments had been stopped "last March", but it is clear, from the history of the case, that he meant March, 1942, and not March, 1943.

In November, 1942, eight months after Gilliats had stopped payments to the plaintiffs, they filed the present suit against the defendants. It was claimed that the defendants who are their agents had refused to comply with their request for payment of Rs. 2,000 and a sum of Rs. 666.67 per month from November 15, 1942, out of the income of the estate. They prayed (a) for a declaration that the defendants are liable to carry out all instructions which the plaintiffs may give them in regard to the disposal of the nett income of Nagrak estate, (b) that the defendants be ordered to pay to the plaintiffs out of the income of the estate a sum of Rs. 2,000 and Rs. 666.67 monthly and to pay to John Gilliat & Co. the remainder of the nett income in reduction of the amount due under bond No. 1,265 sued upon in action 680/MB of the District Court of Colombo.

They obtained judgment as prayed and the defendants have appealed.

One point is clear. Although the defendants claim to be able to run Nagrak estate for the sole benefit of Gilliats, they do not claim to be mortgagees in possession on behalf of Gilliats. They admit they are the agents of the plaintiffs and the questions for decision are whether they are liable, as agents, to carry out all the instructions which the plaintiffs may give them in regard to the disposal of the nett income of Nagrak estate and, in particular, whether they are bound to pay the plaintiffs Rs. 666.67 per mensem out of such income.

Authority is hardly necessary for the proposition that an agent is under an obligation to pay over to his principal, on request, money received in the course of the agency to the use of his principal. Indeed an agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request.

On what grounds, if any, are the defendants entitled to resist the orders of their principals, the plaintiffs? At the hearing of the appeal their Counsel put the matter in this way. The plaintiffs had authorised the

defendants to ship to Gilliats the whole of the crops and produce (P 1), they had authorised Gilliats "to retain the proceeds of sales of tea" (P 4) and they had thus placed at the disposal of Gilliats full control over the whole of the proceeds of sales of tea of Nagrak estate. They had arranged with Gilliats to pay them certain sums of money out of the proceeds coming to their (Gilliats') hands and in particular had authorised them to recover their interest therefrom. In pursuance of the plaintiffs' authorisation the defendants had sent all crops of tea to Gilliats and, when they could no longer do so after 1939, they had remitted to Gilliats the proceeds of sales of tea effected in Ceylon. They had impliedly contracted with Gilliats to do the latter and the plaintiffs had not objected. If they complied with the plaintiffs' demand they would become personally liable to Gilliats. If the arrangement between the plaintiffs and Gilliats, provided for by P 4, in regard to the payments by the latter to the former of a monthly allowance had broken down, that is a matter over which they had no control. They were not bound to pay any part of the proceeds of sales of tea in their hands to the plaintiffs as, by so doing, they would be liable to be sued by Gilliats for damages.

This argument cannot be founded on P 1 alone or on P 1 in combination with any of the provisions contained in the mortgage bonds. Neither P 1 nor any of the mortgage bonds contains any stipulations regarding the manner of payment of interest, or the manner in which interest was recoverable by Gilliats. P 1 provides for the shipment of all crops and produce to Gilliats. In addition to being mortgagees they were to act as the selling agents of the plaintiffs for which they received a commission. In order to earn the maximum commission they could require the defendants to ship all the tea to them for sale. But P 1 did not confer on Gilliats the right to appropriate the proceeds of sales towards interest due to them as mortgagees. In P 3 the plaintiffs required Gilliats "to hold the balance (after deducting their commission and paying the defendants' charges) at our (the plaintiffs) disposal to be accounted for half yearly". There is nothing in the mortgage bonds or P 1 inconsistent with P 3. It appears, however, that while matters were working smoothly the proceeds of sales of tea in Gilliats' hand *were* appropriated towards interest by arrangement between Gilliats and the plaintiffs. The former had no right to make these appropriations and could only have done so with the acquiescence of the plaintiffs.

Now this informal arrangement became legally binding on the plaintiffs in March, 1937, when they wrote P 4. By P 4 they agreed "to leave the management of the estate in your (Gilliats) hands" and authorised them "to retain the proceeds of sales of tea towards the above purposes (these include the payment of interest on 1st mortgage) or in reduction of any sums that may be due to you hereunder". It is not very clear from the evidence of Mr. Beaumont whether his firm received a copy of P 4 from Gilliats or the plaintiffs. But even if it was received from Gilliats and not the plaintiffs, the latter, who must have known that Gilliats would apprise the defendants of the contents of P 4, cannot be heard to say that the defendants had no authority from them to give effect to P 4 so far as they were capable of doing so, and it would appear that after 1939 when shipment became impossible (it became legally impossible in 1942) the

defendants impliedly contracted to remit the proceeds of local sales of tea to Gilliats, that they did so, and that the plaintiffs took no objection to what they did.

It must be remembered, however, that the defendants' contract, or rather implied contract, had reference to and was conditional upon the continuance of the state of affairs brought into being by P 4, and if Gilliats have committed a breach of the conditions imposed on them by P 4, the defendants would not be bound to implement an agreement between their principals and Gilliats which the latter had repudiated, at any rate, in one particular which, from the point of view of the plaintiffs, is of the utmost importance. I refer to the cessation of the monthly payments to them.

In P 4 the plaintiffs, as I have said, authorised Gilliats "to retain the proceeds of sales of tea". This was in consideration of Gilliats, *inter alia*, paying them £60 per mensem from March 1, 1937. No limit was set to the number of payments and it must be taken that they would continue so long as Gilliats were getting into their hands all the proceeds of sales of tea. The defendants are sending Gilliats all the proceeds of sales of tea in Ceylon, they even claim the right—it is put as high as that—to continue to do so, and yet the plaintiffs' monthly payments ceased as long ago as March, 1942. The agreement to pay £60 per mensem was modified by D 9. The plaintiffs received £200 down and it was arranged that this sum was to be liquidated by the reduction for a period of 20 months of the monthly payments from £60 to £50. In D 10, however, with which Gilliats agreed, the plaintiffs made it clear that, after the 20 months, payments were not to stop altogether. (They had mortgaged their estate. They had not sold it.) On the contrary they ask that "should money be available" Gilliats should revert to the original rate of £60 per mensem. The payments of £50 per mensem, were duly made, but it is not known whether, at the conclusion of the 20 months from August, 1939, the date of D 9, *i.e.*, April 1941, Gilliats paid £60 or £50 per mensem. All that is known—it is in the evidence of Mr. Beaumont—is that payments ceased altogether in March 1942. It is clear to my mind, whatever explanation may be forthcoming from Gilliats of P 4, D 9, D 10 and D 11, that the defendants cannot in this suit, and in the absence of any explanation, maintain the position they have taken up on the basis of P 4.

Their position can only be determined now by reference to P 1. If they can ship tea to Gilliats they may do so and indeed Gilliats may require them to do so. If they cannot, the plaintiffs have a right to give them instructions in regard to the disposal of the proceeds of sales effected locally less their charges and all necessary disbursements in the running of Nagrak estate.

One further point requires to be considered. The defendants were instructed to send "all crops and produce to Gilliats for sale or to such person or persons as they may from time to time appoint". Is it to be implied from that—and it is so claimed—that when shipments became impossible, the defendants were authorised, on realising the tea locally, to send all the proceeds to Gilliats? I am aware that "Where an express authority is given, there is an implied authority combined with it to do all acts which may be necessary for the purpose of effecting the object for

which the express authority is given". But I cannot construe P 1 in the way that has been suggested. The purpose of P 1 was to enable Gilliat to reap the advantage of obtaining commissions on sales made by them. It was not to give them full control over all proceeds of sale. Again at the time P 1 was written the state of affairs that obtained from 1939 onwards was not contemplated by anybody. It is, in my view, impossible to hold that P 1 by itself can be construed as an implied authority, on the happening of an unforeseen contingency, to act in the way they claim to have the *right* to act.

The plaintiffs are entitled to a declaration in terms of (a) of the prayer. They are also entitled to the payment of Rs. 2,000 for which they asked. It appears from D 19 that this sum is immediately available. In regard to monthly payments of Rs. 666.67 the defendants are, for the reasons I have given, under a legal obligation to make these payments, assuming of course the money is available. It is possible, of course, that even if money is available, e.g., at the beginning of a month, part of it may have been earmarked for necessary expenses in connection with the running of the estate during the course of the month. Practical difficulties may arise and Counsel for the plaintiffs-respondents recognized this. But I do not anticipate that the plaintiffs will be unreasonable. In their own interests they would not desire to bring work on the estate to a standstill, because of a lack of funds in the hands of their agents. Further, it is clear that if Rs. 666.67 are not available in respect of any month, the Court's order to the effect that the money is payable out of nett income cannot be enforced. The plaintiffs have not been adjudged entitled to the defendants' money but only to their own.

Having regard to these considerations the 3rd paragraph of the decree is amended to read as follows:—

"It is further ordered and decreed that the defendants do pay to the plaintiffs out of the nett income of the said Nagrak estate a sum of Rs. 2,000 forthwith, that they do also out of the said nett income make monthly payments to the plaintiffs at the rate of Rs. 666.67 per mensem (the said Rs. 666.67 or part thereof, if not available in respect of any month being carried forward and remaining due and payable to the plaintiffs according to the tenor of this decree) and that they do pay to John K. Gilliat & Co., Ltd., the remainder of the nett income in reduction of the amount due under bond 1,265 dated February 28, 1938, attested by D. E. Martensz of Colombo, Notary Public, and sued upon in action No. 680/MB of this Court."

In the interests of the plaintiffs and the defendants and in order to avoid misunderstanding and possible friction it seems to be highly desirable that the former should be kept up to date, which of course they are entitled, in regard to Nagrak estate accounts in the books of the defendants as agents of the plaintiffs.

Subject to the variation of the decree indicated above the appeal is dismissed with costs.

DE KRETZER J.—I agree.

Appeal dismissed.