1948 *Present :* **Soertsz S.P.J. and Nagalingam J.**

PEIRIS, Appellant, *and* DE MEL, Respondent

S. C. 212—D. C. Colombo, 13,701

Broker—Contracting as principal—Right to sue on brokering contract—Memorandum—Sale of Goods Ordinance.

The existence of two independent parties is a *sine qua non* before a broker can conclude a transaction, although the broker need not disclose the identity of one party to the other. Where, therefore, the broker constitutes himself the other contracting party to the transaction, he is not entitled to sue on the footing of a brokering contract.

Held further : The Sale of Goods Ordinance does not apply to a brokering contract and the absence of a note or memorandum does not invalidate such a contract.

APPEAL from a judgment of the District Judge, Colombo.

N. E. Weerasooria, K.C., with *N. M. de Silva* and *Sam. Wijesinha*, for defendant appellant.

E. F. N. Gratiaen, K.C., with *D. W. Fernando*, for plaintiff respondent.

Cur. adv. vult.

March 11, 1948. NAGALINGAM J.—

This is an appeal from a judgment and decree of the District Court of Colombo dated October 8, 1947, condemning the defendant appellant to pay a sum of Rs. 20,022·02 to the plaintiff.

The plaintiff, a private limited company, was carrying on business as a firm of brokers. Its case was that the defendant had employed it to buy and sell rubber coupons on his behalf and that on the transactions negotiated by it for him there was due to it the sum for which judgment has now been entered in its favour. Reliance was placed by the plaintiff upon certain usage of the Colombo rubber market to show, *inter alia*, that it had the right to maintain an action in its own name for recovery of moneys in respect of those transactions notwithstanding that it may have acted only as a broker.

The main defence of the defendant was that he did not employ the plaintiff company as a broker but that he entered into wagering contracts with it in its capacity as principal to gamble on the rise and fall of the rubber coupon market, the transactions being, however, disguised as ordinary brokers' contracts but under a definite agreement that he was neither to take nor give delivery of coupons and that he was only to pay or receive "differences". The wagering nature of the transactions apart, the defendant also took up a second line of defence that the plaintiff company, though ostensibly and outwardly acting as brokers, was in fact and in reality the other party to the contracts alleged to have been put through

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by it on behalf of the defendant and was therefore guilty of breach of faith in regard to its employment as a broker and hence was disentitled to relief.

The trial Judge rejecting the defendant's plea that the contracts were wagers entered into between him and the plaintiff *qua* principal has held that the plaintiff company was in fact employed by the defendant in its capacity as a broker to buy and sell rubber coupons for him.

Counsel for the appellant while contesting the soundness of this finding contends that the trial Judge has not appreciated the second of the defences set out above, namely, whether though the plaintiff may have been employed as a broker it did not in fact act as principal, and if so, whether it could recover ; for he urges that there has been no discussion of the evidence from this angle nor have the authorities bearing upon this aspect of the case cited at the hearing been referred to in the judgment.

As the learned Judge has chosen to believe the plaintiff company's managing director in preference to the defendant, I do not think it possible to take a view different from that taken by the trial Court in regard to the first defence set up, nor is it necessary in view of the conclusion I have reached on the second defence put forward. As the latter defence does not appear to have received consideration in the lower Court, it becomes necessary to examine the evidence in support somewhat in detail. The appellant relies mainly upon the testimony of Austin de Mel, the plaintiff company's managing director, which, it is urged, conclusively establishes that though the plaintiff company may not have acted as principals in entering into wagering contracts with the defendant as alleged by him, nevertheless the plaintiff company put through the transactions the subject of this action as principals, disguising its character of principal, however, under the mantle of a broker.

The plaintiff company appears to have commenced business in 1939, and as it has been urged by counsel appearing for it that there was a change in the nature of its activities after August, 1940, it would be convenient to consider the evidence according as those activities are referable to the period before or after August, 1940.

Firstly, then with regard to the period before August, 1940 : The plaintiff company's managing director says that the plaintiff firm was like a coupon exchange bank which, his evidence discloses, is a compendious term adopted by him to indicate that the plaintiff firm itself bought all rubber coupons which its customers desired it to dispose for them and that the firm also itself sold rubber coupons to clients who were desirous of having coupons purchased for them. The reason for pursuing this notion of a coupon exchange bank, the witness explained, was with a view to " holding the client ".

I think it would be best to let the witness narrate in his own words the meaning of the term " holding the client " as well as what the system was that was followed by him in running the coupon exchange bank, and I shall for this purpose quote two passages from his evidence :—

(*a*) Q. You say your main interests are brokering ; what are the other interests ?

A. Holding the client, keeping the client. What I mean is if a man phones us two or three times and we asked him to wait till we find a buyer he will never ring us up again. If a man says he has 20,000 lbs. to sell (and asks) "Will you take it ?" I say "Yes", and then somebody phones and asks "Have you got 20,000 lbs. to sell ?". I would say "Yes" and so on. If he wants only 19,500 lbs., I give it to him. That is what I mean by holding a client.

Q. You are functioning as a party to the contract ?

A. No, that is following a system of convenient trading from a commission point of view even though it be illegal.

Q. You put your name down as the other party to the contract ?

A. That is the practice among the brokers at Colombo with a few exceptions.

(*b*) Q. Your case in the morning was, that Austin de Mel, Ltd., was put in as purchaser or seller merely temporarily ?

A. Yes.

Q. That is, whatever Austin de Mel, Ltd., bought, it immediately sold back ?

A. Not immediately. When it was convenient for them they sold back.

Q. And how long would that convenience take ?

A. A day or may be even two.

Q. Sold back at different prices ?

A. Very nearly the same price, at times slightly lower, at times slightly higher.

Q. But sometimes Austin de Mel, Ltd., appear as seller without having bought ?

A. Most often we appear as buyer. If a buyer came along and I had no ready seller I sold a quantity myself because I know . . . .

Q. May you have sold without having bought ?

A. I may have sold in the hope of buying it from elsewhere.

Q. And if you have sold you would then buy thereafter to cover the contract ?

A. Yes.

Q. And also at different prices ?

A. May be the same price, may be slightly different.

These passages apart from others of a like character, to be found in the very lengthy cross-examination of this witness, make it abundantly clear that the plaintiff company did not wait to negotiate a transaction only after it was able to secure two principals who were willing to contract with each other, but what it really did was *to constitute itself the other contracting party to the transaction* immediately the negotiation of a transaction was placed in its hands by a client in the hope that it would be able to pass on the contract sooner or later to another client who would then be substituted in its place as the other contracting party.

In August, 1940, the firm appears to have been legally advised that the course of business pursued by it was not quite proper. The managing director's evidence, however, is illuminating as to the method adopted by

him to discontinue the practice and in particular what it was that he in fact discontinued. This leads one to a consideration of the nature of the business activities of the firm after August, 1940. It would be best to let Austin de Mel speak once again and to this end I shall extract three more passages from his evidence.

(i) Q. After August, 1940, if a client phone up to sell a quantity of coupons and you had nobody to buy, how would it hold him ?

A. I am not going to give out business secrets.
(Court : You must, there is no secrecy).
If there are hundred people selling and another hundred buying, instead of putting down A selling and Austin de Mel (Ltd.) buying 20,000 lbs. and Austin de Mel selling and B buying 19,500 lbs., I would say A selling and B buying 19,500 lbs. and A selling 500 lbs. That means that the man is satisfied because he gets his 20,000 lbs. This can go on *ad infinitum* to satisfy the law . . . .

Q. After the legal advice I put it to you that you sometimes had blanks and thereafter entered the blanks with names like Oriel de Mel ?

A. I may have done that. *I leave a blank and then find a client or go out of my way and find a client.* If a client does not come I ring up some other client who is always willing to oblige and say, " Will you take this ? " and he says " All right ".

In regard to contract 2123 (P 23) of July 29, 1941, one of the items included in the claim of the plaintiff company and alleged to have been put through by it between the firm of Muller & Cooray as sellers and the defendant as buyer of 10,000 lbs. of rubber coupons, after the witness had admitted that the entry in his rubber coupon register was incorrect in more than one particular and that he had included this item in a set off statement sent to the defendant even before Muller & Cooray had delivered the coupons, his evidence was :—

(ii) Q. Why did you set off something before it was delivered ?

A. We do not wait till delivery by one person to deliver to another person. We run it *on the lines of a coupon exchange.*

In regard to another contract 1140 (P 21) of May 16, 1941, in respect of which too a set off statement had been sent before delivery of coupons by the seller (H. A. Rodrigo) to the defendant, the witness said :—

(iii.) As far as I and the defendant were concerned it was utterly immaterial what H. A. Rodrigo did in respect of the contract. When H. A. Rodrigo delivered the coupons, I took them and dealt with them *as I liked* . . . . When I entered into these contracts there was the mental reservation that it did not matter what the other side did so long as I performed it.

These passages disclose very clearly that even after legal advice was received by the plaintiff company the system of business, though attempted to be camouflaged, continued to be carried on on identically the same

lines as prior to the receipt of the advice. While prior to the advice the name of Austin de Mel, Ltd., used to be put down immediately as the other contracting party, after the advice the name of Austin de Mel, Ltd., did not appear in the document as that of the other contracting party, but the column or space for the insertion of the name of the other contracting party was left blank till the plaintiff company secured the other contracting party either in the ordinary course of its business or after it went out of its way to find an obliging client. The mere delay or suspension in the insertion of the name of the other contracting party did not reflect any change in the mode of transaction of business between the plaintiff company and its clients, for the plaintiff company continued to hold its clients by taking over the contracts immediately they were offered to it as before ; so that even after the date of the legal advice it cannot be said that whenever it purported to negotiate a transaction for one of its clients, it had at the time of the transaction a principal in existence on the other side as the other contracting party. Before the legal advice the plaintiff company in its own name carried over any contract in respect of which it was unable to find at the end of the day a buyer or seller, but after the legal advice it is impossible not to resist the inference that the name of an obliging client, more often than not in the shape of an obliging brother of the company's managing director, was utilised for the purpose. It is however unnecessary to decide the point whether the obliging client or brother was only a dummy or whether they did in fact themselves figure as real parties to the contract. It certainly would have been possible to answer this question with little effort if what has been termed the " position ledger " alleged to have been kept by the plaintiff company had been produced. The managing director stoutly denied the existence or knowledge of any such book. He would have the Court believe that his knowledge of a position ledger was derived from what he had heard of the activities of speculators but he was grievously contradicted by his assistant, one Samaraweera, now himself director of the plaintiff company, who affirmatively stated that he had kept the position ledger and that it had been kept for the private information of Austin de Mel himself. The trial Judge dismisses all the emphasis laid by the defendant on the non-production of this book by observing that the facts merely lend themselves to the supposition that the plaintiff company was itself speculating on the activities of the market. But I think the larger criticism levelled on behalf on the defendant is entitled to prevail to the full. Defendant's counsel contends that the production of the book would have disclosed not only what it was intended to reveal to Austin de Mel himself, namely, the position of the firm in regard to the transactions undertaken by it on behalf of its clients which at the end of the day remained unnegotiated by it and the manner in which those unnegotiated transactions were subsequently squared up, but also that not merely up to August, 1940, but even right down to the dates of the disputed transactions the plaintiff company was in the first instance the other party to the contracts.

On behalf of the defendant it was also urged that the discrepancy noticed in certain instances between the entries in the documents of contracts and the register is attributable to the attempt to close up a whole

series of unnegotiated transactions. I think there is a great deal of force in this contention. The plaintiff company's managing director himself full well realised that to a broker who was interested only in the commission in respect of the transactions negotiated by him between two principal contracting parties a position ledger would be a meaningless document and such document, if produced, would hardly enable him to effect a reconciliation between his evidence and the entries therein.

The suppression of the document, for that is the only view one can take of the Judge's finding on this point, has also another important bearing on the case. The contract forms and the rubber coupon register produced by the plaintiff company are of no assistance in gauging the real nature of the course of plaintiff company's business, for they are written up only after the stage had been reached of negotiation between two of its clients by the plaintiff company of any particular transaction, and if one went only by these documents in the absence of the position ledger it would be possible to argue, as has in fact been argued, that the plaintiff company put through the transactions in each case in the first instance with a third contracting party and not with itself and not that the transactions were concluded after the subsequent " finding " of the third party—an argument in the very teeth of the specific evidence given by the managing director himself.

The position, therefore, appears to be that Austin de Mel even after August, 1940, regarded his firm as a coupon exchange bank in spite of the legal advice received and that the plaintiff company took over itself whatever business was offered to it by its clients and subsequently negotiated and adjusted the transactions among such clients as were available. That the plaintiff company could have brought together the two parties to a contract of buying or selling in the first instance is extremely doubtful inasmuch as the course of business followed by it did not lend itself to the concluding of such a contract between two principals without the intervention of the plaintiff company itself as a party to the contract, for by so doing it could not have avoided the loss of custom which it was determined to prevent at all costs.

Reduced to legal formula the plaintiff company's course of business between a buyer X and a seller Y would be as follows :—

(*a*) X buys from the plaintiff company (first contract).
(*b*) Plaintiff company buys from Y to fulfil contract (*a*) (second contract).
(*c*) Later plaintiff company drops out by purporting to arrange a contract whereunder X buys from Y (third contract).

This last contract (*c*) is the one that is reduced to writing. In this illustration, it would be noticed, the contract of purchase from the plaintiff company is set out earlier than the contract of purchase by it and this has been done with the purpose of drawing attention to the evidence of the plaintiff company's manager that even without owning any goods he would sell in the hope of buying thereafter. It is manifest that the plaintiff company does not negotiate a purchase or sale between two principals in existence at the time it purports to conclude the contract of purchase with the one or the contract of sale with the other. In other words, the plaintiff always contracts with a principal *in esse* and on the footing

of a principal *in posse*, the special characteristic of a trader or merchant distinguishing the latter from a broker. A trader buys in the expectation of selling later to a third party or, to put it differently, in the expectation of "finding" a buyer thereafter, the price at which he sells being immaterial, as it may be that he has sometimes to sell even at a loss.

The questions that arise for determination in this state of facts is whether the plaintiff company did or did not act as the other contracting party in regard to the various contracts sued upon, and if so, whether it could recover.

On the facts disclosed it is not possible to take any other view in law of the part played by the plaintiff company in these transactions but that it was acting as a principal, especially when one bears in mind the reference to the fact that the plaintiff company was functioning as a coupon exchange bank, taken in conjunction with the mental reservation spoken to by the plaintiff's managing director that it did not matter what the other party to the contract did so long as the company itself performed the contract. It has been argued that where a broker intimates, say, to a buyer that he has purchased on his behalf, though in fact at the moment of such intimation no such purchase has been made from a third party, it would be sufficient that the broker is able to arrange a transaction later with a client "found" later. To my mind, it is clear that the character of a broker is completely altered by his adopting such a course of business. It is the essential function of a broker to bring two parties together. It is quite permissible for a broker when a client places an order with him, say for the purchase of goods, to say that he would try and negotiate the purchase, and then when he has found a seller who would be willing to enter into the contract with the purchaser on the latter's terms, to intimate that he has made the purchase, for then it is that he could be said to have concluded the contract. But that it was not the procedure adopted by the plaintiff company is clear. The plaintiff company, on the other hand, even before it found a seller who would be willing to sell the goods required by the purchaser, adopted the course of intimating to the purchaser that it had made the purchase, thus constituting itself the other contracting party.

While the existence of two independent parties is a *sine qua non* before a broker can conclude a transaction, it is not necessary that he should disclose the indentity of the purchaser or seller to the other party. The non-disclosure of the identity of a buyer or seller would not detract from the essential character of a broker nor would the fact that a broker by the usage of a particular market is entitled to sue a defaulting client tend to take away the character of a broker who acts as such.

Blackburn J. in *Robinson v. Mollet* [1] described the duty of a broker as one that required the broker to *establish privity of contract between two principals* and Grove J. in the same case defined "brokers" as persons who were to *negotiate a binding contract between* sellers and buyers. It would be noticed that the plaintiff company in this case never purported to do so at the time it took over the contract from the buyers or sellers. In fact the plaintiff company's managing director's evidence shows that the

[1] *(1874) 33 L. T. 544.*

purchase price paid by a buyer may not necessarily be the same as that paid to the seller, or the firm, according to him, sometimes arranged the transactions at slightly varying prices.

An attempt was made to show that according to the custom of the Colombo rubber coupon market a broker could in the first instance take over the contract himself and thereafter pass it on to some other party. Though the plaintiff in his plaint set out various usages as obtaining in the Colombo market in regard to rubber coupons, he did not plead the existence of such usage. The plaintiff company's managing director, however, did refer to the existence of such a practice and that passage in his evidence has been quoted in extract (*a*). The members of two leading firms of brokers, however, emphatically denied the existence of such a practice. Mr. Muller of the firm of Muller & Cooray said, "I would not put through a contract unless there was a buyer and seller. Muller & Cooray are a firm of brokers. We are not a firm of dealers." Mr. Gibson of Somervilles' was still more emphatic. In answer to the question, "Would you regard Somerville as a kind of coupon exchange where you bought all the coupons you could in the hope of selling them to people who wanted them?" he said, "It is wrong, it is not the practice of the Brokers' Association." and in answer to the further question "Why do you consider it wrong?" he replied, "We claim to be brokers and not dealers."

I do not therefore think that the existence of such a practice, much less a usage or custom, has been established in this case. In fact it would have been surprising, for, otherwise, a broker, to use the language of the witness Gibson, would himself become a dealer and the character of agency which alone entitles him to commission he would have completely shed.

The circumstances which may transmute the character of a broker from an agent into a principal and the legal consequences that flow from a broker acting in reality as a principal are clearly deducible from the principles laid down in the case of *Robinson v. Mollet* (*supra*) and *Armstrong v. Jackson*.[1] The former case was one decided by the House of Lords. The plaintiff, a broker, was commissioned by the defendant on two separate dates to buy for him 50 tons and 200 tons of tallow. In execution of the first order the plaintiffs purchased from a jobber 150 tons intending to appropriate 50 out of that to the defendant's order. In execution of the second order, the plaintiff purchased from two separate jobbers 150 tons and 200 tons respectively, intending to appropriate the entirety of 150 tons of one jobber and 50 out of the other jobber's contract. The defendant defaulted and the plaintiff instituted the action for the recovery of the amount incurred by him in executing the two orders of the defendant. The defence was that the plaintiff having failed to enter into binding contracts on behalf of the defendant for the quantity of tallow ordered by him by the plaintiff having entered into contracts for larger quantities than were warranted by the order placed with him, the plaintiff was not entitled to recover. The question was whether the character of the broker was intrinsically altered by his having

[1] (*1917*) *2 K. B. 822.*

purchased a larger quantity than he was commissioned to buy. Usage of the tallow market that a broker could do so was relied upon, and Lord Chelmsford who delivered the opinion of the house said :—

" Now, the effect of this custom is to change the character of a broker who is an agent to buy for his employer into that of a principal to sell to him " ;

and the noble Lord later continued :—

" But the usage is of such a peculiar character and is so completely at variance with the relation between the parties converting a broker employed to buy into a principal selling for himself and thereby giving him an interest wholly opposed to his duty, that I think no person who is ignorant of such a usage can be held to have agreed to submit to its conditions merely by employing the services of a broker to whom the usage is known to perform the ordinary and customary duties belonging to such employment."

It is needless to consider what the effect of the knowledge on the part of the defendant of the existence of such a practice as alleged by the plaintiff company to exist would be, for on the evidence given, it is obvious that there was no such recognized practice in the Colombo market. I do not, however, wish to be understood as saying that if such usuage had been proved then it would be binding upon the defendant, for the usage must be a reasonable one, and to my mind it is wholly unreasonable to admit of a usage which converts an agent into a principal with the result that his interest would be in conflict with his duty.

In the second of the cases cited above the facts were not dissimilar to those in the case before us. There a medical man employed a broker to purchase shares for him ; the broker pretending to execute the mandate to buy, sold his own shares and on an action by the broker to recover the sums due to him in regard to the transaction the defendant claimed rescission of the contract on the ground that the broker had been guilty of a breach of duty in regard to his employment. McCardie J. made use of the following language in enunciating the legal principle :—

" It is obvious that the defendant gravely failed in his duty to the plaintiff. He was instructed to buy shares but he never carried out his mandate. A broker who is employed to buy shares cannot sell his own shares unless he makes a full and accurate disclosure of the fact to his principal and the principal with a full knowledge gives his assent to the changed position of the broker. The rule is one not merely of law but of obvious morality. As was said by Lord Cairns in *Parker v. McKenna* (1874) L. R. 10 Ch. 96, 118, ' no man can in this Court acting as an agent be allowed to put himself into a position in which his interest and his duty will be in conflict.' Now a broker who secretly sells his own share is in a wholly false position. As vendor it is to his interest to sell his shares at the highest price. As broker it is his clear duty to the principal to buy at the lowest price and to give unbiassed and independent advice (if such be asked) as to the time when and the price at which shares shall be bought or whether they shall be bought at all. The law has ever required a high measure of

good faith from an agent. He departs from good faith when he secretly sell his own property to the principal . . . . it matters not that the broker sells at the market price or that he acts without intent to defraud. See *Bentley v. Craven* (1853) 18 Beven 75. The prohibition of the law is absolute."

It is not pretended in the present case that the plaintiff company made any disclosure to the defendant that it was selling the shares held by it or that it was itself purchasing the shares offered to it by the defendant. Having regard to the principle set out above, it must follow that the plaintiff company which is shown to have acted in its capacity as a principal and not as broker cannot enforce any rights under those contracts on the footing that they were brokering contracts; and that was their case.

In this view of the matter issues 2 (*a*) and 2 (*b*) should have been answered in the negative. As the answers to these issues dispose of the plaintiff's case it is hardly necessary to consider at length two other arguments put forward on behalf of the defendant. One is in regard to the capacity of the plaintiff to maintain the action as a firm of brokers. I see no reason to differ from the view taken by the trial Court that the plaintiff company though itself not licensed as a firm of brokers can enter into valid brokering contracts provided the person acting on its behalf is duly licensed. The other is that the absence of notes or memoranda under the hand of the defendant evidencing the alleged contracts is fatal to the plaintiff's action. Had the contracts between the plaintiff company and the defendant been straight contracts for the purchase and sale by one to the other or *vice versa*, the contention would have been entitled to prevail. But the transactions between the parties as is now proved were brokering contracts, though the plaintiff may have violated the terms of his employment. It is therefore not possible to apply the provisions of the Sale of Goods Ordinance to these contracts and I agree with the trial Judge that there is no merit in this contention.

In the result the plaintiff's action fails and I would therefore allow the appeal and dismiss the action with costs both in this Court and in the Court below.

SOERTSZ S.P.J.—

I agree to make the order proposed by my brother, but I should wish to add a few words to say that, after a careful consideration of the evidence in the case, I find myself in agreement with the view of the trial Judge that, although Austin de Mel was lacking in candour in respect of one or two matters that arose for consideration, he was, on the whole, a much more reliable witness than the defendant. The impression I have gathered of the defendant is that he is one of those unscrupulous persons whose business morality may be summed up in the words, "heads I win, tails you lose". With the trial Judge, I have no hesitation in rejecting his evidence that he and the plaintiff in the transactions in question here between them, were engaged unmistakably in wagering with each other. The defendant was undoubtedly gambling. The plaintiffs could not but have known that,

but that did not make them parties to the gambles. The evidence, as I understand it, shows that the plaintiffs were carrying on business not only as brokers but also as traders in respect, *inter alia*, of rubber coupons, and that, as between them and the defendant, the transactions with which we are concerned were, really, purchase and sale transactions between two principals, the plaintiffs selling to the defendant from what Austin de Mel called " the Ceylon Exchange Bank " and buying from his and others in order not only to replenish their coffers but also " to hold their clients ". But for some reason best known to the plaintiffs and their legal advisers, this action was brought on the footing that these transactions were brokering contracts with certain peculiar features engrafted on them by local custom. The pleadings, the issues and Austin de Mel's evidence leave one in no doubt whatever in regard to that. The question, then, is whether these contracts sued upon were brokering contracts as understood in a proper view of the law relating to brokerage. Austin de Mel's evidence furnishes but one answer to that question and with that answer my brother has dealt so fully in his judgment, that it is quite unnecessary for me to add to it. The result is that, although, in fact, the amount sued for is due from the defendant to the plaintiffs, the plaintiffs cannot recover it as they seek to do, that is to say, as the sum due to them on brokering contracts. Quite clearly, there were not such contracts despite the studied attempt by the plaintiffs to give them that appearance.

Appeal allowed.