1938 *Present :* **Soertsz and de Kretser JJ.**

APPUHAMY *v.* MOHAMED ALLY *et al.*

*355—D. C. Colombo, 1,433.*

*Principal and agent—Purchase by agent on behalf of disclosed principal—Action against both—Judgment against agent—Election—Action barred against the principal.*

Where the first defendant purchased goods from the plaintiffs, as agent on behalf of the second defendant, the disclosed principal, and the plaintiffs obtained judgment against first defendant by consent,—

*Held*, that the plaintiffs must be deemed to have elected to proceed against the agent and cannot thereafter seek to obtain judgment against the second defendant as the other person liable on the contract.

*Bulatsinghala v. Samarasinha* (*14 N. L. R. 389*) not followed.

APPEAL from a judgment of the District Judge of Colombo.

*N. Nadarajah* (with him *H. W. Thambiah*), for second defendant, appellant.

*P. Thiagarajah*, for plaintiffs, respondents.

*Cur. adv. vult.*

March 9, 1938. SOERTSZ J.—

The plaintiffs sued the defendants to recover a sum of Rs. 561.56 on a cheque which the first defendant had drawn in favour of the second defendant and which, they said, the latter had endorsed and delivered to them.

On November 12, 1936, the first defendant through his proctor moved " to be allowed to pay the *balance* claim by monthly instalments of Rs. 20." The claim was described as a balance claim in view of a payment of Rs. 120 which the plaintiffs' proctor moved to certify on November 10, 1936, as a payment made by the second defendant. Later developments make it clear that the second defendant did not pay this amount. It appears to have been a piece of strategy directed against him. On December 4, 1936, decree was entered against the 1st defendant ordering him to pay to the plaintiffs Rs. 561.56 with interest and costs, but providing that if he hypothecated immovable property as security for the *balance* claim due, he would be allowed to pay by monthly instalments of Rs. 100 commencing from January 1, 1937. The second defendant had not yet been served with summons. On March 3, 1937, substituted service of summons was allowed on him, and that had the immediate effect of bringing him into the open. On March 18, 1937, he appeared and obtained time till April 19, 1937, to file his answer, and on that date he filed it. He denied that he had endorsed and delivered the cheque to the plaintiffs. Then on May 21, 1937, the plaintiffs moved to amend their plaint. The second defendant consented to this being done, and an amended plaint was filed and the second defendant filed an amended answer. The extraordinary feature of the amended plaint is that it sought to make both the first and the second defendants liable on the cheque, although the plaintiffs had already obtained a decree against the first defendant on it. There is nothing on the record to show that the first defendant had notice of the amendment or that he knew that the plaintiffs were asking for judgment against him a second time. At any rate he filed no answer. In the amended plaint, there was an alternative claim for goods sold and delivered. The second defendant in his amended answer again denied that he had endorsed and delivered the cheque to the plaintiffs, and in regard to the alternative claim, he pleaded that there were no dealings between him and the plaintiffs, and that no goods had been supplied to him. On the first point the trial Judge held in his favour; on the second he found that the plaintiffs had supplied goods to the second defendant through the first defendant, his agent, and he entered decree ordering him to pay Rs. 561.56 less Rs. 120 alleged to have been paid by him on November 10, 1936.

The only question that was discussed before us on appeal, was that raised by issue No. 8, whether the plaintiffs can " maintain this action against the second defendant inasmuch as judgment had already been entered against the first defendant ".

In regard to this question the amended plaint makes it quite manifest that ultimately both causes of action recited therein, arose out of the same contract. The sum of Rs. 561.56 claimed in the alternative cause of action is the sum for which the cheque sued upon in the first cause of action was issued.

The evidence of the plaintiffs' kanakapulle establishes definitely that the plaintiffs supplied the goods to the first defendant, as the manager of the second defendant's business. He says " the person who introduced the first defendant to me was . . . . Ismailgee. I was told that

the first defendant was the manager of the second defendant . . . . on the very first purchase I entered the second defendant's name", and again later he says, "my case is that the second defendant undertook to pay". This clearly means that the first defendant put himself forward as the agent of the second defendant, and that the plaintiffs accepted him as such, and regarded the second defendant as the principal. The legal position that results from these facts is that the second defendant was liable to be sued as the disclosed principal. The agent too would have been liable if he had contracted *personally*, though on behalf of his principal. See *Reid v. Dreaper* [1]. If an agent has not contracted personally he is not as a rule liable to be sued. There are a few exceptions in which an agent may be sued even if he has not so contracted, but none of those exceptions apply in this case. If an agent purports to act on behalf of a principal when he had no authority to do so, he will be liable on his implied warranty for any loss caused to a third party even if the agent acted in the honest belief that he had the authority. See *Cherry v. Colonial Bank* [2] and *Brown v. Law* [3]. But if while professing to act as agent he can be proved to have been in fact the principal and acting on his own behalf, he is personally liable on the contract. See *Adams v. Hall* [4].

Applying these principles to the case as disclosed by the plaintiffs' kanakapulle's evidence, and to the Judges finding that the first defendant purchased goods from the plaintiff on behalf of the second defendant whose name was disclosed to the plaintiffs, and that as a matter of fact, the second defendant was rightly disclosed as and was the principal, the position in law is that it was the second defendant who was liable to be sued. Certainly till the October 6, 1936, there is nothing to show that the first defendant had contracted *personally* in regard to these goods. But perhaps it can be said that when on that date he gave the plaintiffs a cheque and that is in effect the finding of the trial Judge, that the cheque was given by *him* and not by the second defendant, although it was made payable to the second defendant: and then endorsed as if by the second defendant—he rendered himself personally liable on this contract of goods sold and delivered. There was also the liability of the second defendant as the disclosed principal.

In these circumstances the plaintiffs could have sued either the first defendant or the second defendant. But they brought their action against both the defendants originally on the cheque. As I have already observed, although they were suing on the cheque, they were in reality, suing for the value of the goods sold and delivered. The cheque had been given in payment. When therefore the first defendant consented to judgment and they took it against him they must be deemed to have elected to look, to the agent alone. The "recovery of judgment against one of the persons liable is the one conclusive form of election". See *Ramanathan v. Ibrahim Lebbe* [5]. The plaintiffs cannot now seek to charge the principal as the other person liable on the contract. See *Priestly v.*

[1] (1861) 30 L. J. Ex. 268.
[2] (1869) 38 L. J. P. C. 49 P. C.
[3] (1895) 72 L. T. 779 H. L.
[4] (1877) 37 L. T. 70.
[5] 24 N. L. R. 321, at p. 323.

*Fernie* [1], and *Kendall v. Hamilton* [2]. In regard to the case of *Bulathsinghala v. Samarasinghe* [3], which was cited to us it is difficult to ascertain from the report the exact scope of that decision. If as the headnote indicates, the ruling in that case was that although an agent contracted on behalf of a principal who was in fact the principal, and did not make himself personally liable, both the agent and the principal were liable and could be sued together, all I would say is that it can hardly be reconciled with other decisions of this Court and with English cases. Section 80 of Boustead on agency which is relied upon in the judgment in that case does not seem to justify such a proposition.

In conclusion, I think I ought to say that the amendment proposed by the motion of May 21, 1937, should not have been allowed at that stage of the case. So far as the first defendant was concerned, there was a final judgment against him, and no amendment of pleadings was possible thereafter. Section 93 of the Civil Procedure Code is quite clear.

I would set aside the judgment of the District Judge and dismiss the plaintiff's action as against the second defendant. The second defendant is in great measure, responsible for these futile proceedings in the Court below. He consented to the amendment of the plaint and acquiesced in the misjoinder that resulted. The parties will, therefore, bear their own costs in the trial Court. The second defendant is however entitled to the costs of the appeal.

DE KRETSER J.—I agree.

*Appeal allowed.*