A **JANARDHAN PRASAD AND OTHERS**

v.

INDAR JEET AND ANOTHER

[SUPREME COURT, 1965 (Mills-Owens C.J.), 17th, 29th December]

B

Appellate Jurisdiction

Sale of goods—agency—order to manufacturer's representative for supply of goods by overseas firm.
Sale of goods—loss of profit—damages—in contemplation of parties—recoverable.
Agency—position of manufacturer's representative obtaining order for overseas C *buyer.*

The appellants, who carried on business as manufacturers' representatives, obtained from the respondents an order for the supply by a Singapore firm of a number of children's exercise books. The order was by sample from a book which had one-third inch rulings but the appellants wrongly filled in the order form for one-quarter inch D rulings. The goods arrived with one-quarter inch rulings which made them unacceptable to the schools to which the respondents proposed to resell them. It was held that equal blame for the error in the order was not to be imputed to the respondents though their representative had seen the order.

E *Held:* 1. The appellants had a duty to fulfil the order placed with them, at a fixed price, as the respondents had made known they desired it to be fulfilled by reference to the sample exercise book.

2. The appellants were liable in damages to the respondents.

3. It being evident that the goods were bought for resale at a profit that must have been in the contemplation of the parties and F the consequent loss of profit was recoverable.

Cases referred to: *Oscar Chess Ltd. v. Williams* [1957] 1 W.L.R. 370; [1957] 1 All E.R. 325: *Bolus & Co. Ltd. v. Inglis Bros. Ltd.* [1924] N.Z.L.R. 164: *Ireland v. Livingston* (1872) L.R. 5 H.L. 395; 27 L.T. 79: *Witt & Scott Ltd. v. Blumenreich* [1949] N.Z.L.R. 806: *Cassaboglou v. Gibb* (1883) 11 Q.B.D. 797; 48 L.T. 850.

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Appeal from a judgment of a Magistrates Court.

Ramrakha for the appellants.

D. N. Sahay for the respondents.

H The facts sufficiently appear from the judgment.

MILLS-OWENS C.J.: [29th December, 1965]—

I take the facts of the case as they appear to me to be established in the judgment of the Court below. The appellants ('Prasad Bros.') are a firm carrying on business in Fiji as *(inter alia)* manufacturers' representatives and indentors. The respondent firm ('the shopkeepers') carry on business at Nausori as shopkeepers. A representative of Prasad Bros. discussed with the shopkeepers an order for children's exercise books; he showed the shopkeepers a sample book and secured an order for several gross with varying numbers of pages. It was known to both parties that the books would come from the Shah Trading Co. in Singapore and it is accepted that Prasad Bros.' remuneration, i.e. their commission on the order, would be paid by that Company. An order was made out by Prasad Bros. — on one of their order forms, which describes them as manufacturers' representatives and indentors — for the books required by the shopkeeper; the order was addressed to the Shah Trading Co. and specified the quantities required by reference to the number of pages per book, e.g. 16 pages 3 gross 8/10d. per gross .... 72 pages 3 gross 29/8d. per gross; the order also specified hard covers for some of the books and soft covers for other quantities. The order included the following —

> "Forwarding Instructions: Shipment to Suva Port, Sight Draft through the Bank of New Zealand, Suva, Fiji."

Unfortunately, the order form also specified "with $\frac{1}{4}$" ruling"; that expression appeared twice, once for the hard cover books and once for the soft cover. I think it must be accepted as a fact that whilst the shopkeepers did not sign the order their representative, a partner, did see it before it was despatched. Unknown to both parties the lines or rulings of the sample book were one-third of an inch apart, not one-quarter, and when the books arrived they were, quite naturally, of one-quarter inch ruling in accordance with the terms of the order. The shopkeepers intended to sell the books to local schools. According to the shopkeepers' evidence, those schools will not accept one-quarter inch rulings.

When the books arrived in Suva the shopkeepers, having received intimation thereof from Prasad Bros., attended at the Bank of New Zealand, Suva, paid the invoiced amount to the Bank, collecting the shipping documents, passed the packages through customs, and had the packages carried, unopened, to their shop at Nausori. There they opened the packages and immediately complained to Prasad Bros. that the rulings were not in accordance with the sample exercise book shown to and left with them. A comparison of that sample with the books actually delivered demonstrates the marked contrast in the 'rulings'.

Mr. Ramrakha, for Prasad Bros., made the following main points — that the shopkeepers had accepted the goods; that there was, at most, an innocent misrepresentation by Prasad Bros., not amounting to a term of the contract — therefore no claim for damages could arise (see *Oscar Chess Ltd. v. Williams* [1957] 1 W.L.R. 370); that having seen the order, and thus apparently approved it, the shopkeepers were equally to blame and both parties admittedly being innocent the loss should lie where it fell; that Prasad Bros. were the agents of the Shah Trading Co., not of the shopkeepers, — see the particulars of claim

in the proceedings and observe that Prasad Bros. 'commission was to come from the Shah Trading Co. — Prasad Bros. had established privity of contract between that Company and the shopkeepers; in any event damages had not been proved — they were not entitled to loss of profit; at most it was a case for nominal damages. For the shopkeepers Mr. Sahay argued that it was a case of agency; Prasad Bros. were agents for both parties and owned a duty to both; the shopkeepers could not be concerned with the relationship between the Shah Trading Co. and Prasad Bros. — so far as the shopkeepers were concerned the Shah Trading Co. might not even exist as an entity independently of Prasad Bros.; Prasad Bros. introduced the error — as agents; authorities on conditions and warranties were not applicable but if it were a condition that the rulings should be one-third of an inch the fact that the goods were accepted merely had the result that the goods could not now be rejected; the claim on the condition as a warranty was preserved; on the question of damages it was evident that the shopkeepers bought for resale. In reply Mr. Ramrakha made the point that there was no evidence that Prasad Bros. knew the books were to be resold *to schools*.

In my view the case is to be decided on the principles of agency, that is to say on a consideration of the duty owed by Prasad Bros. as buying agents to the shopkeepers as their principals. I do not think that I need enter upon the question whether Prasad Bros.' duty was (a) to procure the goods or (b) to procure a contract for the goods. If however that question were necessarily to be answered then, in the circumstances of the case and on the authority of *Bolus & Co. Ltd. v. Inglis Bros. Ltd.* [1924] N.Z.L.R. 164 and *Ireland v. Livingston* (1872) 27 L.T. 79, I would be inclined to the view that no privity of contract was established as between the Shah Trading Co. and the shopkeepers. I would refer to the following passage in the judgment in *Witt & Scott Ltd. v. Blumenreich & Others* [1949] N.Z.L.R. 806 at 810-811 —

> "The practice of a New Zealand merchant procuring goods overseas through an intermediary is well known and firmly established. The intermediary is known as a buying agent, and may or may not have a representative in this country. In the present case, the intermediary has a representative in New Zealand, though its head office is in Melbourne.
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> The relation of the parties where such a course of business as that which was conducted in the present case exists was considered by the Court of Appeal in *Bolus and Co., Ltd. v. Inglis Bros., Ltd.* [1924] N.Z.L.R. 164. Salmond J., exhaustively dealt with the matter, and said (and by substituting the word "Australian" for "English", the statement has been made appropriate in the present case): "When a New Zealand merchant procures the goods of an Australian manufacturer through an intermediary in Australia the relation so established between the New Zealand merchant and the Australian intermediary may be of any one of three kinds. In the first place, it may be that of vendor and purchaser — that is to say, the intermediary may purchase the goods from the Australian manufacturer and resell them to the New Zealand merchant. In the second place, the relation may be that of agency, whereby the Australian agent is authorized

> to purchase the goods in his own name and on his own responsibility from the Australian manufacturer, and to send them to his principal, the New Zealand merchant, but it is not authorized to make . . . any contract between him and the Australian manufacturer, or to impose on the principal any contractual liability towards the manufacturer. In such a case the only contract of purchase and sale is that which is made between the Australian agent and the Australian manufacturer, and the only liability of the New Zealand merchant is towards his own agent. The relation between the Australian agent and the Zealand merchant in such a case is merely one of agency, and not one of vendor and purchaser, though in respect to the right of stoppage *in transitu*, and possibly in some other respects, it is analogous to a contract of sale and purchase and possesses similar incidents . . . In the third place, the relation between the New Zealand merchant and the Australian intermediary may be one of agency in the strict sense, the agent being authorized not merely to buy goods from the Australian manufacturer, but to buy them in the name of the New Zealand principal, so as to establish privity of contract between the manufacturer and that principal, and make him responsible to the manufacturer for the price of the goods. Which of these three essentially different relations is established is a question of fact depending on the intention of the parties as inferred from their words and conduct in the particular case. Where, however, the case is not one of vendor and purchaser, but one of agency, there is a presumption that the agency is of the [first] kind which I have mentioned, and not of the second. "The presumption is that the Australian agent of a foreign principal has no authority to establish any contractual relation between that principal and the Australian manufacturer, but is employed merely to buy the goods in his own name and on his own responsibility and to forward them to his foreign principal, An agency of the other kind — an agency which authorizes the Australian intermediary to establish privity of contract between the foreign principal and the Australian vendor — must be proved in the particular case by evidence sufficient to rebut the *prima facie* presumption that the agency was merely an authority to the agent to purchase the goods in his own name without making the foreign principal a party to the contract", ibid., 174, 175.
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> I think that the words and conduct of the parties do not establish either in New Zealand or Australia a contract between the plaintiff company and the defendants. The relation was that of the second kind referred to by Salmond J., ibid., 174 (or what he termed later in his judgment the first kind of agency), and Tozer Kemsley purchased the goods in its own name and on its own responsibility, and no contract was created between plaintiff and defendants."

I would also refer to the following passage in the judgment of Lord Blackburn in *Ireland v. Livingston* —

> "But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due

> diligency to fulfil the order . . . . I therefore perfectly agree with the opinion expressed by Martin B. in the court below, that the present is a contract between vendor and vendee; but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could."

In the present case Prasad Bros. had a duty to fulfil the order placed with them, at a fixed price. I do not say an absolute duty as the goods might not have been obtainable, but a duty to forward the order as the shopkeepers desired it to be fulfilled and as they made known to Prasad Bros. by reference to the sample exercise book. The order was, admittedly, made out by Prasad Bros.; it was they who translated the form of the sample, erroneously, into an order for one-quarter inch rulings. I agree with the learned Magistrate that equal blame for the error is not to be imputed to the shopkeepers notwithstanding that they were shown the made-up order by Prasad Bros. before it was despatched. The shopkeepers would be primarily concerned to check the quantities, sizes and price-rates; they were entitled in my view to rely upon Prasad Bros. correctly translating the form of the sample for the information of the Singapore Company.

It is to be inferred, against Prasad Bros., that this is not a case where the books required by the shopkeepers were not available. That I think is to be inferred by reason of the production of the sample and by reason of the absence of any evidence that the books required were not available. Prasad Bros., also, have not sought to deny that the books required were available.

It was faintly mentioned on the appeal that there was no consideration passing as between the shopkeepers and Prasad Bros. This did not form a ground of appeal and I am not therefore concerned with it. I very much doubt that an agent who entered upon the discharge of the contract of agency and thereby acted to the detriment of the principal could escape liability on that ground.

So far as liability is concerned, therefore, I agree with the learned Magistrate that liability is established on the part of Prasad Bros.

There remains the question of damages. On this aspect the judgment of the Court below reads —

> "With regard to the quantum of damages, the Plaintiffs have not made any real attempt to sell the books other than to the schools. They have not satisfied me that the books have no value or that the price for which they could be sold is less than the price the Plaintiffs paid for them. The only loss which they have proved

> is loss of profit. Plaintiff 2 has given evidence that this would have been 20%. This appears to be reasonable. The Plaintiffs were therefore likely to have made a profit of about £40 if the correct books had been delivered to them."

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It is argued that the shopkeepers are not entitled to recover loss of profit. On this aspect I have referred to the case of *Cassaboglou v. Gibb* (1883) 11 Q.B.D. 797 of which the head-note is as follows —

> "The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. No such opium could then be obtained at Hong Kong, but instead of informing the plaintiff of this fact, the defendants by mistake informed him that they could procure it, and they purchased and shipped to the plaintiff opium which they erroneously supposed to be such as was ordered, but which was really of an inferior description :—
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> > "Held, that the relation between the plaintiff and the defendants was not that of vendor and purchaser but of principal and agent, and that therefore the true measure of damages which the plaintiff was entitled to recover was not the difference between the value of the opium ordered and that shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered."

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A claim for loss of profit on intended resale was disallowed. That case, however, differs from the present case in that it was there established that the goods required could not be obtained, so that in any event there was no profit to be gained. Here the inference is to the contrary and the error of Prasad Bros. has resulted in the shopkeepers being saddled, on the evidence accepted by the learned Magistrate, with something less readily saleable — in particular not saleable in a market in which, had the books been as ordered by the shopkeepers, they would have been saleable at a probable profit of 20%. Where, as here, the principals are shopkeepers it must have been evident to the agents from the start that the goods were being bought for resale at a profit; that must have been in the contemplation of the parties. In my view the Court below was justified in accepting the uncontradicted evidence of the shopkeepers on the point of their loss of profit, and, further, was correct in law, in the circumstances of the case, in treating the loss of profit as being a loss actually sustained, not merely a speculative loss. Resale being within the contemplation of the parties, it follows that loss of profit is recoverable (see, generally, the discussion at paras. 623-4 *Mayne & McGregor on Damages*).

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Accordingly the appeal is dismissed with costs.

Appeal dismissed.