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Present: Pereira J.

BOYSEN *v.* ZAMEELDEEN.

291—C. R. Colombo, 32,556.

Principal and agent—Contract on behalf of a foreign principal—Is agent personally liable ?

Although an agent who makes a contract on behalf of a foreign principal is, as a rule, personally liable on the contract, there may be terms in any particular contract that negative such liability. Where such an agent did no more than introduce his principal and the other contracting party to each other, and it appeared from the facts proved that the principal and the other contracting party bargained together,—

Held, that the agent could not be deemed to be personally liable.

THE facts are set out in the following judgment of the Commissioner of Requests (P. E. Pieris, Esq.):—

Plaintiff is suing in this case for a balance sum alleged to be due on a promissory note. The facts in that connection with that note are triple. Certain goods had arrived consigned to the defendant. He had to pay certain sums to clear the goods. He had not the necessary money. He borrowed this sum from plaintiff and gave the promissory note. Rs. 100 has been paid, and the balance is due. That is the whole case so far as the note is concerned. The defence is really in the nature of a counter-claim. The goods which I have referred to were ordered through the plaintiff; defendant says they were not up to sample, and he claims this Rs. 200 as damages, and denies his liability to pay the claim on the promissory note in consequence. On the question of whether the goods were not in accordance with the sample, I hold for the defendant. He had selected certain samples at the plaintiff's office, and he had given his order in accordance with the trade numbers of those samples. It appears from P 2 " (that if not otherwise prescribed assorted colours are delivered) " that fact was not brought to the notice of defendant. He had selected specific samples. He was entitled, in the absence of any agreement to the contrary, to have the goods supplied to him in exact agreement with the samples in every detail. It is proved that 445 pieces were according to sample and 754 were not. Then arises the chief question in the case, and that is, as to the liability of the plaintiff in respect of this failure. The plaintiff, I understand, is a German, and is established in Colombo, where he carries on various branches of trade. The document which connects him with the defendant is the indent P 1, where he is described as commission agent.

What exactly was the nature of his relation to the defendant ? He has clearly explained the course of business. Parties ordering goods sign the indent, which is in a printed form. On the top of it is printed, on

the left hand side, plaintiff's name and description, on the right hand side is written the name of the foreign shipper, to whom, I understand, the order is addressed. Plaintiff receives this order and forwards it to the shipper. The shipper thereupon communicates to him his acceptance or otherwise of the order. That reply is communicated by the plaintiff to the customer, and by a special term in the indent the contract is not concluded till formal advice has been received by the customer of the acceptance. Plaintiff apparently has nothing further to do with the matter. The goods are consigned to the customer. The invoice is in the customer's name. The bill of lading bears no name. The shippers at the same time to draw on the customer for the value of the goods, and the draft, I understand, is collected through the bank, and the customer can take the goods on payment. If, for instance, the shipper decline to accept the indent, no contract at all comes into existence, and there is no liability at all on the plaintiff. In case of acceptance, the goods are never in the possession of the plaintiff, and he never receives into his hands their value from the customer. Under these circumstances, I am of opinion that the plaintiff is what he has described himself to be, that is, merely a commission agent, and I am of opinion that in the circumstances of the present case he is not liable to defendant in damages, on the ground that the shipper had failed to supply goods according to sample. The defendant's counter-claim is dismissed. Judgment for plaintiff as prayed for with costs.

E. W. Jayewardene, for defendant, appellant.

Bartholomeusz, for plaintiff, respondent.

Cur. adv. vult.

September 15, 1913. PEREIRA J.—

The simple question in this case is whether the plaintiff is liable to the defendant for breach of the contract involved in indent P 1. It was argued that the plaintiff was not so liable, because he was a commission agent acting on behalf of a foreign principal. The law as to the liability of such a commission agent is clearly, though tersely, laid down in Lord Halsbury's *Laws of England* (see vol. I., p. 209): "A contract by an agent on behalf of a foreign principal cannot be enforced by or against such principal even though his existence was known to the other contracting party, unless it is affirmatively shown that at the time when the contract was made the agent had authority to establish privity of contract between such principal and the other party, and that privity of contract was in fact established between them." And, again, it is stated (see page 220): "An agent who makes a contract on behalf of a foreign principal is personally liable on the contract, although he discloses the name of the principal, unless the terms of the contract are inconsistent with his liability."

In the present case it can hardly be said that the contract in question was made by the plaintiff on behalf of A. Averbach of Hamburg, and it is clear that the terms of the contract that has been read in evidence are inconsistent with liability on the part of

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the plaintiff. What the plaintiff did was to bring Mr. Averbach and the defendant together, and the contract was a contract between them. In the case cited at the argument in appeal—*Elbinger Actien Gesellschaft v. Claye* [1]—it will be seen from the judgment of Blackburn J. that the offer that was accepted by Seebech & Co., the commission agents who were said to be acting for the plaintiff in that case, was made by the defendant in writing in the book of Seebech & Co. without any mention of the foreign company, and Blackburn J. observed: "There might, no doubt, be a contract made in a different way between the two parties bargaining together." In the present case the contract was clearly one made in a way different from that made in the case cited. Here the two parties, Mr. Averbach and the defendant, bargained together. The list of facts cited by the Commissioner in his judgment shows this. These facts are established by the evidence of the plaintiff, and I must accept the Commissioner's verdict on that evidence as correct, as the defendant had no right of appeal on the facts in this case.

In the view expressed above, the plaintiff is entitled to succeed in this case, and I affirm the judgment appealed from with costs.

Affirmed.