[IN THE PRIVY COUNCIL.]

1945 *Present :* **Viscount Simon, Lord Thankerton and Sir John Beaumont.**

MARIKAR, Appellant, *and* AUSTIN DE MEL, Respondent.

Privy Council Appeal No. 8 of 1945.

S. C. 40 and 129—D. C. Colombo, 12,458.

Contract—Agency—Broker's right to sue in his own name—Usage of market—Suretyship—Wagering contract.

Where a broker contracted with a buyer for the purchase of rubber coupons from an undisclosed seller and, according to the usage of the market, the broker was liable to deliver to the buyer the coupons sold

[1] *(1938) 26 Cr. App. R. 148.*

whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted,—

***Held*, that if the buyer wrongfully refused to accept delivery the broker could sue in his own name to recover damages for the breach of contract.**

***Held, further*, (i.) that as there was nothing in the contract to suggest that the buyer had first to claim delivery of the coupons from the seller before having recourse to the broker the contract was not one involving suretyship ; (ii.) that the contract was not a wagering one.**

APPEAL from a judgment and decree of the Supreme Court. The judgment of the Supreme Court is reported in *44 N. L. R. 147.*

Sellers, K.C., for the appellant.

W. L. McNair, K.C., for the respondent.

December 19, 1945. [*Delivered by* SIR JOHN BEAUMONT.]

This is an appeal from a judgment and decree of the Supreme Court of the Island of Ceylon dated January 15, 1943, setting aside a judgment and decree of the District Court of Colombo dated January 16, 1942, and entering judgment in favour of the defendant-respondent for the sum of Rs. 107,055·81 with interest and costs.

The appellant instituted this action on October 16, 1940, in the District Court of Colombo, against the respondent for the recovery of the sum of Rs. 56,185·18 being damages sustained by him between April 1, 1940, and May 27, 1940, on certain contracts relating to coupons issued by the Rubber Controller under a Rubber Restriction Scheme in force in Ceylon during the relevant periods under the Rubber Control Ordinance. The export of rubber without such coupons was prohibited.

The respondent which was a Company doing the business of brokers in Colombo admitted its liability to the appellant in respect of the said sum, but alleged that on May 15, 1940, the appellant had instructed it to purchase one million coupons each covering the export of a single pound of rubber, that on the same date it had arranged for the purchase of the said quantity of coupons on the appellant's account with an undisclosed principal, and that the appellant had subsequently repudiated the said contract without lawful cause. The respondent claimed that the appellant was liable to pay to it damages in respect of the said contract, or to indemnify it against liabilities incurred as his brokers, and, giving credit in certain sums admittedly due by it to the appellant, claimed in reconvention a sum of Rs. 107,055·81.

At the trial the market price at which the coupons were sold on various dates was admitted, and the figures were not in dispute. It was agreed that if the respondent succeeded in establishing its claim in reconvention judgment would be entered for it for Rs. 107,055·81, and that if the respondent's claim in reconvention was rejected judgment would be entered for the appellant for Rs. 56,185·18.

The making of the contract of May 15, 1940, on which the respondent's claim in reconvention was founded, was denied by the appellant. At the trial the learned District Judge disbelieved the evidence of the

appellant and held that the contract was made as alleged by the respondent. This finding was upheld by the Supreme Court and has not been challenged before the Board.

The appellant also denied receiving the bought note embodying the contract and did not produce it, but its terms were proved from an entry in the respondent's contract book. That note was in the following terms :—

" Austin de Mel Ltd. Colombo, May 15, 1940.

" RUBBER COUPON CONTRACT No. R. 6661.

" Messrs. E. L. Ebrahim Lebbe Marikar, Esq.

" DEAR SIRS,

" We have this day bought by your order and for your account from Our Principals (1,000,000) lbs. of Rubber Coupons at 30½ cts. per coupon lb. Delivery 2nd issue 1940. Payment on Delivery.

" Yours faithfully,
" for Austin de Mel, Ltd.,
" (Sd.) Austin C. de Mel,
" Brokers.

" Sold according to Chamber of Commerce

" Conditions of Sales.

" This Contract shall be subject to any alteration in the Rubber Control Ordinance or conditions that may be imposed under that Ordinance, or by further legislation affecting transactions in Rubber Coupons ".

It was admitted by the respondent that the seller was Kathleen de Mel, wife of Austin de Mel, the Managing Director and principal shareholder in the respondent company. The appellant contended that Kathleen de Mel was a mere *alias* for the respondent company which had really sold its own coupons to the appellant. The learned trial judge held that there was no conflict of interest between Kathleen de Mel and the respondent company and that the respondent company dealt with Mrs. de Mel in the ordinary course of business, and this finding was accepted by the appellate court. Their Lordships accept this concurrent finding of fact.

A further contention raised by the appellant, which can be disposed of at the outset was that the contract of May 15, 1940, was a wagering contract and unenforceable. This claim was rejected by both the lower courts, and so far as the question is one of fact their Lordships accept the findings of the lower courts. So far as the matter involves any question of law, it is clear that if the appellant was entitled to delivery of the coupons purchased the contract was not a wagering one. There is nothing in the terms of the contract to preclude the appellant from demanding delivery and he was, in fact, by the letter of the respondent's proctor dated June 11, 1940, offered formal tender of the coupons sold, which offer he declined. Their Lordships therefore agree with the lower courts in holding that the contract was not a wagering one.

The principal question discussed in the judgments of the lower courts, and the only question which really arises on this appeal, is whether the respondent company is entitled in law to maintain its claim in reconvention. In order to determine this question it is necessary to notice the course of business and the custom or usage as regards contracts relating to rubber coupons in force in the Colombo market when the contract in suit was made. At the outset of the trial the parties, by their Counsel, agreed as noted in the judgment of the learned District Judge that this custom or usage was as follows :—

"The broker's bought note, or sold note (as the case may be) never discloses the name of the other party to the contract.

"The broker is, as far as the seller is concerned, liable to accept delivery of all coupons tendered, and to pay the full contract price of the amount tendered by the seller whether the buyer accepts delivery or not.

"The seller may, instead of tendering the coupons, instruct the broker to negotiate a fresh contract for the purchase of the same quantity of coupons as that covered by the original contract. In such a case the seller is entitled to receive from, or liable to pay to, the broker direct the difference between the original contract price and the new contract price on a stated account.

"As far as the buyer is concerned, the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not. If the buyer accepts delivery he is liable to pay the contract price direct to the broker. The buyer may, instead of accepting delivery of the coupons, direct the broker to sell the tendered coupons on his behalf at the market price of the day of tender. In that event the difference between the original contract price and the market price is received from or paid to the broker direct.

"The buyer and seller have no dealings with each other direct in regard to performance of the contract. Each party is entitled to look to the broker for performance."

The District Judge having found all the facts against the appellant nevertheless decreed his suit and dismissed the respondent's claim in reconvention upon a point of law. He held that the respondent having entered into the contract in suit as agent for Kathleen de Mel could not sue upon it ; that to allow an agent for an undisclosed principal to sue in his own name upon the principal's contract would be to disregard a well-established principle in the law of agency ; and that the market usage subject to which the contract was made could not alter the intrinsic nature of the contract. The Supreme Court in Appeal took a different view of the law, and gave judgment for the respondent upon its claim in reconvention. Their Lordships entertain no doubt that the view of the Supreme Court was right. The fallacy underlying the judgment of the learned District Judge lies in the assumption that the respondent was suing on a contract made by his principal. This was not the case ; he was suing in his own name under a special power conferred upon him by his contract of employment. Under the agreed usage of the market the broker was liable to deliver to the buyer the coupons sold whether or not he had received

them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted. In the event of the buyer accepting delivery and refusing payment it is plain that the broker must have a right to enforce the liability. It follows logically from this position that if the buyer wrongfully refuses to accept delivery (as in this case he did) the broker is the person to recover damages for the breach of contract. The fact is that the contract in this case imposed upon the broker obligations far more onerous than would normally rest upon an agent. The broker in making payment to the seller and delivery to the buyer was required to act as a principal, and these obligations conferred corresponding rights. There is no objection in law to parties entering into a contract of this nature, and, as the Supreme Court pointed out, the respondent is not to be deprived of his rights under his particular contract because they would not have arisen under a normal contract of agency.

A further point taken by Mr. Sellers for the appellant was that on the true view of the contract of May 15, 1940, the broker became a surety for the due performance of the contract by the seller and the buyer, and that he could not claim indemnity from the buyer unless he proved that he had suffered loss, and that he had not done this since he had tendered no evidence of any payment made to the seller. The answer to this argument is that the contract is not one involving suretyship; there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker. On the contrary, the last paragraph of the agreed market usage expressly provides that the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and that each party is entitled to look to the broker for performance. This negatives the theory that the broker was only a surety.

For these reasons, which are substantially those upon which the Supreme Court acted, their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondent.

Appeal dismissed.