1870.
July 16.

Suit No. 1027 *of* 1867.

VINA'YAKRA'V GANPATRA'V *et al.* .....*Plaintiffs.*

RANSORDA'S PRA'NJIVANDA'S .....*Defendant.*

Agreement—Consideration—Servant inducing his Master to employ particular Broker—Percentage—Sucri—Public Policy.

Where a *mehtá*, without the knowledge of his master, agreed with his master's brokers to receive a percentage (called *sucri*) on the brokerage earned by such brokers in respect of transactions carried out through them by the *mehtá's* master, and no express consideration was alleged or proved by the *mehtá*, the court refused to imply, as a consideration, an agreement by the *mehtá* to induce his master to carry on business through such brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant.

But where the same brokers agreed with the *mehtá* not to charge him brokerage on such private transactions as he should carry on through them, and the *mehtá* carried on private transactions through the brokers, *it was held* that the brokers were bound by that agreement, and could not maintain a claim for such brokerage.

THE plaintiffs, Vináyakráv Gaṇpatráv, Gopálráv Gaṇpatráv, and Mukundráv Gaṇpatráv, who carried on business in Bombay by their *munim*, Balvantráv Bhikáji, under the name of Gaṇesh Vináyak, brought this suit to recover Rs. 10,000 and interest thereon, due under a document in the following form:—

"To Rájá Shrí Ganesh Vináyak, written by Shá Ransordás Pránjivandás, whose salutation, &c.

To wit: Ten thousand rupees in ready cash have been received from you on personal security. Therefore this acknowledgment is written and delivered, Sunday, the 12th of Posh Shudh of Samvat 1921 (8th January 1865). My own handwriting.

(Signed) RANSORDA'S PRA'NJIVANDA'S."

The defendant put in a written statement in which he claimed a set-off from the plaintiffs exceeding the amount of the claim of the plaintiffs.

The 4th para. of the written statement alleged that the defendant employed the plaintiffs as his agents in the sale and purchase of cotton and opium for different *vaidas*, and that the plaintiffs had sent in an account thereof to the defendant, showing a balance in favour of the defendant, and

that, *in addition to such balance,* the defendant claimed credit for Rs. 314-4-9 for remission of commission and discount in brokerage, to which he was entitled, as it had been expressly agreed that no commission should be charged to the defendant, and that he should be allowed the discount deducted by the plaintiffs from the brokerage paid on his account.

This remission formed one item of the defendant's set-off. The defendant also claimed other similar remissions. The 8th para. of the written statement alleged that the defendant was the *mehtá* of Rústamji Jamsetji Jijibhái, who carried on large *vaida* transactions through the plaintiffs, and it was agreed between the plaintiffs and the defendant that the plaintiffs should allow the defendant ten per cent. of the commission they charged Rustamji Jamsetji Jijibhái, and that the plaintiffs had given the defendant credit for this commission on the *vaida* of Mágsar of Samvat 1921, but had not given him credit for commission on other transactions for the *vaida* of Vaisák of that year, amounting to Rs. 2,801-12-9. This formed another item of the defendant's set-off.

On this written statement being filed, the plaintiffs obtained leave to amend their plaint by giving credit to the defendant for such sums as they admitted they owed to the defendant.

This they did, giving credit to the defendant for Rs. 4,252-3-9, and the accounts were referred to the Commissioner.

The Commissioner made his report on the 25th of June 1870, and therein gave credit to the defendant for a commission of ten per cent. upon the commission earned by the plaintiffs in respect of the transactions entered into by Rustamji Jamsetji Jijibhái through the plaintiffs, amounting to Rs. 2,801-12-9; and also for remission of commission on the defendant's own cotton transactions for the *vaida* of Samvat 1921, amounting to Rs. 1,271-2-0.

This report the plaintiffs gave notice of motion to vary, by disallowing the above items, and the motion came on before WESTROPP, C.J., on the 14th of July 1870.

1870.

VINA'YAKRA'V GANPATRA'V *et al.* *v.* RANSORDA'S PRA'NJIVANDA'S.

The Honorable A. R. Scoble (Acting Advocate General) (with him *McCulloch*), for the plaintiffs, contended that there was no consideration to support the agreements under which these items had been allowed, and that the agreements themselves were not proved.

Mayhew (with him *Starling*) *contra.*

Cur. adv. vult.

July 16. WESTROPP, C.J.:—This is a very peculiar case, which came before the court on what was substantially a motion that the Commissioner should be directed to review his report.

The action was brought to recover the sum of Rs. 10,000 and interest thereon, due from the defendant to the plaintiffs on an acknowledgment in writing by the defendant that he had received from the plaintiffs that sum on personal security, thereby showing that the transaction was one of loan; and that such was its character is not denied in the written statement filed by the defendant. There is manifestly no truth in the gloss which subsequently the defendant has tried to put upon the transaction as to the Rs. 10,000 in his evidence. The defence put forward by him in his written statement was simply that he was entitled to set off against the claim of the plaintiffs certain sums mentioned in the account he annexed to that written statement. On the validity of that set-off the Commissioner had to decide when the account was referred to him. Two items of the account are disputed by the plaintiffs. One of these was in respect of a commission on brokerage, which the defendant said he was entitled to receive from the plaintiffs. The other item was in respect of brokerage which had been charged to him on certain transactions carried on for him by the plaintiffs, and which latter brokerage the defendant alleged that the plaintiffs were not justified in so charging.

The first of these items of set-off the defendant claimed in respect of certain transactions carried on by his master, Rustamji Jamsetji Jijibhái, in the *saṭṭá* bazár, through the

plaintiffs as brokers. He thus puts forward his claim in his written statement:—"The defendant was the *mehtá* of Rustamji Jamsetji Jijibhái, who carried on large *vaida* transactions through the plaintiffs, and it was agreed between the plaintiffs and the defendant that they should allow him ten per cent. of the commission they charged Rustamji Jamsetji Jijibhái. The plaintiffs have given the defendant credit for this commission on the *vaida* of Mágsar of Samvat 1921, but have not given him credit for commission on the other transactions for the *vaida* of Vaisák of that year, which amounts to Rs. 2,801-12-9."

It does appear that the plaintiffs have given certain credits to the defendant in respect of *sucri* on the transactions of Rustamji Jamsetji Jijibhái, carried on by the plaintiffs as his brokers and shroffs, in the *vaidas* of 1920. The mere fact that the plaintiffs have on some occasions allowed such credits to the defendant will not entitle him to demand further allowances of the same nature, if the previous allowances were purely voluntary on the part of the plaintiffs, or for such a consideration as a Court of Justice cannot properly sanction.

The word "*sucri*" is rendered "present" by the Translator, its more literal interpretation being "sweetmeats." I have never before known a claim of this kind to be made in court. The defendant does not contend that he was employed as a broker in the transactions between the plaintiffs and his master, Rustamji Jamsetji Jijibhái. The defendant was the *mehtá, i.e.*, clerk, of Rustamji—in fact his servant, and as his servant he says he was to get from the plaintiffs a commission of ten per cent. on all *vaida* transactions (time-bargains) carried out for Rustamji by the plaintiffs; and it is not alleged that this agreement was known to or sanctioned by Rustamji. There is no allegation in the written statement, nor is there in the evidence anything to show, that in consideration of this commission the defendant was to do anything; so that, so far as positive statement goes, there is a total absence as well of allegation as of proof of consideration for the agreement. Is there any implied consideration

1870.
VINA'YAKRA'V GANPATRA'V *et al.* *v.* RANSORDA'S PRA'NJIVANDA'S.

for it, or if there be such a consideration implied, as was suggested in argument for the defendant, namely, that of inducing Rustamji to employ the plaintiffs, of keeping Rustamji in good humour with the plaintiffs, is it a valid one, Rustamji not knowing of the agreement? I think it is not. To support such an agreement would be against the policy which should regulate the relation of master and servant, and would be subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals, which the servant ought to be vigilant to expose and to check. It is true that these were *saṭṭá* transactions, which were carried on by the plaintiffs for Rustamji Jamsetji Jijibhái, and, as such, might not perhaps afford many opportunities to the defendant of assisting the plaintiffs to impose upon his master; but if the Court were to allow such a claim as this in *saṭṭá* transactions, on what principle could it refuse to allow a similar claim in other and more legitimate transactions? Could any one contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for a percentage on his master's purchases, supposing an agreement to that effect? It would be against all policy; it would place the servant in a position inconsistent with the duty which he owes to his master. It would lead him to pass over unfair and dishonest acts on the part of the tradesman. If the Court were to treat the suggested consideration in this case as a good consideration, it would be lending its sanction to a very dangerous doctrine. I think that this claim of the defendant is unsustainable: 1*st*, because there has not been any consideration for it proved; and, 2*ndly*, because the Court is not, in my opinion, at liberty to imply the only consideration which has been suggested.

Then as to the second item, I feel much difficulty as to whether there was such an agreement made as the defendant alleges. However, although the evidence of it is very unsatisfactory, and I doubt if I should have held it proved, if the matter had been submitted to me in the first instance,

yet I am not so far certain that the evidence is insufficient as to induce me to set aside the decision that the Commissioner, Mr. Fox, has made. [His Lordship here reviewed the evidence on this point, and proceeded.] Assuming, then, that the agreement was made, is it a valid one? It is possible that the defendant would not have entered into these *saṭṭá* transactions on his own account if the plaintiffs had not promised to conduct them for him free of charge, and the defendant has sworn that he did enter into them for that reason. He says: "As to transactions which I might carry on, on my own account, through the plaintiffs, he, Balvantráv (the *munim* of the plaintiffs' firm), said he would not charge commission; as he voluntarily said this, I carried on transactions through him." So that it is not only probable that such was the reason, but it is affirmed by the defendant to have been so; and the plaintiffs, through their *munim*, having promised the defendant not to make the usual charge, and having thereby induced the defendant to enter into these transactions, I do not think they are now at liberty to turn round upon the defendant and to charge him with brokerage. On the other hand, if the plaintiffs had, notwithstanding their promise, declined to effect these *saṭṭá* bargains for the defendant, he could not have maintained any action for the breach of that promise. These transactions having been entered into before Bombay Act III. of 1865 passed, it must be allowed that the brokerage upon them could be recovered, if there were not an agreement to the contrary. That this is so was decided in the case of *Jorávarmal Sivlál* v. *Dádábhái Byrámji*, by Sir Matthew Sausse, C.J., and not only that brokerage was recoverable, but also moneys paid by shroffs and others in settlement of such contracts on behalf of their principals. That case was argued on the 12th of April 1859, and judgment was given on the 14th of the same month, and the law has ever since been held to have been in accordance with that judgment. It was for the purpose of altering the law in those respects that Bombay Act III. of 1865 was passed, but it is not retrospective. So that these charges for brokerage would have been

1870.

VINA'YAKRA'V GANPATRA'V *et al.* *v.* RANSORDA'S PRA'NJIVANDA'S.

lawful, being before July 1865; but the plaintiffs having agreed not to charge, I must hold that they cannot turn round and say they will now make the charge, after having induced the defendant by their conduct to act as he did.

Under these circumstances, the usual direction to give would be that the case should go back to the Master, with a direction to him to review his report in accordance with this judgment; but, if the parties consent, I will at once, in order to save expense, make a decree for the amount which may be found due after disposing of the disputed items of set-off in accordance with the principles which I have laid down; such amount to be agreed on by the parties, without prejudice to their right to appeal on the questions submitted to me. *

Attorneys for the plaintiffs: *Dallas & Co.*

Attorney for the defendant: *C. Tyabji.*

* NOTE BY EDITOR.—The sum of Rs. 7,300-15-6 was agreed upon as the amount of the decree, on the basis laid down in the above judgment, and there has not been any appeal against that judgment.