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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2015

CORAM:

THE HON'BLE MRS.JUSTICE S.VIMALA

C.S.No.9 of 1999

Reserved on : 27.04.2015

Pronounced on : 13.07.2015

M/s.Evergreen Sea Foods Pvt. Ltd.
Rep. by its Managing Director,
Mr.T.Loganathan
No.29, Kummalamman Koil Street,
Tondiarpet,
Chennai - 600 081.

.... Plaintiff

vs.

1. M/s.Ruskim Sea Foods Ltd.
Stafford Park 15
Teleford Shropshire TF3 3BB
United Kingdom.
2. Mr.Aslam
Sole Proprietor
M/s.Oceans
P.B.No.283, Kochangadi
Cochin 682 002.
3. Gelpeixe S.A.
Sete Casa Apariado 42
Portugal.
4. Vee Tee Jay Exports Pvt. Ltd.
Palluruthy
Cochin 682 005.

... Defendants

This suit filed under Order IV Rule 1 of O.S.Rules &
Order 7 Rule 1 C.P.C., praying for the following relief:

(a) directing the Defendants 1 to 3 jointly and severally



to pay the plaintiff a sum of Rs.38,53,798.49 together with interest at the rate of 24% p.a. from the date of plaint till the date of realization.

(b) directing the defendants jointly and severally to pay the plaintiff a sum of Rs.10,38,456.36 together with interest at 24% p.a. From the date of plaint till the date of realization and (c) costs of this suit.

For Plaintiff : Mr.S.Vasudevan
For D1 : M/s.Raja Ramani
For D2 : Mr.K.Venkataramani
Senior Counsel
For D3 & D4 : Ex parte

J U D G M E N T

Normally, as a general rule, an agent cannot be made liable for a contract entered into by the principal or entered into by the agent himself for and on behalf of the principal. There are three exceptions to this general exemption from liability, as contemplated under Section 230 of the Indian Contract Act. Whether these three exemptions are mutually exclusive of each other or these three conditions should co-exist in order to attract the liability of the agent is the main question of law to be answered in this Civil Suit.

2. This suit is filed for recovery of money in respect of the value of the cargo supplied.

Brief facts:

3. The plaintiff is a private limited Company

incorporated under Companies Act, 1956 and it is an exporter



of Marine Foods. The first defendant, a public limited company, carrying on business in the United Kingdom regularly placed export orders on the plaintiff through its agent, namely, the second defendant for the supply of marine foods to its customers.

3.1. The first defendant through its agent, the second defendant, placed a purchase order No.EUR/RUS'94, dated 13.06.1997 for the supply of **1150 cases** of frozen whole cleaned squid consisting of

- a) 9500 kgs of 10/20 grade in **475 cases**
- b) 13500 kgs of 20/40 grade in **675 cases**

This supply was to be effected at Lisbon, Portugal to the third defendant.

3.2. The first defendant placed a purchase order No.EUR/RUS'95 dated 13.06.1997 for the supply of 772 cases of frozen whole cuttle fish. The order was placed directly on the plaintiff. The other order was placed to the fourth defendant and as the fourth defendant was unable to execute the order, he transferred the same to the plaintiff, by his fax dated 11.07.1997.

3.3. The plaintiff made the merchandise mentioned in the two purchase orders ready. The plaintiff obtained laboratory analysis report on 28.06.1997. The Test report indicated that samples were free from any infection including Cholera. The plaintiff thereafter exported these supplies under the



respective purchase orders through the bill of lading dated 01.07.1997 and 13.10.1997 respectively.

3.4. The plaintiff, having exported a cargo, being entitled to receive payment, raised invoices for a sum of US \$ 72399. The purchase orders placed by the first defendant indicated payment on "letter of credit" terms payable within 85 days from the date of bill of lading. The plaintiff having completed the export waited for opening of the letter of credit. The first defendant did not open it. Instead, the first defendant through the second defendant requested that the document be sent on collection basis through Bangkok Bank, PCL, London.

3.5. The plaintiff issued a bill of exchange on the first defendant and these bills were sent for collection through Canara Bank, Vipary to Bangkok Bank, PCL, London.

3.6. The export cargo arrived at Lisbon, Portugal on 05.08.1997 to 12.08.1997. From the local agent of the carrier through the fax message dated 22.09.1997, the plaintiff came to know that the **cargo of frozen cuttle fish** was cleared by the third defendant as permitted by the first defendant.

3.7. So far as the cargo of **frozen squid** is concerned, the plaintiff was informed by the first and second defendants



that the Health Authorities allegedly found the fish to be infected with Cholera, therefore, the first defendant by its fax message dated 14.11.1997 informed the plaintiff that cargo of frozen squid would either be reshipped from Lisbon to Chennai, the freight shall be borne out by the first defendant or the cargo will be destroyed on the permission of the plaintiff at the cost of US \$ 2000.

3.8. The plaintiff did not agree for destruction of the cargo, as the cargo had been certified to be free from any infection by the Government of India before the shipment. The first defendant informed the plaintiff that they will be reshipping the goods to Chennai, and first defendant would pay for the reshipment. This claim is unjustified. Hence, the plaintiff is entitled to the value of the cargo supplied.

3.9. The plaintiff was informed by the Canara Bank on 02.01.1998 that both the bills of exchange were dishonoured, on maturity, for the reason 'both consignments were rejected by the Port Authorities in Portugal'. The reason alleged is false. At no point of time, the first defendant ever stated that the second cargo of the frozen whole cuttle fish was rejected by the Health Authorities.

3.10. The plaintiff issued a legal notice dated 14.05.1998 to the defendants as well as Canara Bank, Vipary, and Bangkok Bank, PCL, London. The first and third defendants had received notice but did not sent any reply. The second



defendant issued the reply, disputing his liability. The first defendant as a purchaser/foreign principal, the second defendant as an agent in India, the third defendant, who is an actual consignee, are jointly and severally liable to pay a sum of US \$ 72399 to the plaintiff.

3.11. The Plaintiff claims that the defendants 1 to 3 are jointly and severally liable to pay the plaintiff a sum of Rs.3853798.49 towards the value of entire supplies made by the Plaintiff under both the purchase orders and that fourth defendant is jointly liable along with defendants 1 to 3, in respect of the second purchase order, for a sum of Rs.1038456.36/- together with interest at the rate of 24% per annum on both the Principal amount, from the date of plaint till the date of realization.

4. Both the first and the second defendants have filed their written statements.

4.1. The first defendant has disputed his liability on the following grounds:

(i) The second defendant is the authorized agent of the first defendant to act as purchasing agent towards the purchase of frozen sea foods in India on behalf of the first defendant.

(ii) The Purchase order dated 13.06.1997 with reference to ERU/RUS/95 for the supply of 772 cases of frozen whole cuttle fish was placed only on the fourth defendant by the



first defendant. While so, the fourth defendant has no authority to transfer the same to the plaintiff without the concurrence of the first defendant.

If the case of the first defendant is to be accepted, then, the third defendant should not have received the supply made by the plaintiff and the first defendant ought not to have received the payment from the third defendant in respect of the supplies made by the plaintiff. The third defendant did not reject the goods supplied by the plaintiff on the ground that the fourth defendant has no authority to transfer the order placed by them on the plaintiff. Therefore, this contention of the first defendant is calculated to evade payment and not a genuine contention.

In the evidence of D.W.1, it is stated that third defendant is the customer of the first defendant; that the third defendant to his knowledge orally placed orders on the first defendant; both Exs.P1 and P2-purchase orders were placed by the second defendant on behalf of the first defendant; that the payment of Exs.P1&P2 consignments would be paid through irrevocable letter of credit; third defendant took the delivery of goods under Exs.P4 and P5-copy of the bill of lading; in respect of second consignment of cuttle fish, the first defendant received the payment from the third defendant. These admissions would go to show that the defence



defendant did not give consent is not correct.

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(iii) There was delay in delivery of documents and therefore, the goods remained at Lisbon port for a considerable time for which defendants 1 to 3 are not liable.

(iv) The request made for reshipment of goods by the first defendant to the plaintiff was not attended to properly by the plaintiff; there was inaction on the part of the plaintiff and hence, the Health Authority at the Portugal destroyed the goods and expenses were charged on the first defendant. As the transaction was on collection basis, the plaintiff ought to have delivered the documents to the consignee to take delivery of goods and to enable the defendants to open Letter of Credit in 85 days. As there was inaction and deliberate negligence on the part of the plaintiff, the defendants are not liable.

5. The second defendant has supported the written statement filed by the first defendant apart from disputing his liability, on the ground that the first defendant has no obligation to honour the Bill of Exchange raised by the plaintiff as no order was placed on them to export cuttle fish. In all other respects it is a repetition of the written statement filed by the first defendant. The further defence of the second defendant is that they are answerable only to the fourth defendant in respect of US\$.19624 and not to the plaintiff.



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6. D3 and D4 entered appearance through counsel, but did not file their written statements and hence, they have been set ex parte on 08.12.2009.

7. The following issues were framed for trial:

(i) Whether this Court has territorial jurisdiction to try the suit?

(ii) Whether the Plaintiff has supplied the consignment in accordance with the Purchase Order No.EUR/RUS/94 dated 13.06.1997 placed by the first defendant?

(iii) Whether the defendants are entitled to reject the cargo under the Purchase Order No.EUR/RUS/94 dated 13.06.1997 on the ground that the cargo was infected with Colera?

(iv) Whether there is privity of contract between the plaintiff' and the first and second defendants in respect of the Purchase Order No.EUR/RUS/95 dated 13.06.1997?

(v) Whether the first defendant has accepted the Bill of Exchange dated 06.08.1997 & 02.09.1997?

(vi) Whether the Plaintiff is entitled to the sum of Rs.38,53,798.49/- from the defendants 1 to 3 jointly and severally in respect of the Purchase Order dated 13.06.1997?

(vii) Whether the Plaintiff is entitled to suit claim of Rs.10,39,456.36/- from the defendants 1 to 4 jointly and severally under the second Purchase Order No.EUR/RUS/95 dated 13.06.1997?



(viii) To what relief is the plaintiff entitled?

8. Before arguments, it was conceded by both sides that issue no.5 would not arise for consideration and that issue Nos.6 and 7 are required to be clarified.

9. On behalf of the plaintiff, P.W.1 is the only witness and Ex.P1 to P17 are the documents marked. On behalf of the first defendant, D.W.1 is the only witness and documents on the side of the defendants have been marked through cross examination of the plaintiff.

10. The Plaintiff has filed the suit for recovery of money towards supply of two consignments, namely, a) Frozen whole cleaned squid and b) Frozen whole cuttle fish, shipped by the plaintiff from India to Portugal.

11. The first defendant is a foreign principal / purchaser of the two consignments having its office and business at UK. The second defendant is the Agent of the first defendant. The third defendant is the consignee and the fourth defendant is one of the suppliers of the first defendant. The third and fourth defendants remained *ex parte*.

12. So far as the first consignment is concerned, the case of the plaintiff is that the first defendant placed orders through the second defendant, the cost of consignment being US\$ 52775. So far as the second consignment is concerned, the case of the plaintiff is that the first defendant has placed orders on the 4th defendant, who, because



of his inability, transmitted the order to the Plaintiff and thereafter the plaintiff had supplied the same. It is the clear case of the plaintiff that the consignments were free from cholera as testified by the Laboratory's report.

13. So far as the mode of payment is concerned, the case of the plaintiff is that the payment was on Letter of Credit terms payable within 85 days from the date of Bill of Lading and that the first defendant did not open the Letter of Credit and instead, the first defendant through the second defendant requested that documents be sent on collection basis.

14. The plaintiff has further averred that the 1st defendant has accepted the Bill of Exchange and therefore, the 1st defendant is liable to pay the suit claim. But, the case of the 1st defendant is that the plaintiff alone is liable for the loss, on account of the deliberate delay caused in sending the documents, which are essential for clearing the consignment. Because of the delay involved, the cargo also got infected with Cholera and therefore, the defendants suffered loss not only on account of loss of goods, but also on account of payment of destruction charges.

15. So far as the 2nd consignment is concerned, the case of the 1st defendant is that the privity of contract was only between himself and the 4th defendant and not between himself and the plaintiff and the plaintiff, having accepted the order placed by the 4th defendant without the concurrence of the 1st



defendant, has no legal right to ask for payment from the 1st defendant. In other words, the contention is that the remedy open to the plaintiff is to ask for his dues from the 4th defendant and not from the 1st defendant. The specific case of the 1st defendant is that he did not accept the Bill of Exchange. In other words, it is contended that 4th defendant has no authority or right to transfer the purchase order received by them to the plaintiff without the consent of the first defendant. The first defendant has also made challenge with regard to the jurisdiction of this Court to try the suit.

16. The learned counsel for the plaintiff would submit that the plaintiff is carrying on business only at Chennai; the plaintiff has received the purchase orders only at Chennai; purchase orders were executed at Chennai by exporting the Cargo from the port of Chennai; Bills of Exchange were drawn at Chennai and was negotiated through Bankers at Vepary Branch, Chennai and that the amounts due under the Bill of Exchange are payable only at Chennai and therefore, the Court at Chennai alone will have jurisdiction and as the defendants are residing outside the jurisdiction of this Court, the Hon'ble High Court granted leave to sue the defendants. The leave granted has not been revoked so far. Therefore, this Court got jurisdiction.

17. The suit transaction is governed by two purchase orders, namely, Exs.P1 and P2. Perusal of Ex.P1 and Ex.P2



would reveal that it is in the letter head of the second defendant. This purchase order is signed by the Proprietor of the second defendant, namely, Aslam and it has been accepted by the plaintiff. The payment has to be made within 85 days after opening the Letter of Credit. The order has been placed (under Ex.P1) for and on behalf of the first defendant, that is pertaining to frozen whole cleaned squid. So far as the second consignment is concerned (Ex.P2), it is also for and on behalf of the first defendant placed by the second defendant, but not on the fourth defendant as contended by both sides, but on the plaintiff directly.

18. According to the plaintiff, those consignments were inspected by Export Inspection Agency and their reports negatived the existence of Cholera. It is pointed out by the learned counsel for the first defendant that there is nothing to indicate that the reports relate to two consignments. Whether this contention could be accepted, is the issue to be considered. The reports are accompanied by covering letter of Export Inspection Agency dated 28.06.1997, in which, it is stated that the samples of the consignments of Frozen Cuttle Fish Whole (CFW) and Frozen Squid Whole Clean (SQWC) were drawn and the same is tested and the test report is enclosed. Therefore, when the purchase orders dated 13.06.1997 and the test report is dated 28.06.1997, the description of the materials tallies with the purchase orders placed, then, it



must be accepted that the test reports referred to the materials are covered in the purchase orders. If it is not so, it is for the first defendant to prove that the plaintiff also exported the same products to somebody else also. Moreover, in the evidence of D.W.1, who is the Managing Director of the first defendant Company, it is clearly admitted that they have received the Health Certificate issued by the Indian Authorities certifying that the Cargo is free from Cholera along with other documents. Therefore, it is not open to the first defendant to contend that the certificates did not relate to the consignments.

19. These consignments were also accompanied by Health Certificates which are filed as Ex.P17 and Ex.P18. Ex.P18 reveals that the temperature required during storage and transportation of the consignment (Frozen Whole Cleaned Squid) was -18° C. In the Bill of Lading (Ex.P4 and Ex.P5), it is specifically stated that the cargo stowed in Refrigerated container. The temperature at which the cargo has been placed has been indicated as -20° C. Thus, it is cleared that the Cargo has been shipped under healthy and protected condition. The learned counsel for the plaintiff contended the purchase orders are on the basis of F.O.B. Contracts. The two containers which are placed in two shipped Ever-Reward and Orient Bliss have issued two bill of lading dated 01.07.1997 and 13.07.1997. The plaintiff sent the original Bill of Lading



along with other documents, namely, Invoice, Packing List, Health Certificate, MPEDA (Generalized system of preferences Certificate of origin issued by the Marine Products Export Development Authority). It is pointed out that as it is mandatory as required by the purchaser, the Certificate is not only in English and also in Portuguese language. These are the documents, which are required to be sent to the purchaser as required by the purchase orders.

20. The grievance of the learned counsel for the plaintiff is that within 15 days from the date of bill of lading, letter of credit ought to have been opened by the first defendant, but, it was not done so. According to the plaintiff, he was informed that no letter of credit will be opened and the defendants 1 and 2 wanted the plaintiff to send the document through Bank under Bill of Exchange. This was given in writing for the first time by the defendants 1 and 2 by their Fax Message dated 27.08.1997 (Ex.D5). Under Ex.D5, it is admitted that normally, letter of credit terms has 85 days. In the Fax Message, the message given reads as under:

"After the Shipment, we had very clearly told your Partner, Mr.Thomas Vayalat, we will not be giving any LC for these 2 shipments and the documents should be sent to Ruskim Seafoods. Literally everyday, I have been telling Thomas to send the documents. But documents were not reaching. Again I told him that Cargo reaching on 30th of July and no action was taken. For your



information, even now Thomas said the 2nd container of Whole Cuttle Fish which he is sending directly sending to Ruskim, even this has not been done."

21. Under Ex.D2-letter dated 11.03.1998, the plaintiff has mentioned that the second defendant has admitted the factum of non opening of Letter of Credit as per the purchase orders through the Fax message dated 27.08.1997. Therefore, it is clear that the first and second defendants have violated the terms and conditions of the purchase order and the delay was only on the part of the defendants.

22. Even though the first defendant failed in opening the letter of credit for the two consignments, the first defendant accepted the bill of exchange for payment at sight after 90 days, being the value of two consignments exported to the first defendant for its customer, namely, the third defendant. It is the case of the plaintiff that the first defendant failed to honour the commitment and took a false stand that the consignments affected with Cholera and therefore, the payment would not be made. Perusal of Exs.P9(towards the shipment of 736 Cartons of Marine Foods shipped to Lisbon, Portugal per M.V.Orient Bliss V.027 on 13.07.1997 as per our invoice no.004/97/97.) and P8 (towards shipment of 23000 Kgs. Of Indian Fresh Frozen Whole cleaned Squid shipped to Lisbon, Portugal per X-press resolve V.518 as per our Invoice

No.003/97-98) would show that the Bill of Exchange sent by the



plaintiff has been accepted by Ruskim Seafood, the first defendant. The signing of the Bill of Exchange has been admitted by D.W.1. According to the learned counsel for the plaintiff, the defendants 1 and 2 did not even inform on what date the Health Authorities rejected the Cargo exported by the plaintiff. The plaintiff is stated to have sent a letter to the Agent of the first defendant, who confirmed that the consignee has taken delivery of the Cargo as per the documents sent by the plaintiff's Bank to the first defendant's Bank. **From the perusal of Ex.P10, it is evident that the Agent of the carrier, namely, Choice Intermodal Services have informed the details regarding arrival of vessels at Lisbon and regarding the delivery of Cargo to the consignee. The reply reads as under:**

1. The Vessel arrived at Lisbon : 12.08.1997
2. The consignee took delivery of the cargo at Lisbon :
19.09.1997
3. The consignee cleared the cargo under the original B/L
4. The charges & demurrages paid by the consignee for
clearance:\$1850

23. Contra to this evidence, it is contended by the learned counsel for the first defendant that the cargo was destroyed and destruction of the Cargo is proved through D9 series documents. It is pointed out that D9 series are the translated version of a xerox copy which is inadmissible



that the translator was not examined and this translated copy cannot be admittedly evidence as it is not proved. The plaintiff relies upon 2008 5 MGLJ 53 equivalent to MANU/MH/0803/2008, as well as the Supreme Court Judgment reported in 2007 (5) SCC 730 and 2012 (6) CTC 648, in support of the contention that the xerox copy is not an admissible.

24. It is the further contention that because it was F.O.B Contract, the first defendant becomes the owner of the Cargo, as soon as it is shipped and it is his duty to protect the Cargo at the discharge port by maintaining proper temperature in the refrigerated container. In view of the contention it is necessary to understand the difference between the FOB and CIF contract.

25. The crucial difference between an FOB and a CIF agreement is the point at which responsibility and liability transfer from seller to buyer. With an FOB shipment, this occurs when the shipment reaches the port or other facility designated as the point of origin. With a CIF agreement, the seller pays costs and assumes liability until the goods reach the port of destination chosen by the buyer.

26. In other words the important differences between FOB and CIF contract is that, FOB contract specifies the port of loading, however CIF contract specifies the port of arrival.



The Right and Duties of Seller and Buyer

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27. The main duty of the seller under the FOB contract is loading. The seller must deliver the goods on board the vessel, at a place where the buyer has already identified as the port of loading and within the period of shipment which the parties indicated in the contract of sale. **Name of the port in a FOB contract is a condition.** For instance, the seller sends the goods to the other port from the port where it has been identified in the contract of sale. The seller commits a breach of a condition, so the buyer is entitled to refuse the delivery of the goods.

28. Under the CIF contract, the seller is required to deliver the goods on board of the vessel at the agreed port of delivery. However, in contrast to an FOB contract, the seller can also procure the goods afloat which are already shipped.

29. The learned counsel for the plaintiff relies upon the decision of the Hon'ble Supreme Court Reported in 2010 4 SCC 256, which explains the difference between F.O.B . Contract and C.I.F. Contract.

The important observation reads as under:

"The principle underlying transfer of title ' in goods in FOB contracts was stated by a



Constitution Bench of this Court in **B.K. Wadeyar v. Daulatram Rameshwarlal** MANU/SC/0273/1960 : AIR 1961 SC 311. The question as to the transfer of title in the goods arose in that case in the context of a fiscal provision but the principle relating to the transfer of title in goods in terms of FOB contract was unequivocally recognised. This Court held that in FOB contracts for sale of goods, the property is intended to pass and does pass on the shipment of the goods"

According to the dictum laid down in the decision, the obligation of the plaintiff is complete once he places the Cargo on board the ship and on obtaining the original bills of lading and send the same to the buyer. The title to the goods passes to the first defendant immediately. The cargo is carried and delivered at the risk of the buyer, i.e. the first defendant. Therefore, it is not open to the first defendant to say that he is not liable to pay the purchase money.

30. The main contention of the second defendant is that, as an agent, second defendant is not liable for the act of the disclosed principal namely the first defendant, as per Section 230 of the Indian Contract Act and therefore, he is not liable for the suit transaction. In support of the said contention, the following decisions are relied upon:-

1. In the decision of the Supreme Court reported in 2009 (1) CTC 190 (SC) (Prem Nath Motors Ltd., v. Anurag Mittal), it is held as follows:



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"4. Section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in the case of Marine Contained Services South Pvt. Ltd. vs. Go Go Garments AIR 1999 (SC) 80 where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed."

a) This decision will not apply to the facts of this case. Admittedly, no written contract has been produced on either side. The first defendant is the foreign principal. In the absence of written agreement, the contract must have been oral. In that case, the probability is that the second defendant alone should have entered into the contract with the plaintiff. The probability is, the plaintiff should have relied more upon the local agent than upon the foreign principal. At a time when the contract has been brought into existence, there was no spurring in technology, as it happens today. Therefore, it is only the second defendant, who must have taken a crucial role in bringing the contract.

b) Moreover, it is for the second defendant to have given evidence, if it is not so. When the plaintiff alleges that the second defendant is also liable, it is for the second defendant to give evidence to show that he is not responsible under the contract. Even though the official on behalf of the second defendant has been examined, he has stated that he has



no personal knowledge regarding the terms and conditions of the contract. Therefore, examination of somebody on behalf of the second defendant did not help the second defendant to establish his case. The non examination of the second defendant is fatal to the case of the second defendant that he is not liable. The non examination of the second defendant strengthened the case of the plaintiff that it is a case of contract to the contrary.

c) Even in cases where the name of the Principal is disclosed, even then the agent may be liable provided there is a **contract to the contrary**. So far as this case is concerned, there is no written contract. The nature and extent of liability of the second defendant has to be decided only with regard to the facts and circumstances available in this case, as discussed above.

d) As held in the case of AIR 1960 Madras 452, the liability of a local agent is a question of fact in each case, whether the contract is between a principal here and the foreign principal directly, or whether the home-agent of the foreign principal has entered into the contract. So far as this case is concerned, there is no written contract. Therefore, the contract might have been entered into between the second defendant and the plaintiff. Therefore, it is a case of contract to the contrary.



2. In the case of Oriental Insurance Co. Ltd., v. P.S.T.S. & Sons Pvt. Ltd., Tuticorin, reported in (2015) 1 MLJ 604, the relevant paragraph reads as under:

"16. Section 230 of the Act has two parts. Firstly, an agent is not personally liable for the acts done by him on behalf of the principal. It incorporates a general principle of law of agency. But, there is an exemption to it. If there is a contract to the contrary, an agent is liable. If there is express provision in the contract that under certain circumstances, the agent is also liable then the agent is liable under Section 230 and Section 233 enables the third party to sue either of them or both. Section 230 of the Act also contains three legal presumptions. Under those circumstances, the agent is personally liable. "

The main observation in the reported decision is that there was no sufficient pleading in the plaint as to how and what circumstances, the plaintiff is suing the defendants. So far as this case is concerned, there are pleadings as to how the second defendant is liable. Moreover, in the availability of the decision by the Supreme Court being relied upon, **2004 (13) SCC 434 (Cochin Frozen Food Exports (P) Ltd., v. Vanchinad Agencies and others)**, the decision by this Court cannot be conclusive.



3. (1970) 2 MLJ 648 (Wheels India Ltd., v. Khemchand Rajkumar and another).

"19. While construing the provisions of [Section 230](#) aforesaid, a Division Bench of the Madras High Court has in [Mohanakrishnan v. Chimanlal & Co.](#) , observed as follows:

...the vital words are 'contracts entered into by him on behalf of his principal'. It will be a question of fact in each case, whether the contract is between a principal here and the foreign principal directly, or whether the home agent of the foreign principal has entered into the contract. If he has, his personal liability is exempted under the general principle, unless there is a specific term of the contract stipulating such a liability."

4. (1999) 1 MLJ 45 (Trade Wings Ltd., v. M/s. Garment House (Exports), A partnership Firm, Represented by its Partner, S.Ranganathan)

"For the above Rule, there are also certain exceptions and they do not become applicable to the facts of this case, since (1) the contract is not made by the agent, (2) nor does he disclose the name of his principal and (3) where the principal, though disclosed, cannot be sued. Here, first of all, no agreement entered into in between the plaintiff and the defendant has been filed or marked as a document, much less specifying the terms and conditions of the contract in between them. But, it is an admitted fact that the defendant was acting as the agent of M/s. Sabena Airlines and the plaintiff has come forward to file the very suit against the defendant in that capacity only.

True that the agreement between the defendants 1 and 2 and the plaintiff is not filed, but, however, the transaction between the defendants 1 and 2 and the plaintiff is not disputed. In the absence of the written document being filed, the court has to rely



upon only the facts and circumstances.

5. (2008) 3 MLJ 367 (P.Appasamy v. Samy Lourde Joseph and another), it is stated as follows:

"As per Section 230 of Contract Act, an agent cannot be made liable for the act done on behalf of his principal, particularly, when the agent has no personal interest and there is no allegation of fraud."

6. AIR 1960 Mad 452 (V.R.Mohanakrishnan v. Chimanlal Desai and Co.)

"(8) First, focusing attention upon the strict requirements of the section, we see that the vital words are "contracts entered into by him o behalf of his principal". It will be a question of fact in each case, whether the contract is between a principal here and the foreign principal directly, or whether the home-agent of the foreign principal has entered into the contract. If he has, his personal liability is exempted under the general principle, unless there is a specific term of the contract stipulating such a liability."

7. AIR 2002 Calcutta 211 (West Bengal Essential v. Koren Foreign Transportation)

"25. In this case actually there is pleading. Only discrepancy is regarding date of the short landing certificate between the pleading and the proof. Therefore, this case stands on a better footing than that of the case mentioned in the aforesaid Supreme Court judgment. So, without any hesitation I overrule the objection of Mr. Bose as being wholly irrelevant if not frivolous one as no specific case being made out in the written statement in this direction."

31. It is necessary to look into the provisions of Section 230 of the Indian Contract Act, 1872, in order to appreciate the contentions of the learned counsel for the second defendant, which reads thus:-



230. **Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.**—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases:— (when liable)

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.

32. Normally an agent cannot be made liable for the contract entered into by such agent, for and on behalf of his principal. But Section 230 provides for three exceptions to it.

1. If the principal is abroad and when the agent has entered into such contract.
2. Undisclosed Principal, I.e. Name of the principal not disclosed.
3. Though the name of the Principal is disclosed, the Principal cannot be sued on account of any disability.

33. **The three special cases mentioned in this section are in the nature of presumptions and are not exhaustive.** These presumptions are rebuttable. An agent may also exclude his personal liability by contract. But, the extent to which the liability is excluded would depend upon the terms of the



34. Ordinarily, an agent contracting in the name of his Principal and not in his own name is not entitled to sue nor can he be sued on such contracts. In other words, when in making a contract no credit is given to himself as Agent, but **credit is exclusively given to the Principal**, he is not personally liable thereon.

35. ***The test question in cases within the principle of Section 230 is that to whom credit was given by the other party or if that cannot be proved as a fact to whom it may reasonably be presumed to have been given.***

36. In the presumption clause, in the circumstances mentioned, the party cannot be supposed to rely exclusively on a foreign principal whose name he does not know and whose standing and credit he therefore cannot verify or on a person or body who, for whatever reason, is on the face of the transaction not legally liable.

Contract to the contrary:

37. Whether an agent, apart from the cases specifically mentioned, is to be taken to have contracted personally or merely on behalf of the Principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances. **(Walter Smith v. Ahmed Abdeenbhoy AIR 1935 PC 154; 69 Mad.L.J. 341 : 157 I.C. 9).**

Foreign Principal:

38. This is based on convenience and general mercantile usage. In the case of British Merchant buying for a foreigner, "According to the Universal understanding of



merchants and of all persons in trade, the credit is then considered to be given to the British buyer and not to the foreigner". **Thomson v. Davenport (1829) 9 B & C at p.87 : 32 R.R. @ 85.**

39. The English Law as to the personal liability of an Agent is that the question whether an agent is deemed to have contracted personally and if so the extent of his liability depend on the intention of the parties to be deduced from the: (a) nature and terms of the particular contract; and (b) the surrounding circumstances including any binding custom.

A Home Agent contracting on behalf of a foreign principal is presumed to contract personally in the absence of a contrary intention.

40. Relying upon the decision reported in **2004 (13) SCC 434 (Cochin Frozen Food Exports (P) Ltd., v. Vanchinad Agencies and others)** it is contended by the learned counsel for the plaintiff that, whether the principal name is disclosed or not, whether he could be sued or not, on account of any disability, it is immaterial and that the only requirement is that, the principal should be resident abroad and as this requirement is satisfied, the second defendant, as agent, is liable. The relevant paragraph reads as under:-

"5. The section provides that, as a general rule, an agent cannot be made liable for a contract entered into by such agent for and on behalf of his principal. There are three exceptions to this general exemption from liability. The first exception is that one with which we are concerned in this case. ***It provides that if the principal is abroad then the agent could be sued and be made liable on a contract entered into by such agent on behalf of such***



principal. The second exception deals with the case of an undisclosed principal and the third with the case where the principal's name though disclosed, cannot be sued by reason of any disability. **The disclosure or non-disclosure of the principal as far as the first exception is concerned is immaterial.** The only requirement is that the principal should be resident abroad."

41. According to the learned counsel for the second defendant, as a general rule, an agent cannot be made liable for a contract entered into for and on behalf of the principal and there are three exceptions to the general exemption to liability, but those three exceptions cannot be made applicable to the second defendant in the present case. It is strenuously contended that there is no contract entered into by the agent on behalf of the first defendant either for sale or for purchase of goods for the merchant residing abroad.

42. This contention is far-fetched as the **Purchase Order itself has been placed by the second defendant** on behalf of the first defendant and the Sea Foods have to be delivered by the plaintiff to the third defendant, as is evident from Exs.P-1 and P-2-Purchase Orders.

43. Even though there is no separate contract neither entered into by the first defendant nor by the second defendant, still the first defendant has stated in his evidence that they have given authorization to the 2nd defendant to act as their agent for purchasing frozen sea food in India mainly based upon the specific conditions



44. It is pertinent to point out that the second defendant did not choose to enter into the box directly, but, has given evidence through the Assistant employed, in the second defendant concern, who has no personal knowledge regarding the transaction. Akthar (D.W.2) would state that the second defendant was appointed as an agent approximately for five years prior to his appointment and that he did not even know whether appointment of second defendant as agent of the first defendant was made in writing or not. There is an admission that the first defendant does not carry on business in India directly, but, carries on business only through the second defendant. Further, he would state that the knowledge of the second defendant with regard to Ex.P1 to P4 was through the information provided by the first defendant in respect of the suit transaction over phone and fax message. This part of the evidence would go to show that apart from acting as agent, the agent has extended interest in the business itself.

45. So far as Exs.P1 and P2 are concerned, it is stated that second defendant confirmed the purchase of the merchandise on behalf of the Principal Ruskim Seafoods Ltd. Under Ex.P10 which is a letter sent to the plaintiff, it is stated that the consignee took delivery of cargo at Lisbon on 19.09.1997.

46. But the fact remains that purchase orders have been duly executed by the plaintiff. Even though the first



defendant initially agreed to purchase through letter of credit, after the shipment of goods, did not open letter of credit and requested the plaintiff to send the bill of exchange. The fact remains that this arrangement was also oral. D.W.1 has confirmed that he received the bill of lading, invoice, packing list, Form-A as well as Health Certificate for the consignment. Even though D.W.1 has received the payment for the second consignment from the 3rd defendant, he did not pay the same to the plaintiff.

47. It is a case of the first defendant that the cargo was infested with Cholera and therefore, they are not liable for payment. Even though D.W.1 has admitted that he did not file any documents to show that the consignment was infested with Cholera subsequently, through D.W.2, Ex.D9 series has been filed which is stated to be a translation of the xerox copy of the certificate alleged to have been issued by the Department of Officials at Lisbon. It is settled law that a xerox copy of the copy is not admissible evidence. In the decision reported in 2007 5 SCC 730, it is held as follows:

"Learned Single Judge held that the documents which were sought to be received and marked as secondary evidence are photo copies. It was noted that it may be a fact that the original of the documents are not available with the parties but at the same time the requirement of [Section 63](#) of the Indian Evidence Act, 1872 (in short the 'Act') is that a document can be received as an evidence under the head of secondary evidence only when the copies made from or compared with the original are certified copies or such other documents as



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found the photo copies can not be received as secondary evidence in terms of Section 63 of the Act and they ought not to have been received as secondary evidence. Since the documents in question were admittedly photo copies, there was no possibility of the documents being compared with the originals. Accordingly the Civil Revision was allowed."

48. Moreover, the translator who is available in India has not been examined. At the time of Export, the plaintiff has filed a document to show that the consignment was not infested with Cholera. Therefore, how the consignment was infested with cholera at a later point of time has to be proved only by the defendants. The defendants have failed in proving the same.

49. Learned counsel for the plaintiff would submit that the responsibility of the plaintiff terminates one he places the cargo on board and on obtaining the original bill of lading and sending the same to the buyer. The title to the goods passed on to the first defendant immediately and the cargo is carried and delivery only at the risk of the buyer, the first defendant. The learned counsel for the plaintiff also pointed out the distinction between F.O.B. contract and C.I.F. Contract explained in the decision reported in 2010 4 SCC 256 **Contship Container Lines Ltd vs D.K. Lall & Ors** . The relevant paragraph reads as under:

"... The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) is well recognized in the commercial



world. While in the case of CIF contract the seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination etc., in the case of FOB contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer."

50. Therefore, it is clear that the contract is an F.O.B. Contract. Hence, the goods have been carried and delivered only at the risk of the first defendant. It is relevant to point out that the bill of exchange under P8 and P9 have been accepted. There had been a promise to pay the plaintiff in 90 days' time.

51. It is the contention of the defendants that there was a delay on the part of the plaintiff in sending the document. But, the contention of the plaintiff is that the moment when the first and second defendants changed the payment terms (from letter of credit to Bill of exchange), the plaintiff had immediately sent the documents through its Banker's. This is admitted by D.W.1 and D.W.2. Even assuming that there was some delay on the part of the plaintiff, the fact remains that it is only the defendant 1 and 2 who changed the payment terms, not before the despatch of goods, but after shipment of the goods and therefore, it is not open to the defendants to plead

