1937

Present : **Soertsz J.**

DE SILVA *v.* DON CAROLIS & SONS, LTD.

134—C. R. Colombo, 18,130.

Principal and Agent—Sale of goods in shop—Authority of salesman to receive payment.

A salesman who sells goods in a shop has authority to receive payment for goods sold by him as agent of his employer, where he has actual or ostensible authority or customary authority to receive payment by reason of the fact that payment is made to the salesman in the course of business followed in the shop.

Mandy v. Galle Face Hotel Company, Ltd. (*4 N. L. R. 191*) referred to.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. E. Weerasooria (with him *E. B. Wikremanayake*), for defendants, appellants.

Croos da Brera (with him *Nevil Perera*), for plaintiff, respondent.

March 12, 1937. SOERTSZ J.—

The question involved in this appeal is which of the two innocent parties, the plaintiff or the defendants, should suffer for the fraud of a third party, namely, the defendants' salesman.

The question must be examined and answered on the basis that the plaintiff did pay the sum of Rs. 128.25 into the hands of the salesman. The Commissioner has so found, and the evidence is overwhelmingly in support of that finding.

The defendants' case is that payment to the salesman was not payment to them because the salesman had no authority to receive payment, and the defendants had taken the precaution of exhibiting in a prominent place in their shop a notice (D 4) to the effect—" All payments should be made to cashier and firms' receipt obtained for same ". In regard to the first matter, the trend of recent decisions has been to reduce to certain limits the general proposition which appears to have been laid down in some early cases, that " he who has power to sell has power to receive money ". In *Butwick v. Grant*[1], Horridge and Sankey JJ. followed the

[1] *L. R. (1924) 2 K. B. 483.*

ruling in *Drakeford v. Piercy* [1], and held that the proposition that "an agent authorized to sell has, as a necessary legal consequence, authority to receive payment is utterly untenable and contrary to authority".

Sankey J. said, "In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the seller to show, and in the absence of any reason to the contrary he would be entitled to succeed on showing either that the agent had *actual authority* to receive payment, or that he had *ostensible authority* to receive payment or that he had *customary authority* by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question". Applying this test to the facts of this case, there is evidence to show that William Perera had authority to and did receive money from customers in order to hand it himself to the cashier. A. E. H. Mendis, the Accountant of the defendant's firm, said, "The salesman took the money from the customers to the cashier" and Jayasinghe, the cashier, corroborated Mendis when he stated "Customers' money is always brought to me by the salesmen". According to this evidence the first two conditions laid down by Sankey J. are satisfied, namely, that the buyer should show that the salesmen had (*a*) actual, (*b*) ostensible authority to receive money. In my opinion, in this case, the third condition is also satisfied that the buyer should show that the salesman had customary authority to receive money. It is notorious that it is the salesmen in shops who receive payments from customers for goods purchased by them. They, of course, usually take it to the cashier. But the point is that they have authority actual or ostensible to receive money and, therefore, when they receive it, they receive it as agents of their employers. I do not think it makes any difference on this question of the responsibility of the principals for the money so received by salesmen, whether the salesman, directly he received the money, ran out at the door, to use the words of Mr. Croos da Brera's submission, and the money was lost to the parties in that way, or whether the money was lost to them, because the salesman gave a sufficiently probable explanation for his not giving the customer the cashier's receipt as the salesman in this case did, to satisfy the customer that everything was right and in order. The salesman, when he took the money and offered the explanation he did, was acting within the apparent scope of his employment. It would be very irksome indeed to customers if they were required or expected to act on the assumption that salesmen employed in firms like these were more probably thieves than honest men, and to keep them in constant view, and follow them about to make sure that they actually took the money to the cashier, or to verify that the cashier is actually not in his seat, when the salesman says he is not, as the salesman in this case did. It will be, least of all, in the interests of shopkeepers if that degree of meticulous observation and inquiry is demanded of their customers. But it is urged in this case, that the shopkeeper had taken the precaution of displaying a notice to inform customers that they should make payments to the cashier and obtain the firm's receipts. The evidence of Mendis and Jayasinghe shows that this is a requirement that is honoured in the breach, not in the observance. But quite apart from that, there is no evidence to show that the plaintiff

[1] *7 B. & S. 515.*

in his case was aware of this notice, or that that he could not but be aware. The evidence is that "the defendant firm has a very extensive business place. In each floor there are six or seven halls. The cashier is in one of the halls. And all we are told of this notice is that it "is displayed in the show room in a prominent place". It appear to be a matter of pure luck whether a particular customer sees this notice or not. It depends on whether or not he enters the showroom. There is nothing on record to show that the plaintiff entered the show room. In *Mandy v. Galle Face Hotel Co.*[1] an attempt on the part of the hotel to avoid liability for the bicycle of a guest which was lost from the premises on the ground that a notice was displayed that "no responsibility shall attach to the hotel for any property lost, unless previously placed in the Manager's charge for safe custody", was respected. Lawrie J. contented himself with saying "It was not proved that the plaintiff saw or read this notice". In my opinion, the defence based on this notice fails. The *locus classicus* on this question of the incidence of the loss between innocent parties is, I believe, *Lickbarrow v. Mason*[2], where Ashurst J. held "that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third party to occasion the loss must sustain it". In this case, the defendants enabled the salesman to occasion the loss by permitting him to receive money. I am not suggesting that they should not have permitted him to receive money. Business of this kind can hardly be carried on conveniently and expeditiously without investing salesmen with such authority. But employers must take the risks involved.

In my opinion the appeal fails and must be dismissed with costs.

Appeal dismissed.