

1952

Present : Nagalingam A.C.J. and Swan J.

JAFFERJEE, Appelant, and THE ATTORNEY-GENERAL,
Respondent

S. C. 501—D. C. Colombo, 19,869

Agency—Undisclosed principal—Right to sue.

In a contract entered into by the Government of Ceylon with an indenting agent in Colombo, the latter undertook to indent for the former certain goods at a price fixed in dollars and ex-factory at Hong Kong.

Held, that the undisclosed foreign principal was entitled to sue on the contract.

Held further, that the question whether at the time the contract was entered into the agent had in fact the authority of the principal to act for him was a mixed question of law and fact and could not be raised for the first time in appeal.

¹ 17 *T. L. R.* 578.

² 14 *T. L. R.* 241.

APPPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with C. Renganathan, E. Vannitamby, and V. K. Palasunderam, for the plaintiff appellant.

D. Jansze. Crown Counsel, for the respondent.

Cur. adv. vult.

March 17, 1952. NAGALINGAM A.C.J.—

This litigation arises out of a commercial contract entered into by the Government of Ceylon. The Commissioner of Co-operative Development placed an order with Jafferjee Brothers of Colombo for 100 pieces of China silk of 19-20 yards of 120-125 ounces (width 27-28") at 260 dollars per piece ex-factory Hong Kong. To this order the following conditions were annexed: (a) that the shipment must be by the first available steamer, and (b) that shipment be consigned to the Commissioner of Co-operative Development. The contract was also subject to the following terms: (1) that the bill was to be presented for payment at the office of the Commissioner, and (2) that commission as usual at 4 per cent. on cost and freight was payable by the Commissioner to Jafferjee Brothers. The plaintiff who executed the order, sued the Attorney-General as representing the Crown for the recovery of a sum of Rs. 841.08 as balance due after giving credit for all previous payments received by him. The plaintiff's case was dismissed by the learned Additional District Judge on two grounds. The first ground was that there was no privity of contract between the plaintiff and the Commissioner of Co-operative Development and that therefore the action was not maintainable. The second ground was that the action was barred by prescription.

I do not think there can be any doubt but that the contract itself was not made between the plaintiff and the Commissioner. While that may be true, the rights of parties cannot be adjudicated upon upon a simple answer to that question considered in its elementary form. The case was presented on behalf of the plaintiff-appellant in the lower Court on the footing that although the contract was entered into by Jafferjee Brothers with the Commissioner, nevertheless, it was a contract by an agent on behalf of a principal whose name, it was true, had not been disclosed.

The learned Additional District Judge has properly, in one part of his judgment, having regard to all the facts proved, arrived at the conclusion that "the plaintiff was entitled to adopt and ratify the contract made by his agent and sue and be sued on the contract". This finding Counsel for the respondent challenges and contends that the terms of the contract do not indicate that Jafferjee Brothers were acting as agents.

I do not think the contention of learned Crown Counsel is sound. There is ample oral testimony which was uncontradicted and which the learned Judge has accepted which shews that Jafferjee Brothers were carrying on business as indenting agents and export and import agents and that they have had previous commercial transactions with the Commissioner,

that the Commissioner at the time that this contract was arranged was aware of the fact that Jafferjee Brothers themselves were not to supply china silk but that they were to indent for them—this fact is clearly deducible from the terms that the price was fixed in dollars and was to be ex-factory at Hong Kong. Further the fact that they were to be indented for from certain undisclosed principles is clear from the circumstances that one of the terms of the agreement between the parties was that the Commissioner was to pay commission as usual at 4 per cent. on cost and freight, that is to say, commission which an indenting agent normally gets in the trade. An indenting agent is no more than an agent who is known in law as a *del credere* agent. It is unfortunate that the learned Judge used the word “ratify” in the passage referred to, which has been criticised by Counsel for the respondent as indicating a confusion in regard to the principles underlying the law of undisclosed principal and agent. Subject to this infirmity, I am of opinion that the learned Judge’s finding on this part of the case is substantially right.

The learned Judge, however, took the view that the order placed with Jafferjee Brothers was nothing more than an offer made to them, and that there was nothing to shew that Jafferjee Brothers had unconditionally communicated the acceptance of this offer either orally or in writing to the Commissioner. Learned Crown Counsel did not attempt to support this conclusion of the learned Judge. There can be little doubt but that there was a completed contract and that the order was not an offer.

The learned Judge then proceeded to hold that as the goods had not been consigned to the Commissioner there was a breach of one of the conditions which have been set out at the commencement of this judgment. If this view be correct, the Commissioner then should have rejected the goods when they were tendered to him, but on the other hand without any objection he accepted the documents, cleared the goods and took delivery of them. If there was a breach of the terms, then the proper course would have been for the Commissioner either to have rejected the goods or, if he accepted them, to have claimed damages. But he has done neither. The position, then is that the plaintiff, an undisclosed principal, sues upon a contract made by an agent on his behalf. That an undisclosed principal can sue was not challenged at the argument, and it is only necessary to refer to the judgment of Lord Lindley in the case of *Keighley Maxsted & Co. v. Durant*¹, where he sets out the reason for permitting a party who is not a party to the contract to sue on it:—

“The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is that the contract is, in truth although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made, and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although the truth may not be known to the other party.”

¹ (1901) A. C. 240 at 261.

Mr. Jansze, however, attempted to support the judgment on another ground, namely, that there was no proof that *at the time the contract was entered into* Jafferjee Brothers had in fact the authority of the plaintiff to act for him. This is not a pure question of law; it is a mixed question of law and fact. The fact was never put in issue in the lower Court as to whether Jafferjee Brothers had authority or not to act on behalf of the plaintiff at the time they entered into the contract. In fact, in view of the evidence that the plaintiff is a brother of the partners constituting Jafferjee Brothers in Colombo, it would have been futile to have raised such a point, and besides the judgment of the learned Judge proceeds on the footing that Jafferjee Brothers were in fact the agents of the plaintiff even at the date of the contract.

The conclusion I reach, therefore, is that the plaintiff is entitled to maintain this action.

The only other question is one of prescription, and Mr. Jansze conceded that if this view be taken of the first question the plea of prescription cannot be sustained.

I therefore set aside the judgment of the District Court and enter judgment for plaintiff as prayed for with costs both in this Court and in the Court below.

SWAN J.—I agree.

Appeal allowed.
