

1920.

Present: Ennis J. and De Sampayo J.

SILVA & NAGENDRA *v.* HANIFFA.

332—D. C. Colombo, 52,882.

Indent for goods by defendant through a commission agent from a foreign company—Action instituted by commission agent for damages for breach of contract.

The defendant delivered to the plaintiffs (commission agents) an order for certain goods addressed to a company in Japan. The Japanese company accepted the order, and goods were consigned direct to the defendant, and the bill of exchange was drawn on the defendant. The defendant accepted the bill, but dishonoured it at maturity. The plaintiffs paid it, sold the goods by public auction, and instituted this action after giving credit for the price realized at the sale.

Held, that the plaintiffs had not the status to maintain this action, as they were not the agents of the foreign firm.

THE facts are set out in the following judgment of the District Judge:—

The plaintiffs are commission agents. On May 7, 1918, the defendant delivered to them an order for certain copper drawn up in the form P 1. This form is headed with the plaintiffs' names, and the

order was addressed to Otaki & Co. in Tokio. In due course an acceptance D 1 arrived from Japan and was delivered to the defendant by the plaintiff. Later the invoice of the goods D 2 was similarly received and handed to defendant. These goods were consigned to the defendant at the same time the shippers drew against the defendant for the value of the goods by a bill of exchange. This bill was accepted on presentment, but was dishonoured by the defendant at maturity. Thereupon the plaintiffs sold the goods by public auction, and are suing the defendant for the difference between the amount realized by the sale and the value of the goods with incidental expenses.

The only issue to decide is, whether the plaintiffs have the necessary status for maintaining this action.

The rights of the plaintiffs are entirely governed by the clauses and conditions of P 1.

Under this the defendant agreed as follows (omitting unnecessary words):—

“ Should I fail to pay at maturity such draft I authorize your agents to dispose off the goods by public auction on my risk in such manner as may appear best to your agents, and I hereby bind myself to, make good any loss or deficiency that may arise from such sale and all expenses, and in such case I agree to accept your account sales as correct, and, if necessary, to the same being used by you or your agents in any Court against me without further proof, and, besides, you or your agents shall be at liberty to stop all shipments of any goods which I may have ordered. ”

Then follows certain conditions under which the plaintiffs were entitled, in case of any dispute, to cancel this order or to submit the matter to arbitration, the plaintiffs were declared not liable for damages in case of delay, and they were also given the option in certain circumstances of cancelling the order without payment of any compensation.

It appears to me that the parties clearly contemplated that in case of default by the defendant the plaintiffs should have the necessary authority to sue him in an action like the present. I accordingly give judgment for the plaintiffs as prayed for, less Rs. 104.72 commission which is now waived, and costs.

The indent (P 1) was as follows:—

P 1.

Colombo,—, 191—.

Indent No.—.

Silva & Nagendra, 16, Keyzer street, Colombo.

Messrs. G. Otaki & Co.

From —.

DEAR SIRS,—I/WE, the undersigned, request you to purchase, yourselves or through your agents, on my/our account and at my/our risk, the whole or any part of the under-mentioned goods for shipment to Ceylon on the conditions stated below. Draft at — days — through the Honk Kong & Shanghai Banking Corporation, Ltd. Colombo.

For reimbursement I/We authorize you, your agents, to draw on me/us at current rate of exchange in sterling through above bank for invoice value. Buying commission at — per cent., and I/we agree

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with you, and as a separate agreement, with your agents to accept such draft or drafts on presentation, and to pay the same at maturity.

Should I/we fail to accept or pay at maturity such draft or drafts I/we hereby authorize you or your agents, whether they hold your power or attorney or not, to dispose of the documents or goods by private sale or public auction on my/our account and risk, without notice in such manner as may appear best to you or your agents, and I/we hereby bind myself (ourselves) to make good any loss or deficiency that may arise from such sale and all expenses, together with usual brokerage and interest, waiving all claims to any advantage thereon, and in such case I/we agree to accept your account sales as correct, and consent, if necessary, to the same being used by you or your agents in any Court against me/us without further proof, and, besides, you or your agents shall be at liberty to stop all deliveries or shipments of any goods which I/we may have ordered.

Conditions

In case of any dispute Messrs. Silva & Nagendra or their agents, to have the option of cancelling this order of submitting the matter before the Ceylon Chamber of Commerce or to one or two European merchants for arbitration, and his or their decision or that of his or their referee shall be binding upon both parties, the party in default to pay the cost of the arbitration.

If, owing to any unforeseen circumstances, any delay arising from any cause whatsoever in shipping goods which have been delivered in time at port of departure, such goods to be accepted as though actually shipped within the limit of time stipulated. Should the goods be late no action for damages or loss of profit to be taken against Messrs. Silva & Nagendra or their agents, but indentors to have the option of accepting the goods without any allowance or of cancelling the order.

In the event of fire, strikes, accident, trouble with workmen, or the failure of manufacturer or his agents, Messrs. Silva & Nagendra have the option of cancelling the order without payment of any compensation whatever.

No claim for incorrect outturn to be entertained unless made within twenty-one days from the date of steamer's arrival, and then only on absolute proof that suppliers are in fault. All goods to be insured 10 per cent. above invoice value at my/our cost.

Any writing in the vernacular, apart from the indenter's signature, to be null and void.

(Signed) HANIFFA.

J. S. Jayawardene, for defendant, appellant.

A. St. V. Jayawardene, for plaintiffs, respondents.

March 10, 1920. ENNIS J.—

This action was apparently one for damages for breach of contract. The only question on the appeal is whether the plaintiffs could maintain the action. The learned Judge held that they could, and the appeal is from that decision.

It appears that the defendant made an offer to the firm of Otaki & Co. of Tokio in the terms shown in the document P 1, and Otaki & Co. accepted the offer under the document D 1. The goods were consigned by Otaki & Co. direct to the defendant, and the bill of exchange was drawn on the defendant. The defendant dishonoured the bill. It would seem that the plaintiffs thereupon paid it and instituted this action, giving credit for the price realized on a sale of the goods. The plaintiffs do not sue as agents of Otaki & Co., and there is nothing to show that they are such. They appear to rely on the document P 1, showing that they were principals in the transaction. The whole of the contract, however, was between the defendant and Otaki & Co., and the plaintiffs were not parties to the contract. The plaintiffs, therefore, have no legal status to maintain the action. This action is very similar to the case of *Rahim v. Davoodbhoy*.¹

I would accordingly allow the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.

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EXAMS J

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