an administartive and not a judicial proceeding and that the award made by the Collector under Section 11 of the Act is not a final award binding on the claimant but merely a tender or an offer of an amount mentioned in the award as compensation payable by the Government to the claimant. An award is in fact merely the starting point of other proceedings, and is almost invariably followed by a reference to the District Judge, which is called a reference rather than an appeal although in effect it is virtually an appeal, and then an appeal to the High Court. In the circumstances I do not consider that there is any ground for interference and dismiss the petition with costs. Counsel's fee Rs. 100 to each of the respondents.

B.R.T.

APPELLATE CIVIL.

Before Gosain and Grover, JJ.

THE CENTRAL BANK OF INDIA, LTD.,—*Defendant-Appellant.*

versus

FIRM RUR CHAND-KURRA MAL,—*Plaintiff-Respondent.*

Regular First Appeal No. 235 of 1950.

1957

Dec., 19th

Indian Contract Act (IX of 1872)—Section 194—Agent authorised to appoint another to execute the work of agency —Privity of contract—Whether created between the principal and the "substitute"—Substituted agent and sub-agent—Difference between—Liability of the original agent—Whether exists after their appointment—Indian Evidence Act (I of 1872)—Section 101—Executant of a document admitting his signatures thereon—Onus to explain the circumstances under which he signed it—On whom lies—Section 114(g)—Firm failing to produce its account books—Presumption to be drawn—Practice—Plea not raised in the plaint nor any issue framed on the point—Whether can be allowed to be raised in appeal

Held, that exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. The authority to this effect may and should be implied where from the conduct of the parties or the nature of the business it may reasonably be presumed that the parties originally intended that such authority should exist. Where such authority existed and is duly exercised privity of contract arises between the principal and the substitute and the latter becomes responsible to the former for the due discharge of the duties. The substituted agent, in such a case, becomes the nominee of the principal and the agent is not concerned with the character or efficiency of the substituted agent and the obligation of the original agent quoad any part of the business of the agency entrusted to the substituted agent ceases as soon as the privity of contract is created between the substituted agent and the principal.

Held, that in the case of a substituted agent, the naming has to be by the agent to the principal so as to bring about privity of contract between the two and no liability attaches to the original agent in respect of the whole or part of the business first entrusted to him and then to the substituted agent. In the case of a sub-agent the naming need not be to the principal and consequently no privity of contract is established between the two and the agent remains liable to the principal.

Held, that when a person admits his signatures on a document or does not deny them, it is for him to explain how his signatures came to be obtained on the document and whether its contents had been explained to him or not and on what date the signatures were obtained.

Held, that where the plaintiff firm alleges that it is a joint family firm and the defendant alleges it to be a contractual partnership firm and the firm fails to produce its account books, the court is justified in raising the presumption that the entries therein relating to partnership were

contrary to the plea that the firm was a joint family firm.

Held, that where no plea is raised in the plaint nor is any issue framed on the point nor is the contention in that form advanced before the trial court, the appellate court will not allow it to be raised in the appeal for the first time.

Case law discussed.

Regular First Appeal from the decree of Shri Pitam Singh Jain, Senior Sub-Judge, Hissar, dated 31st August, 1950, granting the plaintiff a decree for Rs. 5,912 and proportionate costs against the defendant, and further allowing him future interest on a sum of Rs. 5,300 at the rate of 6 per cent per annum from the date of decree till realization.

A. M. SURI, for Appellant.

F. C. MITAL and D. C. GUPTA, for Respondent.

JUDGMENT

GROVER, J.—This is a defendant's appeal against a decree for Rs. 5,912 with proportionate costs and future interest granted in favour of the plaintiff-firm Roor Chand-Kura Mal. The said firm had a cash credit account with the Uklana pay office of the defendant-bank which has its head office at Bombay. On 21st January, 1947, the plaintiff-firm gave a *hundi* for Rs. 5,300 to the Uklana pay office together with a railway receipt of 245 bags of gram for realization from Messrs Guranditta Mal-Saudagar Mal of Anjera, district Campbellpur, and on the same date credit was given to the said firm for the aforesaid amount in their account. The Uklana pay office sent the *hundi* along with the railway receipt to the branch of the defendant-bank at Rawalpindi for realisation from the drawee-firm. The Rawalpindi Branch contacted the drawee-firm who insisted that the aforesaid documents be sent through the Oriental Bank which had its head office at

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Rawalpindi and a branch office at Tamman—a town which was at a distance of about 17 miles from Anjera—and with which the drawee-firm had dealings. On 1st February, 1947, the Rawalpindi branch of the defendant-bank sent a telegram to the Uklana pay office, intimating that the party in question desired to retire the *hundi* through the Oriental Bank Tamman and sought instructions on the point. On the same date the Uklana pay office sent a reply confirming that the same might be done. On 3rd February, 1947, the *hundi* along with the other papers was sent by the Rawalpindi branch of the defendant-bank to the Oriental Bank, Rawalpindi, for collection. On 7th February, 1947, the Uklana pay office wired,—*vide* Exhibit D. 17 to the Rawalpindi branch enquiring about the fate of the *hundi* which was described in all these telegrams as Beepee 209. On 10th February, 1947, the Rawalpindi branch wrote to the Oriental Bank there enquiring as to what had happened to the Beepee in question (Exhibit D. 21). On 19th February, 1947, a telegram, Exhibit D. 20, was sent by the Rawalpindi branch to Uklana that the bill had been realised. This, however, as will be seen later was the result of a mistake. Thereafter the Rawalpindi branch kept on enquiring by several letters from the Oriental Bank about the fate of the *hundi*. On 26th March, 1947, the Managing Director of the Oriental Bank wrote to the Rawalpindi branch of the defendant-bank a letter, Exhibit D. 31, saying that the Tamman office was situate in a district near the boundary of Mianwali where in the radius of 20 miles there was hardly any town which had not been entirely burnt or looted. It was stated that normal business was expected to be resumed shortly and then the required information would be sent. It is alleged by the defendant that on 1st April, 1947, a letter, Exhibit

D. 62, was written by the officer-in-charge of the Uklana pay office to the plaintiff-firm as follows:—

> "We have been intimated by our Rawalpindi office that we have not so far received the payment of the above bill from the Oriental Bank, Tamman, and as such please note that your bill in question stands unpaid on your risk and responsibility."

It may be stated that there is a dispute with regard to the correct date, on which this letter was written as also with regard to the factum of its delivery. On 9th April, 1947, the Rawalpindi branch wrote to Uklana, a letter, Exhibit D. 36, conveying information that no payment had yet been received from the Oriental Bank. After further correspondence on 26th April, 1947, the Rawalpindi branch served a notice, Exhibit C. 1, through counsel on the Oriental Bank informing the Oriental Bank that the legal responsibility for the amount together with expenses etc., was of that bank. According to the defendant-bank confirmation was obtained on a voucher, dated 8th March, 1948, Exhibit D. 1, from Jagdish Chander who throughout acted on behalf of the plaintiff-firm with regard to the debit of Rs. 5,300 to the account of the firm, this having been done on account of the non-realisation of the *hundi* in question. The plaintiff-firm, however, disputes that the confirmation was so made. A letter is alleged to have been addressed on the same date, Exhibit D. 64, to the plaintiff-firm intimating that the cash credit account of the firm had been debited with Rs. 5,300 on account of the *hundi* in question sent to the Oriental Bank Limited, Tamman, at the risk and responsibility for collection of the plaintiff-firm. The receipt of this letter also is not

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admitted by the plaintiff-firm. On the 30th March, 1948, the Officer-in-charge of the Uklana pay office sent a letter to the plaintiff-firm to the following effect :—

> "In response to your registered notice dated 12th March, 1948, we beg to inform you that the bill in question was discounted and sent in collection at your risk and responsibility and as the amount thereof has not so far been received by us, you are naturally responsible for the same."

On the same date the Amritsar branch of the defendant-bank sent a letter to the plaintiff-firm stating that the total debit balance in the account of the plaintiff-firm was Rs. 22,960-8-3 and unless the amount was adjusted within a week, the securities would be sold. In April, 1948, the plaintiff-firm is said to have paid the entire sum demanded under protest and took delivery of the bales of cotton which had been pledged with the defendant-bank. It was on 22nd April, 1948, that the present suit was filed for recovery of Rs. 7,200 stated to have been realised by the defendant-bank in excess in the account which the plaintiff-firm maintained with the defendant-bank.

In the suit it was pleaded that the plaintiff-firm was a joint Hindu family firm and that it gave the R.R. in respect of 245 bags of gram along with a *hundi* of Rs. 5,300 to the Uklana pay office. It was also alleged that another R.R. was got prepared on 2nd February, 1947, for being sent to the same drawees for a sum of Rs. 4,850 which amount the Bank had credited as also the amount of Rs. 5,300. The defendant's employees had informed the plaintiff-firm in April, 1947, that the

amount of *hundi* had been realised. Later on the plaintiff-firm wanted the delivery of 100 bales of cotton on payment of the money due. The defendant-bank demanded more money and refused to give credit for the *hundi* in the sum of Rs. 5,300. The amount was paid under protest and it was only when the plaintiff-firm wanted to see the account that information was given to them that they had been debited with the aforesaid amount. The Bank had also charged Rs. 1,900 as interest together with costs in respect of godown-keeper, insurance etc. The defendant-bank denied that the plaintiff-firm was a joint family firm. It was pleaded that the *hundi* of Rs. 5,300 along with the relevant R.R. was sent to the Rawalpindi branch by B.P. bill No. 209 and the Rawalpindi branch called upon the drawees to receive the R.R. against payment but as that firm refused to do so and desired that the R.R. and the *hundi* be presented through the Oriental Bank, Tamman, the same was done after getting instructions from Uklana pay office and that the plaintiff-firm gave the Uklana pay office written instructions on 1st February, 1947, to collect the *hundi* through the Oriental Bank, Tamman, on their risk and responsibility. It was further stated that it had not been possible in spite of repeated enquiries to find out whether Guranditta Mal Saudagar Mal paid off the *hundi* and took delivery of the R.R. or not. It was pleaded that in any case as the defendant bank had not realised the money due, the credit entry of Rs. 5,300 made in the bank's book had to be reversed. A definite plea was raised that the defendant had acted only as an agent of the plaintiff for sending the R.R. and the *hundi* to the Oriental Bank Limitd, Tamman, on plaintiff's risk and responsibility and the defendant had no liability to pay the amount unless it was proved that the amount had been received by the

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bank. On the pleadings of the parties the following issues were raised:—

(1) Is the plaintiff-firm a joint family firm and can sue without registration?

(2) Was the sum of Rs. 1,900 or more duly debited to plaintiff's account?

(3) Was the sum of Rs. 5,300 duly debited to plaintiff's account?

(4) To what amount as interest and other charges the defendant was entitled?

(5) Is the plaintiff estopped from contesting the liability of the amounts in dispute?

The trial Court decided issue No. 1 in favour of the plaintiff-firm. No separate finding was given on issue No. 2. Issue No. 3 which was the main issue was found in favour of the plaintiff-firm and it was held that the sum of Rs. 5,300 had been wrongly debited in the account. On issue No. 4, it was found that the plaintiff had been wrongly debited with a sum of Rs. 612 in all in the account. In the result, a decree for Rs. 5,912 with proportionate costs and future interest on a sum of Rs. 5,300 at 6 per cent per annum was passed.

Mr. Anand Mohan Suri has firstly challenged the decision of the trial Court on issue No. 1. It is contended by him that the Court below had based the decision merely on the statement of the plaintiff and the admission of Babu Lal (D.W. 1) that the plaintiff-firm was a joint family firm and that the trial Court had not properly considered—

(a) the documentary evidence,

(b) the effect of non-production of books of accounts by the plaintiff-firm, and

(c) certain important facts and circumstances which showed that the plaintiff-firm could not have been a joint family firm.

Our attention has been invited to Exhibit D. 6 which is a letter dated 10th February, 1948, addressed by Jagdish Chander, who signed on behalf of Roor Chand-Kura Mal saying that with reference to the demand promissory Note for Rs. 1,25,000 dated 10th February, 1948, the firm undertook to pay the amount due on the said demand Promissory Note without the note being presented for payment. This Promissory Note is Exhibit D. 10 and purports to have been executed on behalf of the firm by Jagdish Chander. But the more important document is Exhibit D. 3 of the same date which is a letter addressed by Jagadish Chander, Kura Mal and Narain Dass to the Amritsar Branch of the defendant-bank in which it is stated in very clear terms that they alone were the partners of the firm Roor Chand Kura Mal and that they were jointly and severally responsible to the Bank for the liabilities of the firm and that whenever any change occurred in the partnership, the bank would be informed. All the aforesaid three persons signed at the place where it was written "to be signed here by each partner of the firm". Jagdish Chander further executed an agreement regarding pledge of goods to secure a demand cash credit. These documents were executed before the suit was filed by the plaintiff-firm and they are relevant and admissible for the purpose of showing that on 10th February, 1948, Jagdish Chander, Kura Mal and Narain Dass referred to themselves as a firm of the name of Roor Chand Kura Mal and actually stated that they were the partners thereof. This was consistent only with the firm being a partnership firm and not a joint Hindu family firm which

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according to the evidence of Jagdish Chander consisted of Rur Chand and his five sons, Kura Mal, Tulsi Ram, Narain Chand, Jagga Ram alias Jagdish Chander and Chhabil Dass. The said documents can be looked at for the purpose of seeing whether on 10th February, 1948, the three persons mentioned above represented themselves to be the partners of the firm, Roor Chand-Kura Mal and acted as such. In face of these documents, it was necessary for the plaintiff-firm to produce the books of accounts which would have shown whether the firm was a joint Hindu family firm or a partnership firm at the material time. The failure to produce the books of account entitles the Court to raise a presumption that the entries therein relaing to partnership were contrary to the plea that the firm was a joint family firm. The other facts and circumstances are significant inasmuch as the entire correspondence and transactions were being done by Jagdish Chander who admittedly is not the Karta of the joint Hindu family. In the plaint Kura Mal is described as its manager. Normally the real Karta should be the father, Roor Chand, but assuming Kura Mal was the manager of the joint Hindu family, it has not been explained why Jagdish Chander should have been acting on behalf of the joint Hindu family firm in all the transactions. It would be more consistent with the theory of a partnership that Jadish Chander, who was one of the partners, would be acting on behalf of the firm. Kura Mal who is described to be the manager of the joint Hindu family firm never appeared in the witness-box to give any information about the constitution of the firm. No explanation has been given for his not having made any statement in Court. It must, therefore, be held that the plaintiff-firm had failed to prove that it was a joint Hindu family firm.

On issue No. 3, the attack of Mr. Anand Mohan Suri is directed against a number of points decided by the trial Court. His contention is that there could be no doubt that the payment of the hundi in question had not been made by the Oriental Bank to the defendant-bank. For this purpose he relies on the finding of the trial Court that the telegram which had been sent on 19th February, 1947, in which it was stated that the bill had been realised was sent on account of a mistake on the part of some clerk who misread the entry in the I.B.C. register of the Rawalpindi branch. It is submitted by him that the essential question in the case was whether by virtue of the execution of the document, Exhibit D. 2, by Jagdish Chander according to which the defendant bank was authorised to get the *hundi* and the bills collected through the Oriental Bank Limited, Tamman, on the risk and responsibility of the plaintiff-firm, section 194 of the Indian Contract Act would be attracted. Section 194, provides that where an agent, holding an express or implied authority to name another person to act for the principal, has named another person, such person is not a sub-agent, but is an agent of the principal himself. For the sake of brevity, such other person who has been named is called a "substituted" agent. According to the case of the defendant-bank the Oriental Bank having been named to act for the plaintiff-firm that bank became the substituted agent and, therefore, the plaintiff-firm could enforce their claim against the Oriental Bank only and the defendant-bank was in no way liable for the acts of the substituted agent. In order to decide this point it is necessary to determine whether Exhibit D. 2 was in fact executed by Jagdish Chander as the same was disputed on behalf of the plaintiff-firm. The trial Court, after considering the evidence and after comparison of

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the disputed signatures with the admitted signatures of Jagdish Chander with the help of the experts produced, came to the conclusion that the signatures on Exhibit D. 2 were of Jagdish Chander himself. But curiously enough the trial Court acted on surmises and conjectures in considering that such a document could have been prepared either on the signatures of the plaintiff which were already with the bank or on signatures made for a different purpose. After examining the evidence of Babu Lal (D.W. 1), the then Head Cashier at Uklana pay office, Ram Chand Sharma (D.W. 5), and Brij Lal (P.W. 7), the then clerk at Uklana, the trial Court concluded that the weight of oral evidence was against the authenticity of the document, Exhibit D. 2. Importance was attached to the fact that the aforesaid document was undated and that the attestation of the Cashier did not bear any date. Reliance was placed on the statement of Ram Chand Sharma (D.W. 5), that the document which was written on the 1st February, 1947, was forwarded to Amritsar branch office for record but that there was no proof that actually it had found its way to Amritsar. It was considered that another document Exhibit D. 1 seemed to have been forged by Ram Chand Sharma and in the correspondence no mention had ever been made of the document, Exhibit D. 2, which showed that Exhibit D. 2 had not been executed as alleged by the bank. It seems that the approach of the trial Court was erroneous. After finding that the document Exhibit D. 1, bore the signatures of Jagdish Chander it became necessary at once to examine what Jagdish Chander himself had to say with regard to the same. In a statement made on 11th October, 1949, all that Jagdish Chander stated, as P.W. 2, was that he had seen the Urdu signatures

(encircled with blue pencil) on the writings Exhibits D. 1 and D. 2 and he could not say positively whether these signatures were in his own..... ..... writing or not. It was never suggested that he was made to sign some blank document or that he was never explained the contents of the document. The trial Court had relied on the statement of Babu Lal (D.W. 1), who had attested the signatures of Jagdish Chander in his capacity as a Cashier and on his admission that the contents of the document were not read over to Jagdish Chander at the time it was signed. It was considered that this made it probable that the contents of the document D. 2, were not read over to Jagdish Chander plaintiff, and that the signatures might possibly have been obtained in March, 1948, rather than in February, 1947. It was certainly not open to the trial Court to build up a version which Jagdish Chander never put forward himself. It is significant that even in his statement which he made in rebuttal after the entire evidence of the bank had been recorded, Jagdish Chander did not state anything which could lend support to the theory which has appealed to the trial Court. The execution of Exhibit D. 2, on 1st February, 1947, as deposed to by the witnesses of the defendant-bank must be held to be proved for another reason. It has already been stated that on 1st February, 1947, after the drawee firm had intimated a desire for retiring the hundi through the Oriental Bank, Tamman, the Rawalpindi branch of the defendant-bank sent a telegram Exhibit D. 61/1, for instructions in the matter to Uklana. It stands to reason that the bank would not normally take any responsibility itself and the usual course would be to send for the plaintiff Jagdish Chander and get the necessary document signed by him. A reply was in fact immediately sent from Uklana that the documents might be

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presented through the Oriental Bank (*vide* Exhibit D. 14). This is deposed to by Ram Chand Sharma (D.W. 5), who was the officer-in-charge of the Uklana pay office. It was stated by him that the contents of Exhibit D. 2 were translated and explained to Jagdish Chander and he signed it with full knowledge of its contents. It is true that Ram Chand Sharma admits that at the time the document Exhibit D. 2, was signed by Jagdish Chander, Babu Lal Cashier and Brij Lal Clerk were present. Babu Lal (D.W. 1), stated that he did not read over the contents of the document D. 2 to Jagdish Chander. This does not, however, contradict the evidence of Ram Chand Sharma according to whom he himself explained its contents in Hindustani to Jagdish Chander. The trial Court placed reliance on the evidence of Brij Lal who was a clerk in the Uklana pay office from 1945 to 1948 and who had been produced by the plaintiff-firm as P.W. 7. He had stated that the letter, Exhibit D. 2, was in his writing and he wrote it at the instance of Ram Chand Sharma. According to him the signatures purporting to be of Jagadish Chander were not made in his presence and that the document Exhibit D. 2 was written by him in the month of February or March, 1948. Even the trial Court found that this witness was inimical to the defendant-bank. Admittedly his services had been terminated and he had originally been cited as a witness on behalf of the bank but on 14th December, 1949, a statement was made by the counsel for the defendant that he was being given up as he had been won over. It is noteworthy that Brij Lal gives a version which is a great improvement on the version of Jagdish Chander himself with regard to the manner and the year in which the document was executed. The other circumstances which have been taken by the trial Court into consideration may raise

a certain amount of suspicion with regard to the authenticity of the document Exhibit D. 2, but it is well settled that suspicion cannot take the place of proof. It was for the plaintiff Jagdish Chander to explain how his signatures came to be obtained on Exhibit D. 2 and whether its contents had been explained to him or not and on what date the signatures were obtained. The complete failure on his part to make any statement on these points is, in our mind, conclusive and the document must be held to have been executed as alleged by the bank. Once this conclusion is reached, the liability of the defendant-bank can be fixed only if the Oriental Bank was not a substituted agent and was a sub-agent of the defendant-bank. Mr. Anand Mohan Suri has relied on the express language of section 194 of the Contract Act, as also on the observations in *De Bussche* v. *Alt* (1), in which the law was very clearly stated by the Court of Appeal at page 310. It has been laid down that exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. The authority to this effect may and should be implied where from the conduct of the parties or the nature of the business it may reasonably be presumed that the parties originally intended that such authority should exist. Where such authority existed and is duly exercised privity of contract arises between the principal

(1) (1878) 8 Ch. D. 286.

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and the substitute and the latter becomes responsible to the former for the due discharge of the duties. Mr. Dalip Chand Gupta submits on behalf of the plaintiff-firm that the Oriental Bank never became a substituted agent but was the sub-agent of the defendant-bank and as such the liability of the defendant bank remained intact throughout. He has invited attention to the various letters which passed between the Rawalpindi Branch and the Uklana pay office as also the Amritsar Branch which showed that the defendant-bank always regarded itself as a sub-agent assuming full responsibility in the matter. It is true that in some of the letters the bank officials kept on writing to the Oriental Bank to make payment of the bill or return the same, *vide* Exhibits D. 23, D. 24, D. 25, D. 26 etc. In the letter dated 9th April, 1947, addressed to the Oriental Bank by the Rawalpindi Branch of the defendant-bank it was stated "Please note that we hold you responsible for the payment of the bill or for any damage or claim made by the party.". But this cannot alter the true relationship between the parties. It seems that the defendant-bank was trying its best in the interest of its constituent, namely, the plaintiff-firm, to make realisation from the Oriental Bank and to put all pressure on the said bank to remit the amount in question. But if by virtue of Exhibit D. 2, the real relationship between the plaintiff-firm and the Oriental Bank was one of principal and agent and there was privity of contract between them, no matter what the officials of the defendant-bank had been thinking or writing, no liability can be fixed on the defendant-bank. There is another way of looking at the matter. According to Exhibit D.2 the Uklana pay office was authorised by the plaintiff-firm to collect the hundi and the bills

through Oriental Bank, Limited, Tamman, on the risk and responsibility of the firm. In such a case the substituted agent became the nominee of the principal and the defendant-bank was not concerned with the character or efficiency of the substituted agent and the obligation of the original agent *quoad* any part of the business of the agency entrusted to the substituted agent ceased if and so soon as privity of contract had been created between the substituted agent and the principal. This view was taken by Page, J. in *Chowdhury T. C. and Bros.* v. *Girindra Mohan Neogi* (1). In that case N. purchased from a firm C at Calcutta a quantity of corrugated iron sheets and paid a sum of Rs. 250 in part payment of price. N instructed the firm to send the goods to his place K and collect the balance of purchase money through the local Bank at K. The firm C thereupon sent goods to K and despatched the railway receipt, their bill and demand draft with a covering letter to the National Bank, their bankers at Calcutta, instructing them to collect the bills through the Bank at K. Contrary to the instructions the Bank at K made over goods to N. N delayed payment and later offered to pay in instalments. Thereupon the firm C brought a suit to recover balance from National Bank. It was held that the local bank at K was the agent of the firm C for the work directed to be done at K, and the National Bank was merely the conduit pipe through which C firm communicated thier instructions to Bank at K and the Bank at K was not the sub-agent of the National Bank. The learned Calcutta Judge was of the view that section 194 would not strictly apply to such a case, because the aforsaid section connoted that the agent had a discretion "in selecting such agent for his principal", but the original agent would not be answer-

(1) A.I.R. 1930 Cal. 10.

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able for the conduct of the substituted agent. His duty finished when he had established relations between the substituted agent and the principal. In Halsbury's Laws of England (Volume I, Simonds edition), it is stated in paragraph 405 that there may be three classes of sub-agents: (1) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound; (2) those employed with the express or implied authority of the principal but between whom and the principal there is no privity of contract; (3) those employed with the principal's authority, between whom and the principal there is privity of contract, and a direct relationship of principal and agent is, accordingly, established. For the acts and defaults of the first two classes the agent is responsible to the principal; in the third case the sub-agent has the rights and liabilities of an agent *vis a vis* the principal. According to Mr. Dalip Chand Gupta, the class of sub-agents within which the Oriental Bank fell would be No. 2 and not No. 3. He has placed reliance on *Mercantile Bank of India Ltd.* v. *Chetumal Bulchand* (1). After carefully examining the judgment of Rupchand, A.J.C., who indeed knew a great deal about commerical law, it is not possible to hold that any assistance can be derived by the plaintiff from the said decision. The learned Additional Judicial Commissioner has himself referred to Halsbury's Laws of England, Volume I, wherein it is stated—

> "There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a

(1) A.I.R. 1930 Sind 247.

party to the appointment of the sub-agent or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them."

If Exhibit D. 2 was in fact executed as has been found by us, this case would fall within the exception. In the Sind case the plaintiffs had arranged credits with the defendants and handed over to them shipping documents of certain goods which they had agreed to sell to one P at Port Said. The defendants had forwarded the shipping documents and the draft to the Egyptian National Bank of Port Said for delivery against payment. P, however, managed to obtain the shipping documents without paying for the shipping documents and after inspection he raised objection to the value of the goods and refused to accept or honour the draft. Later on the goods passed into the possession of the National Egyptian Bank as the rightful holder of the bill of lading and under instructions from the plaintiffs they were transferred to some grocer on payment of a certain amount. The defendants adjusted their account with the plaintiffs and after giving credit for the amount received and the expenses incurred, debited the sum of £38 being custom duty which the National Egyptian Bank paid on delivery without instructions from the plaintiffs. The plaintiffs thereupon instituted a suit for the recovery of £38 odd. It was held that the matter fell within class (2) of the sub-agents as classified by Halsbury and after an examination of sections 190 to 194 of the Indian Contract Act and the relevant authorities, Rupchand, A. J. C., observed at page 251 :—

"In the present case there were not only no allegations, much less proof, that the

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defendants had authority to nominate the National Egyptian Bank to act for the plaintiff in the business of his agency, but there is positive evidence of a responsible officer of that bank to show that they never recognized the plaintiff at all."

It is, therefore, quite clear that the Sind case does not advance the contention of Mr. Dalip Chand Gupta at all. While examining sections 192 to 194 of the Indian Contract Act, Beaman, J. in *Nensukhdas Shivnaraen* v. *Birdichand Anraj* (1), noticed cases in which, where it was a case of sub-agency under the definition of the Indian law, the English Courts held that it was one of substituted agency and where it was clearly a case of substituted agency under the Indian law, the English Courts refused to give the principal redress against the substituted agent. The case of *De Bussche* v. *Alt* (2), was a case of sub-agent according to Indian law and yet the Court there had no hesitation whatever in allowing the plaintiff to have recourse to the sub-agent and in holding that privity of contract had been established between them. Another case, namely, of *Lockwood* v. *Abdy* (3), was as clearly a case of substituted agent under our law as could be desired, yet the English Courts had no difficulty in finding that the principal could not recover against such a substituted agent. It has been observed by Beaman, J. that the whole distinction in our law appears to turn on the original agent naming the person he appoints to represent the principal for the whole or part of the business first entrusted to him. Whether this naming is put to the agent or principal is by no means apparent. The naming

(1) A.I.R. 1917 Bom. 19.
(2) (1878) 8 Ch. D. 286.
(3) (1845) 14 Sim. 457.

should, however, be to the principal himself so as to bring about privity of contract. In case of a sub-agent no such naming is required and consequently no such privity in law is established. In the present case, however, there is hardly any difficulty in deciding whether the Oriental Bank Limited Tamman, became the substituted agent or was a sub-agent of the defendant-bank. That is so by reason of the execution of the letter, Exhibit D. 2, without which a number of difficulties would have arisen in deciding the real relationship which obtained between the parties.

Mr. Dalip Chand Gupta has also raised the point that according to the bank's own admission, the bill in question had been purchased. He refers to Exhibit D. 63 which is a letter written to the agent of the Amritsar branch of the defendant-bank. The Officer-in-charge, Uklana pay office, wrote that the bill had been purchased by the bank from the plaintiff-firm on 22nd January, 1947. The submission is that since the bills had been purchased by the defendant-bank, the bank was under no circumstances entitled to debit the amount to the plaintiff-firm in the event of non-realisation of the same. No such plea was raised in the plaint nor was any issue framed on the point. Even before the trial Court the contention does not seem to have been advanced in this manner. This point cannot, therefore, be allowed to be raised at this stage.

In view of the conclusion at which we have arrived, namely, that the relationship between the plaintiff-firm and the Oriental Bank was one of substituted agent, it becomes unnecessary to go into other matters which have been considered by the trial Court and which have been argued before us. It is equally unnecessary to decide whether there was any negligence on the part of

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the defendant-bank in the matter of entrusting the work to the Oriental Bank or in the delay in informing the plaintiff-firm about non-realisation of the amount of the hundi. It was admitted by Mr. Dalip Chand Gupta that the question of negligence would only arise if the defendant-bank was the agent and not if the Oriental Bank became the substituted agent.

In the result, the appeal is allowed and the decree of the Court below is set aside. The plaintiff's suit shall stand dismissed. The defendant-bank will be entitled to costs in this Court.

B.R.T.

REVISIONAL CIVIL.

Before Falshaw, J.

THE STATE OF PUNJAB,—*Petitioner.*

versus

MESSRS WENGER AND CO.,—*Respondents.*

Civil Revision No. 8-D of 1955.

1957

Dec., 23rd

Indian Limitation Act (IX of 1908)—Article 97—Catering for festivities on certain dates given—Festivities postponed and then abandoned—Failure of consideration—When took place—Right barred under the Act—Whether can be revived by a subsequent enactment.

The festivities were fixed for three days from 16th to 18th March, 1948, for which catering contract was given to the defendant. These festivities were first postponed and then abandoned.

Held, that the failure of consideration took place on the date when the decision to abandon the festivities was taken and that was the starting point of limitation.

Held, that if a right to sue had become barred by the provisions of the Limitation Act then in force on the date of the coming into force of a new Act, then such a barred right is not revived by the application of the new enactment.