1931 *Present:* **Drieberg and Akbar JJ.**

SENEVIRATNE *v.* SENEVIRATNE.

361—D. C. Colombo, 32,685.

Principal and agent—Agent's authority to bind principal by bond—Payment of debt due to agent—Conflict of interest.

An agent is not entitled, under the authority given to him by a power of attorney, to enter into a mortgage bond for the purpose of paying himself a debt due to him from the principal.

IN this action the plaintiff sued the defendant, alleging three causes of action. As a first cause of action it was stated that the defendant went to England to prosecute his studies in 1919, having appointed plaintiff his attorney and that the defendant requested him to advance such sums of moneys which may be necessary for him. The plaintiff accordingly advanced to the defendant a sum of Rs. 14,393.94 till 1924. To liquidate this sum, the plaintiff as attorney of the defendant borrowed a sum of Rs. 15,000 from a Chettiar. The mortgagee put the bond in suit against the plaintiff and the defendant. At the trial the defendant pleaded that he was not bound on the bond. By agreement, judgment was entered against the plaintiff alone on the bond, and his right to sue the defendant on this liability reserved. The plaintiff pleaded as a first cause of action that he was compelled to pay the creditor a sum of Rs. 20,316, which he claimed from the defendant. As a second

cause of action, that he was entitled to recover the said sum of Rs. 14,393.94. On the third cause of action, the plaintiff claimed a further sum of Rs. 2,723.95. The defendant traversed the averments in the first and second causes of action and counterclaimed a sum of Rs. 5,300 on the third cause of action. The learned District Judge held in favour of the plaintiff on the first and third causes of action.

H. V. Perera, for defendant, appellant.—An agent can only act in the interest and for the benefit of the principal and should not place himself in such a position that his duty and interest clash. This is an action by the agent for an indemnity. A right of indemnity arises only in respect of matters within the scope of the agent's authority and contracts which the agent enters into on behalf of, and for the benefit of, the principal: (*Storey on Agency, § 341; Boustead on Agency, p. 134, Art. 48; Bentley v. Craven*[1]; *Westrop v. Solomon*[2]).

Keuneman (with him *Croos Dabrera*) for plaintiff, respondent.—An indemnity could be claimed by the agent if the transaction to bind the principal with a third party was within the power of attorney.

The plaintiff had a right to mortgage both from the power of attorney and the actual relationship that existed between the plaintiff and defendant.

A creditor who is also the agent of the debtor can exercise all the vigilance that an ordinary creditor could exercise.

H. V. Perera, in reply.—The power of attorney did not entitle the plaintiff to mortgage defendant's property for the purpose of raising a loan in order to pay himself a debt due from the defendant. An agent has no right to substitute another creditor for himself on more onerous terms without the sanction of the principal.

The agent's authority is only to bring the principal into contractual relations with third parties (*Anson on Contracts, pp. 385, 391*).

An agent in his personal capacity cannot contract with the principal under cover of the power of attorney. Such a contract would be outside the contract of agency and would require the usual elements of an ordinary contract (*Offer and Acceptance V., 1, 2; 1 Halsbury 147, 148; Tetley v. Shand*[3]; *Solomons v. Pender*[4]).

October 14, 1931. AKBAR J.—

The plaintiff and defendant are brothers. In his plaint the plaintiff alleged three causes of action. As the first cause of action he stated that the defendant went to England to prosecute his studies in the year 1919 having appointed the plaintiff as his attorney and that the defendant requested him to advance him such sums of money which may be found necessary for the purposes of his stay in England. In compliance with this request, plaintiff advanced the defendant a sum of Rs. 14,393.94 till October 17, 1924. To liquidate this sum, the plaintiff, as attorney of the defendant, borrowed a sum of Rs. 15,000 by mortgage bond dated October 17, 1924, from a Chettiar which the plaintiff himself signed as principal. The mortgagee put this bond in suit against the plaintiff

[1] *(1853) 18 Beav. 75.*
[2] *19 L. J. C. P. 1.*
[3] *25 L. T. 658.*
[4] *(1865) L. J. Exchequer 95.*

and the defendant, but at the trial the defendant pleaded that he was not bound on the bond. By agreement judgment was entered against the plaintiff alone on this bond, but the plaintiff's right was reserved to sue the defendant on this liability and the judgment was not to operate as *res judicata* between the plaintiff and the defendant. The plaintiff pleaded as a first cause of action that he was compelled to pay the creditor a sum of Rs. 20,316 which he said was a debt really due from the defendant. As a second cause of action, the plaintiff stated, in the alternative, that he was entitled to recover from the defendant the above-mentioned sum of Rs. 14,393.94. On the third cause of action the plaintiff stated that from September, 1925, to December, 1926, the plaintiff advanced sums of money to the defendant and that after setting off the income received from the lands of the defendant, there was due a futher sum of Rs. 2,723.95. The defendant in his answer merely traversed the averments on the first and second causes of action alleged in the plaint and he counterclaimed for a sum of Rs. 5,300 as being due to him on account of the estate managed by the plaintiff on his behalf.

Various issues were framed, of which I need mention only the first six, which are as follows:—

(1) Did the defendant request the plaintiff to make advances to him during his stay in England ?

(2) If so, did the plaintiff make any advances to defendant ?

(3) If so, to what extent ?

(4) If money was advanced by plaintiff, as alleged, is his claim in respect thereof barred by prescription in whole or in part ?

(5) Was the money raised on the mortgage bond 3,837 utilized to pay off the amount of the advances referred to in the above issues ?

(6) If so, is the plaintiff entitled to repayment by the defendant of the amount which he was compelled to pay to the mortgagee by the decree of Court ?

The District Judge held in favour of the plaintiff on the first and third causes of action. He held that the remittances were sent by the plaintiff at the request of the defendant and that the plaintiff had mortgaged defendant's property because plaintiff was entitled to repay himself the amount due on the remittances. He further held that the plaintiff had the power to enter into such a bond on the power of attorney. On those findings no question of prescription could arise in the Judge's opinion. He also gave judgment in favour of the plaintiff on the third cause of action. The appeal is from this judgment. This case was fully argued by Counsel on both sides and we are very much indebted to them for their assistance. It will be remembered that the plaintiff alleged in his plaint that he had advanced the money himself at the request of the defendant. The defendant while admitting that these remittances were sent to him denied that they were sent at his request and further that they were sent by the plaintiff. The evidence of the plaintiff shows that these remittances were sent from the funds of a Company called the Britannia Oil Mills, which business belonged to a partnership composed, at the time material to this case, of the plaintiff

and his brother Eddie Seneviratne who were trading as Arthur F. Seneviratne & Co. The plaintiff himself admitted as follows:—" It is my case that the money remitted to my brother was my money. It was the money of Arthur F. Seneviratne & Co., and it was remitted through the National Bank. That Bank remitted the value of the remittance against the account of A. F. Seneviratne & Co. At the time of the remitting the money was the money of the Company. In the ledgers P 6 and P 7 the defendant appears as the debtor of the partnership and he still so appears. On August 1, 1923, the debit was Rs. 14,393.94. The debit has not been increased since. In the partnership ledger there is my private account. That personal account of mine was never debited with the amount of these remittances. The account that I received from the Chettiar was not brought into the partnership account, the reason being that the books had already been closed. In the books my brother is still a debtor to the partnership for the amount." So that it will be seen that the facts are quite different to those alleged in the plaint. The remittances were not sent by the plaintiff but by the firm of A. F. Seneviratne & Co., and they are shown in the books of the Company as a debt due by the defendant to the firm.

It appears that there was a dispute between the two partners, which led to a case between them, namely, case No. 1,011, D. C. Negombo, instituted by the plaintiff against his brother Eddie Seneviratne. The decree in this case is dated January 19, 1927, and refers to a balance sheet filed by an auditor bringing the accounts up to August 2, 1924. This balance sheet contains two statements, one statement marked A showing the debts due by the Company to various creditors, one of whom is the plaintiff. Another statement B gives a list of debtors who owe money to the Company and the name of the defendant is given as owing Rs. 14,393.94 to the Company. So that it is clear that when the accounts were balanced on August 2, 1924, the defendant's name appeared as a debtor to the Company and the fact that the plaintiff's name also appears as one of the creditors of the Company shows that remittances were made from the funds of the Company and not from those of the plaintiff.

It is only necessary to mention that in the decree Eddie Seneviratne was declared the owner of the Britannia Oil Mills, but the plaintiff was declared entitled to recover debts due to the Britannia Oil Mills, according to the report of the above-mentioned auditor up to the extent of Rs. 15,000 but exclusive of any sums already recovered up to date by the plaintiff. It will be remembered that the date of the decree was January 19, 1927. The plaintiff contends that as the decree recognized his right to recover debts due to the firm, he liquidated the sum due by the defendant by borrowing Rs. 15,000 from a Chettiar on October 17, 1924, on the mortgage bond mentioned in the first cause of action. Mr. Perera contended in the first place that the power of attorney given by the defendant to the plaintiff did not entitle him to mortgage the defendant's property for the purpose of raising a loan in order to pay himself the debt due from his principal. He argued that, although the power of attorney would

bind the defendant on any contract entered into on his behalf by the plaintiff with a third party, yet the defendant was entitled to plead in law that an agent had no authority to utilize his powers under the agency for the purpose of enriching himself of paying a debt due to the agent by his principal. He argued that the effect of the plaintiff utilizing the power of attorney for this purpose was to substitute a new creditor in place of the old creditor, and that he had thus deprived him of the right of pleading against his new creditor any defence he may have against the old creditor.

It will be convenient, I think, at this stage to examine the facts a little further. The remittances were sent in monthly instalments of £18 from 1919 to August, 1923, and being money sent by his two brothers, there was no understanding as to the levying of an interest, if they are in fact to be regarded as loans. As a matter of fact, in the creditor's balance sheet attached to the decree there is no interest charged. The defendant stated (and he is corroborated to some extent by the correspondence produced between this defendant and his two brothers, viz., plaintiff and Eddie) that he opened an office in London to carry on business as a Commission Agent and that he was of material help in putting through much business of the firm of Messrs. A. F. Seneviratne & Co., and that he regarded the £18 monthly allowance as a remuneration or as a contribution towards the expenses of his office in London. Even though these sums may not be remuneration, defendant contends that he was entitled to set off a claim for services rendered against any possible claim by the Britannia Oil Mills in respect of these remittances. He therefore contends that by the plaintiff's action in pretending that the money was lent by him, he has deprived the defendant of the right of claiming this set off. Whatever one may think of these pleas, there are some facts which are proved beyond any doubt and which must be taken into account. The remittances were made from the funds of the Britannia Oil Mills and when the plaintiff purported to raise the loan of Rs. 15,000 on October 17, 1924, from the Chettiar the terms included an agreement to pay interest at 18 per cent. So, not only was a new creditor substituted without the consent of the defendant, but the latter was subjected to more onerous terms. There was no urgency in the repayment of the remittances, because no demand was made to the defendant. Further, the letter D 3 shows that the first intimation the defendant received of the mortgage was on September 11, 1925, a most a year after the mortgage bond, and defendant repudiated this loan by his letter D 4 of October 8, 1925. The decree entered into between the plaintiff and his brother Eddie adjusting their differences with regard to the Britannia Oil Mills is dated January 19, 1927, and shows that so far as the firm was concerned the debts due to the firm were to be collected as from that date. All these facts and the further fact that plaintiff mortgaged some of his own property to raise the loan of Rs. 15,000 in addition to the defendant's property indicate that the plaintiff raised the loan to secure the money for his own urgent pressing necessities. The authorities quoted by Mr. Perera, which I shall indicate later, show that an agent's act will be closely scrutinized when his duty comes into conflict with his interest. The reason why the plaintiff has

included the first cause of action in his plaint is obvious and was for the purpose of meeting a defence of prescription on the second cause of action. Plaintiff in this first cause of action pleads that he was obliged to pay the Chettiar the sum of Rs. 20,316 which was really the debt of the defendant and that the defendant was liable to indemnify the plaintiff for this payment. But can he base his claim on this ground in view of what happened in the Chettiar's mortgage action ? Of consent the Chettiar expressed his willingness to recover the full sum on the bond from the plaintiff and to absolve the defendant entirely from liability on the bond. It is true that any question or right between the plaintiff and the defendant. This can only mean that the plaintiff's right to by the bond was reserved to be tried in another case between the plaintiff and the defenfant. This can only mean that the plaintiff's right to recover money said to have been advanced to the defendant in England was reserved to the plaintiff to be decided in another case, *i.e.*, the claim on the second cause of action. As regards the second cause of action, it is prescribed, the period of prescription being three years, and the action having been brought by the plaintiff more than three years after the return of the defendant from England (see letters P 32 and P 33). It seems to me that the judgment of the District Judge on the first cause of action is wrong and that the plaintiff's action should have been dismissed on this cause of action. I have stated the facts fully dealing with the whole case and it will be seen from these facts that the moneys were remitted not by the plaintiff out of his own funds but from those of the Britannia Oil Mills. Mr. Perera argues that the power of attorney was given by the defendant in favour of the plaintiff so as to bring the defendant into relationship with third parties, but so far as transactions between the defendant and the plaintiff were concerned that could only be the subject-matter of contract. Therefore before binding the defendant as regards payment of the debts due by him in respect of the remittances plaintiff should have asked for defendant's prior consent. The facts indicate something further, namely, that the plaintiff purported to mortgage the defendant's property under the power of attorney to raise a loan not so much to repay the debt due on the remittances, but more for his own purpose as he was badly in want of money at the time. An agent on behalf of an absent principal appears to be clothed with certain restrictions as regards the manner in which he should deal with his principal's property when his action is involved to some extent with his own interest. Lord Halsbury in the *Laws of England, Vol. 1., p. 148*, states as follows:—" An agent is employed for the purpose of placing the principal in contractual or other relations with a third party, and it is therefore essential to the relation of agency that a third party should be in existence or contemplation. The essence of the agent's position is that he shall be but a conduit pipe connecting two other parties. Thus an agent for sale or purchase is debarred from being himself either buyer or seller without full disclosure to the principal. If a person who holds himself out to be an agent is in fact seeking to sell his own property or buy that of his principal, he violates the first condition of his employment. "

In the case of *Tetley v. Shand*[1], the defendant employed the plaintiffs as his agent to buy cotton. It was held by the Court of Common Pleas that a contract whereby the plaintiffs purported to sell their own cotton was no contract. As Keating J. pointed out " This case, I think, supplies an illustration of the rule, that an agent employed to buy ought not to be allowed to make himself the seller, nor an agent employed to sell to be himself the buyer . . . . To conclude, the only question for our decision is, whether the defendant authorized the plaintiff to make for him the contract on which they now sue. I do not think he did ". Similarly Bret J. pointed out " It is not pretended that the plaintiffs had any express authority to bind the defendant on such a contract; on the contrary. It remains then to be seen, whether the plaintiffs had any implied authority. So far from that, the law, for good reasons, declares that relation between the parties was inconsistent with such an implication. When a man is employed by another as agent, he cannot make himself the principal. That is stated not only in the passage in *Smith's Mercantile Law*, referred to by my brother Willes, but it is also laid down in equally clear terms by Storey in his work on *Agency, p. 9*:—' But though all persons *sui juris* are in general (as we have seen) capable of becoming agents, yet we are to understand that they cannot at the same time take upon themselves incompatible duties and characters; or become agents in a transaction, where they have an adverse interest or employment. Thus a person cannot act as agent in buying for another goods belonging to himself; and at a sale made for his principal, he cannot become the buyer.' The same principle is also laid down in Storey's *Equity Jurisprudence*, and in all the text books on the law of principal and agent."

In the case of *Salomons v. Pender*[2], the plaintiff was only a shareholder in a Company which bought a piece of land through the plaintiff from the defendant. The defendant accepted the contract and an action was brought by the plaintiff to recover commission on the sale. It was there held that although the defendant had accepted the contract and although the plaintiff had only a small interest in the purchasing company, yet the defendant was not bound to pay a commission for the sale to the defendant which was virtually a sale by the plaintiff.

Bramwell B. stated as follows:—" I think my brother Martin's view was quite correct. It certainly may be a little hard upon the plaintiff, whose interest in the land may be very much smaller than the commission he would have got if he had sold it to third parties; but we must look to the case on principle, and it appears to me that Mr. Bovill has made a fatal concession. He concedes that the defendant might have rejected the bargain if the defendant had known that the plaintiff was one of the principals. Why ? It must be because the plaintiff had no authority to make such a contract on his employer's behalf; if the plaintiff had no authority to make the contract, he was not employed to enter into it, and therefore he has earned no commission. It is almost a matter of demonstration. It is quite true that the defendant gets the benefit, if benefit it be; but he may say, ' If you choose to bring about a contract for my benefit which I did not employ you to do, I will not pay you as

[1] *25 L. T. 658.* [2] *(1865) L J. 95.*

if I had employed you—it is the act of a volunteer, and I will take advantage of it.' But there is another view. He might say, 'I did not employ you to make this contract, but you have made it, and you have altered my position by what you have done, and I am not under the obligation to reject it.' It seems to me that the case is against Mr. Bovill even in his own way of putting it, and that there should be no rule."

If we are to apply this principle to this case, defendant can plead that, even assuming that the plaintiff lent the money to him, that was a contract outside the agency and that therefore the plaintiff had no authority to substitute a new creditor and to impose more onerous terms on him in paying off the debt due by the defendant without his approval. The conclusion to which I have come is as follows:—The District Judge's judgment on the first cause of action was wrong and should be set aside; the plaintiff's action on the second cause of action is prescribed. As regards the third cause of action, all items shown in the schedule A attached to the plaint as interest paid by the plaintiff on the bond should be deleted and judgment should be entered in favour of the defendant for the balance as shown in that account, *i.e.*, Rs. 1,569.80, and the plaintiff's action will be dismissed with costs in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.