[SMITH, C.J. AND MIDDLETON, J.]

CONSTANTI S. PILAVACHI, *Plaintiff*,

*v.*

BARNABA MICHAILIDES, *Defendant*.

*Jan.* 4

AGENCY—PURCHASE OF GOODS BY AGENT—LOSS OF GOODS IN TRANSIT—DISPOSAL OF GOODS IN CONTRAVENTION OF AGREEMENT BETWEEN PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR LOSS—MEJELLE, ARTICLE 1492.

*P. when ordering twenty-five sacks of sugar from Trieste, at M.'s request ordered twenty-five sacks for him also. The sugar arrived at Larnaca, and twenty-six sacks were brought round to Papho, the place of business of P. and M. The remainder of the sugar was stored temporarily at Larnaca with P.'s agent, and before it was shipped, P., at M.'s request, agreed to sell the remainder of his share at Larnaca. P. failed to acquaint his agent at Larnaca with this arrangement, and the rest of the sugar was shipped and wrecked on the voyage, some portion, however, being saved and sold. In an action by P. to recover half the loss on the twenty-four sacks.*

HELD (*affirming the judgment of the District Court*): *that M. was relieved from liability to pay for the twelve sacks in consequence of P. having dealt with them contrary to his own agreement and M.'s instructions.*

SEMBLE: *that the loss having occurred whilst P. was thus dealing with the sugar, he must, under the principle laid down in Article* 1492 *of the Mejellé, be treated as an agent who detains goods in his own right, and must bear the loss himself.*

APPEAL from the District Court of Paphos.

*Pascal Constantinides* for the Appellant.

*Artemis* for the Respondent.

The facts and arguments sufficiently appear from the judgment.

*Judgment*: The Plaintiff in this action claimed the sum of £18 8s. 7¾c.p. being the Defendant's share of the loss arising from the wreck of twenty-six sacks of sugar held in partnership, which occurred on a voyage from Larnaca to Paphos, in January, 1893. *Jan.* 12

The facts which were proved at the hearing before the District Court of Paphos appear to be as follows:

The Plaintiff was about to order on his own account twenty-five sacks of sugar from Trieste, and was requested by the Defendant to order twenty-five sacks for him also.

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The sugar was ordered by the Plaintiff accordingly. It arrived at Larnaca consigned to the Plaintiff, was paid for by him and delivered to his agent Dormoush Pascalides.

It was not found possible to ship the whole fifty sacks at once to Paphos, and twenty-six sacks were forwarded first, and were received by the Plaintiff who handed over thirteen sacks to the Defendant. The Defendant then asked the Plaintiff to sell the remaining twelve sacks at Larnaca at current prices, and the Plaintiff agreed to do this.

The Plaintiff denied that anything of the sort took place, but whatever view we think that we ourselves might take, we see no reason why we should interfere with the finding of the District Court on this question of fact, and we, therefore, take it to be proved that the Defendant did tell the Plaintiff that his twelve sacks were not to be shipped to Paphos but were to be sold at Larnaca, and that the Plaintiff consented to undertake that this should be done. However, the remaining twenty-four sacks were loaded by the Plaintiff's agent at Larnaca on a lighter bound for Paphos. The lighter was wrecked on the voyage, and a portion of the cargo being saved was sold by the Plaintiff's agent for what it would fetch; the result being that on these twenty-four sacks of sugar, a loss of £36 17s. 6½c.p. was made, the half of which was sought to be recovered by the Plaintiff in this action from the Defendant.

The District Court, after hearing the evidence, found that there was no partnership between the parties in this transaction, that the Plaintiff had undertaken to supply the Defendant with twenty-five sacks of sugar and had failed to carry out his obligation, and must bear the loss arising from the wreck of the sugar himself. The Plaintiff's action was, therefore dismissed, and the Plaintiff appealed from the judgment.

It seems clear from the evidence adduced that this was not a partnership transaction, but was a case where the Plaintiff at the Defendant's request ordered and paid for twenty-five sacks of sugar on the latter's account. The defendant himself admitted that when the sugar arrived at Larnaca one-half was his property and that he was liable to pay the Plaintiff half the value of the whole fifty sacks, plus half the amount of the charges thereon. It, therefore, appears to us that this sugar was not held in partnership, but that as to twenty-five sacks it was sugar ordered by the Plaintiff at the Defendant's request, which the latter was liable to pay for.

After the delivery of thirteen sacks to the Defendant at Paphos, the latter requested the Plaintiff to sell for him the remaining twelve sacks at Larnaca, and this the Plaintiff undertook to do.

Instead of carrying out his undertaking, however, the Plaintiff through his agent shipped the sugar at Larnaca for Paphos, and on the voyage it was wrecked and partially lost or damaged.

It seems to us that the Plaintiff should at once on getting the Defendant's instructions as to the disposal of the twelve sacks, have instructed his agent at Larnaca to hold them to the Defendant's order or to sell them on his account as he had agreed to do.

We think that the transaction should be treated as a whole, and the Plaintiff's obligation was to order and pay for the sugar and dispose of it in accordance with the Defendant's instructions, and according to his agreement. As he failed to do this, we think that the District Court was justified in holding that the Defendant was relieved from liability to pay for the twelve sacks which the Plaintiff had dealt with contrary to the Defendant's instructions and his own agreement.

It appears to us that the judgment may be supported on the principle laid down in Article 1492 of the Mejellé. That article says that in the case of an agent for purchase, such as the Plaintiff was in this case, if the purchased property perishes by mischance in the hands of the agent the principal must bear the loss, but if it perish in the hands of the agent whilst he holds it in virtue of the lien he has upon it until he is paid, then he must bear the loss himself. The principle on which this rests is, that in the first case the property is considered as entrusted to him, and being lost by chance the owner must bear the loss; whilst in the second case as he is detaining the property in his own right he must bear the loss himself.

Still less, then, it seems to us, can the sugar be regarded as entrusted to the Plaintiff and as having perished by chance in his hands, when the loss occurred through his dealing with it in a manner directly contrary to his own undertaking and the Defendant's instructions. By shipping it with his own sugar he must be treated as though he were holding it in his own right.

If we were to adopt the view pressed upon us by the Appellant's Advocate, that the transaction between these parties is not to be regarded as a whole, but that there were two separate transactions, we should have to hold that though the Defendant was liable for the price of the twelve sacks less the amount realized on the sale of the damaged sugar, he would have a right to counterclaim against the Plaintiff for damages for the wrongful misappropriation of his property by the latter.

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The amount of these damages would be equal to or, perhaps, greater than the Plaintiff's claim, and if we felt driven to adopt this view, we should, certainly, stay execution of the judgment in order that the Defendant might bring his action.

We think, however, as we have said above, that the course pursued by the Plaintiff, with regard to the twelve sacks of sugar, affords a good defence to this action, and the judgment of the District Court is therefore affirmed and this appeal dismissed with costs.

*Appeal dismissed.*