

11

Zanzibar
1955

~~PC 675.82~~

No. 13 of 1954.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

M. TAKIM & COMPANY (Plaintiffs) *Appellants*

AND

FAZAL KASSAM VELJI (Defendant) *Respondent.*

RECORD OF PROCEEDINGS

BIRCHAM & CO.,
WINCHESTER HOUSE,
100 OLD BROAD STREET, E.C.2,
Solicitors for the Appellants.

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20 COPTHALL AVENUE,
LONDON WALL,
LONDON, E.C.2,
Solicitors for the Respondent.

**INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1E**

12530

UNIVERSITY OF LONDON
W.C.1.

-3 JUL 1956

No. 13 of 1954.

In the Privy Council

INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

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RECORD OF PROCEEDINGS

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In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

M. TAKIM & COMPANY (Plaintiffs) *Appellants*

AND

FAZAL KASSAM VELJI (Defendant) *Respondent.*

RECORD OF PROCEEDINGS

10

No. 1.

PLAINT.

HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.
In the High Court.
Holden at Zanzibar.

Civil Case No. 21 of 1951.

M. TAKIM & CO., a firm carrying on business in
partnership at Kiponda, Zanzibar Plaintiffs
versus

FAZAL KASSAM VELJI Defendant.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 1.
Plaint,
15th May
1951.

20 The Plaintiffs above-named state as follows :—

1. Both the Plaintiffs and the Defendant are Indian Merchants residing and carrying on business *inter alia* as Clove dealers at Kiponda and Mlandege respectively in the Town of Zanzibar.

2. By a Contract in writing dated 20th June, 1950, copy translation whereof in English is annexed hereto and marked "A," the Defendant sold and agreed to deliver to the Plaintiffs 20,000 lbs. of fair quality cloves at the price of Shs.95/- per 100 lbs. Delivery of the said 20,000 lbs. of fair quality cloves was to be given by the Defendant to the Plaintiffs between 1st November, 1950 and 30th November, 1950, on payment of

30 the price thereof.

*His
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Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 1.
Plaint,
15th May
1951,
continued.

3. That in spite of repeated demands made by the Plaintiffs the Defendant failed and neglected to deliver the said 20,000 lbs. of fair quality cloves or any at all. The Plaintiffs have thereby suffered damage.

4. The Plaintiffs are entitled to damages at the rate of Shs.44/- per every 100 lbs. of cloves, being the difference between Shs.95/-, the Contract price and Shs.139/-, the Market price on 30th November, 1950.

5. By their Advocates' letter dated 24th January, 1951, the Plaintiffs demanded from the Defendant payment of Shs.8,800/- being the difference between Shs.95/-, the Contract price and Shs.139/-, the Market price on 30th November, 1950, per 100 lbs. for the said 20,000 lbs. of fair quality 10 cloves which the Defendant sold and agreed to deliver to the Plaintiffs under the Contract referred to in paragraph 2 hereof.

6. The Defendant has failed and neglected to pay to the Plaintiffs the said sum of Shs.8,800/- or any part thereof.

The Plaintiffs therefore pray for Judgment against the Defendant for Shs.8,800/- and costs, and for interest on the decretal amount at 6% per annum till payment.

(Sgd.) A. R. NATHANI,
for M. TAKIM & CO.,
Plaintiffs. 20

I, AKBER RASHID NATHANI, a partner in the Plaintiffs firm hereby declare that what is stated above is true to the best of my knowledge, information and belief.

(Sgd.) A. R. NATHANI,
for M. TAKIM & CO.,
Plaintiffs.

(Sgd.) WIGGINS & STEPHENS,
Advocates for Plaintiffs.

Dated at Zanzibar this 15th day of May, 1951.

HSD.

30

No. 1A.

EXHIBIT " A " TO PLAINT.

ENGLISH TRANSLATION OF LOCAL CONTRACT NOTE NO. 24/50—
20 JUNE 1950.

LOCAL CONTRACT NOTE.

Original }
Duplicate } Copy.
Triplicate }

*His
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Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 1A.
Exhibit
" A " to
Plaint.

No. B.

10 Contract Note No. 24/50.

Broker MOHAMED SALEH BHALOO
MOHAMED SALEH BHALOO Broker
Zanzibar.

Zanzibar date 20-6-50.

The goods mentioned in this contract have been sold by Sheth F. K. Welji to Sheth M. Takim & Co. through broker Mohamed Saleh Bhaloo under the under-mentioned conditions.

- Quality of goods .. Zanzibar or Pemba cloves.
- Quantity 20,000 lbs. net in words twenty thousand complete.
- Size or weight
- Packing In gunny bags.
- Delivery Customs or godown.
- Samples Fair quality.
- Duty paid or transhipment
- Price Shs.95/- per 100 lbs. in words ninety-five complete.
- Period
- Ready or forward .. November Seller's option.
- 30 Shipment
- Other conditions Between 1st November of the current year and 30th November 1950 whenever the Seller gives delivery the Buyer is to weigh at the above-mentioned price cloves 20,000 lbs. net in words twenty thousand complete. Buyer is to settle the payment of whatsoever (quantity) the Seller delivers during the said period. In the end, by the date mentioned in the contract the Seller is to give the complete delivery. The

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Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 1A.
Exhibit
"A" to
Plaint,
continued.

Seller is to give to the Buyer two days' notice in advance (of delivery). The Seller and Buyer have entered into a binding signed transaction. That is all.

Broker's signature .. (Sgd.) MOHAMED SALEH BHALOO.

NOTE.—The above-mentioned goods have been sold according to the above-written conditions which are acceptable to us. Due to war or accident if goods do not arrive the Seller is not responsible but Buyer is to take delivery whenever goods arrive according to the shipment written in the contract. 10

Seller's signature (Sgd.) FAZEL KASSAM WELJI.

Buyer's signature (Sgd.) M. TAKIM & Co., Akber.

No. 2.
Summons,
17th May
1951.

No. 2.
SUMMONS.

HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.
In the High Court.
Holden at Zanzibar.

Civil Suit No. 21 of 1951.

M. TAKIM & CO., a firm carrying on business in partner-
ship at Kiponda, Zanzibar Plaintiffs 20

versus

FAZEL KASSAM WELJI, Mlandege, Zanzibar . . . Defendant.

To

The above-named Defendant.

WHEREAS the abovenamed Plaintiffs have instituted a suit against you for the reliefs specified in the plaint a copy whereof is hereunto annexed and for the costs of this action you are hereby summoned to appear in this Court in person, or by an advocate duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the 30 28th day of May, 1951 at 9.30 o'clock in the forenoon, to answer the claim; should you appear and dispute the claim the Court will proceed to give directions for the disposal of the suit but in default of your appearance on the day before mentioned the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, this 17th day of May 1951.

(Sgd.) J. F. DASTUR,
Registrar.

NOTICE.—1. Should you apprehend your witness will not attend of their own accord you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

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Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

2. If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both.

10

Court costs Shgs.269.00.
Counsel's costs Shgs.112.50.

No. 2.
Summons,
17th May
1951,
continued.

No. 3.

DEFENCE.

No. 3.
Defence,
25th June
1951.

IN HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.
In the High Court.
Holden at Zanzibar.

Civil Case No. 21 of 1951.

M. TAKIM & COMPANY Plaintiffs

versus

FAZAL KASSAM VELJI Defendant.

20 1. Each and every allegation as set forth in the Plaint is denied save as is herein specifically admitted.

2. The Defendant admits paragraph 1 of the Plaint.

3. As regards paragraph 2 of the Plaint the Defendant denies that the " writing dated the 20th June 1950 " is a contract or that the same has got any legal effect. He further maintains that the said writing is inadmissible in evidence and is unenforceable in law.

4. The Defendant denies that the Plaintiffs have suffered any damage or that the Plaintiffs are entitled to recover any damage as against him and he further denies that the market price of cloves on the 30 30th November 1950 was Shs.139/- per hundred pounds.

5. The Defendant denies that the Plaintiffs have any right of action against him.

WHEREFORE the Defendant prays that the Plaintiffs' suit be dismissed with costs.

Dated this 25th day of June 1951.

(Sgd.) FAZAL KASSAM VELJI,
Defendant.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

I, FAZAL KASSAM VELJI, the Defendant abovenamed, hereby declare that what is stated above is true to the best of my knowledge information and belief.

(Sgd.) FAZAL KASSAM VELJI,
Defendant.

Drawn By : O'BRINE KELLY & HASSAN,
Advocates, Mombasa.

Filed By : FAZAL KASSAM VELJI,
Defendant, Zanzibar.

No. 3.
Defence,
25th June
1951,
continued.

No. 4.

10

AMENDED DEFENCE.

No. 4.
Amended
Defence,
20th July,
1951.

IN HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.
In the High Court.
Holden at Zanzibar.

Civil Case No. 21 of 1951.

M. TAKIM & COMPANY Plaintiffs

versus

FAZAL KASSAM VELJI Defendant.

1. Each and every allegation as set forth in the Plaintiff is denied save as is herein specifically admitted. 20

2. The Defendant admits paragraph 1 of the Plaintiff.

3. As regards paragraph 2 of the Plaintiff the Defendant denies that the " writing dated the 20th June 1950 " is a contract or that same has got any legal effect. He further maintains that the said writing is a note or memorandum made by a Broker and not being duly stamped is not admissible in evidence and therefore is unenforceable in law.

4. The Defendant denies that the Plaintiffs have suffered any damage or that the Plaintiffs are entitled to recover any damage as against him and he further denies that the market price of cloves on the 30th November 1950 was Shs.139/- per hundred pounds. 30

5. The Defendant denies that the Plaintiffs have any right of action against him.

WHEREFORE the Defendant prays that the Plaintiffs' suit be dismissed with costs.

Dated this 20th day of July 1951.

(Sgd. in Gujarati) FAZAL KASSAM VELJI,
Defendant.

I, FAZAL KASSAM VELJI, the Defendant above named, hereby declare that what is stated above is true to the best of my knowledge information and belief.

(Sgd. in Gujarati) FAZAL KASSAM VELJI,
Defendant.

Drawn by :—

O'BRINE KELLY & HASSAN,
Advocates,
Mombasa.

10 Filed by :—

FAZAL KASSAM VELJI,
Defendant,
Zanzibar.

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Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 4.
Amended
Defence,
20th July,
1951,
continued.

No. 5.

PROCEEDINGS before Hearing.

IN HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.

In the High Court.
Holden at Zanzibar.

Civil Case No. 21 of 1951.

No. 5.
Proceedings
before
hearing,
17th May
1951 to
1st
October
1951.

20 M. TAKIM & COMPANY Plaintiffs

versus

FAZAL KASSAM VELJI Defendant.

17.5.51.

Plaint admitted.

(Sgd.) I. R. GREENE,
Ag. Judge,
17.5.51.

28.5.51.

Talati for Plaintiff.

30 Defendant in person.

Defence to be filed by 15.6.51. Mention 18.6.51.

(Sgd.) I. R. GREENE,
Ag. Judge,
28.5.51.

18.6.51.

P. S. Talati for Plaintiff.

Defendant present.

No W.S. filed.

Time for filing W.S. extended to 7.7.51. Mention on 9.7.51.

40 Defendant is warned that he will not receive any further extension of time.
Costs of to-day to Plaintiff in any event.

(Sg.) J. M. GRAY,
18.6.51.

PROCEEDINGS.

IN HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.

In the High Court.

Holden at Zanzibar.

Civil Case No. 21 of 1951.

M. TAKIM & COMPANY Plaintiffs

versus

FAZAL KASSAM VELJI Defendant.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 6.
Pro-
ceedings,
31st
October
1951.

10 31.10.51.

K. S. Talati for Plaintiff.

Hassan for Defendant.

Pleadings read.

Issues—

1. Is writing of 20.6.50 enforceable in law ?
2. If so damages ?

PLAINTIFFS' EVIDENCE.

AKBAR RASHID NATHANI (Moh.), sworn.

20 Partner in Plaintiff firm. Plaintiffs hold a general trades' licence. We deal in cloves. In June 1950 I instructed my broker Saleh Bhaloo Chandoo, he is the same person as Mohamed Saleh Bhaloo. I asked him to get a firm bid for 20,000 lbs. of fair average quality cloves. I said I wanted a forward contract with delivery in November 1950. Later in afternoon of same day the broker brought me an offer of cloves at 95/- per 100 lbs. for November delivery, 1950. He told me seller's name—namely, the Defendant. I confirmed the bargain. Then he brought me the contract the following day. There were three copies of contract. When he brought it, it was signed by Defendant. I signed all three

30 copies. I retained one and returned two to the broker. I handed my copy to my clerk for stamping and filing. The clerk stamped it. He stamped it in my presence. I produce contract with certified copy translation thereof.

(*Hassan* : I object to production of document. It is a broker's note or memorandum. He is ready to admit the document for purposes of identification and will make a legal submission at a later stage.)

(*Talati* : I agree to suggestion. I say document is properly stamped.)

*Plaintiffs'
Evidence.*

No. 7.
1st
Witness.
Akbar
Rashid
Nathani,
31st
October
1951.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.
Plaintiffs'
Evidence.*

No. 7.

1st
Witness.
Akbar
Rashid
Nathani,
31st
October
1951,
continued.

Period of delivery was from 1.11.50 to 30.11.50. There was no delivery of any cloves during this period. I made a demand for delivery. I think I wrote to Defendant. Defendant did not deliver. After termination of period of delivery I sent same broker to Defendant. This was after 30.11.50. He offered to pay a difference of about 2,000/- which I refused. Later on 24.1.51 my lawyers sent Ex. 2 to Defendant. I think market price of cloves on 30.11.50 was 139/- per 100 lbs. I therefore now claim difference of 8,800/-. I suffered loss. I sold these cloves to Europe at a profit. When Defendant failed to deliver, I had to make good the difference to my own buyers. In past I have made similar 10 contracts like Ex. 1. I have both sold and purchased on such contracts. I have made contracts by a broker's note. Exh. 1 would not have been binding on one without my signature. If neither party signed the contract would not be binding.

Xxd. Hassan :

I think broker brought Exh. 1 to me for signature on the morning following my giving him his instructions. I think he came on 20.6.50. Exh. 1 was already filled up when he came to me. It had broker's and seller's signatures on it. Seller's signature was on Exh. 1. I am sure of this. I am certainly not mistaken. I think I signed in broker's presence. 20 I signed all three copies. Exh. 3 appears to be another copy of Exh. 1. I took the original (Exh. 1) and returned the other two copies to the broker. Broker may have left in a minute or two. My clerk did not go and buy a stamp. We have stamps ready in our office. I think broker was present when stamp was put on Exh. 1. It is a long time ago but I think he was there. The broker was acting as a broker and not as agent. He negotiated the deal for me. If the broker makes an agreement, like this we have to accept it. I cannot say if there has been any case in which a broker's authority has been repudiated. As far as I am concerned I have fulfilled all my obligations. This contract was settled between 30 the sellers and the broker and then brought to me as a contract. I asked the broker to get me a bid and he settled with the seller and brought me a bid. I had no discussion of terms of this contract direct with seller.

Re-xd. Talati :

I instructed broker and he brought me an offer. I was not bound to accept the offer.

No. 8.
2nd
Witness.
Suleman
Gulam-
hussein
Bhaloo,
31st
October
1951.

No. 8.

SULEMAN GULAMHUSSEIN BHALOO (Moh.), sworn.

Broker, Clove Growers Association. Market value of cloves on 30.11.50 was 138/75 to 142/- per 100 lbs. 40

Xxd. Hassan :

Clove Growers Association issues weekly reports.
No re-xn.

No. 9.

MAHOMMED SALEH BHALOO (Moh.), sworn.

Broker. In June, 1950, I was instructed by first witness to get an offer for cloves. He asked me the price at which he could buy them. He said he wanted 20,000 lbs. He wanted delivery by 30.11.50. I made inquiries as to Plaintiff. F. K. Velji the Defendant offered me the cloves at 95/- per 100 lbs. I informed first witness I could get the cloves at that price. He told me to go and buy at that price. I went and completed the bargain with Defendant. First of all the bargain was verbal. I went to my house in the evening and I wrote out the contract. I obtained the parties' signatures on the following day. I made three copies of the contract. I obtained the seller's signature first. Then I went to buyer. After obtaining the signature Plaintiff took one copy and I took the two other copies. Exh. 1 is copy Plaintiff retained. After Plaintiff signed the copy, I heard Plaintiff instruct his clerk to stamp the copy which was retained by him. Then I left and delivered one copy to Defendant and kept one copy myself. Later Plaintiff told me Defendant had not delivered the cloves. I went to Defendant and told him to deliver. That is all I did. After a few days Defendant told me he wanted to settle the matter. I told Plaintiff. Plaintiff agreed to accept the difference between contract price and price ruling on last day of delivery. I went to Defendant. He told me he could not pay this amount. I told Plaintiff. Then some after some days I went to Defendant again. I told Defendant it would be good for him to settle the matter. I asked what he was ready to pay. He said he would pay 1,000/-. I told him 1,000/- was an unreasonable offer. After a few days Defendant offered to pay 2,000/-. I went and told Plaintiff. Plaintiff refused to accept the offer. Exh. 4 is the copy of contract I retained. I also make a record in my book of the contract for purposes of brokerage. When I first spoke to Plaintiff he did not give me authority to buy straight away. He asked me to inquire as to the price. He first of all asked me to inquire the price. He did not name a price at which I was to buy. After Plaintiff confirmed that he was prepared to buy, I went to Defendant. The deal was not complete without signatures of Plaintiff and Defendant. Till then it was only a promise. Sales of cloves in Zanzibar are entered into in forms like Exh. 1, if they are forward sales.

Xxd. Hassan :

I am a licensed broker. I have been a broker from 1930 onwards. I do not know if Exh. 1 is in same form as used by Clove Growers Association. This contract has nothing to do with C.G.A. Other brokers use forms similar to Exh. 1. These forms are printed in a bound book. I use three forms for each contract. I filled up the forms of contract on 19.6.50. I used carbons. I wrote it in my own hand. When I wrote it, neither Plaintiff nor Defendant was there. I put in my signature at time of writing contract. There was no stamp on contract when I wrote it. I obtained Plaintiff's signature next day. No signature was on contract at time Plaintiff signed it. There was no stamp on Exh. 1 when I delivered it to him. When I negotiate these contracts for sale of cloves, I act as agent definitely for one or other of the parties, either the seller

*His
Britannic
Majesty's
Court for
Zanzibar.*

*In the
High
Court
Holden at
Zanzibar.*

*Plaintiffs'
Evidence.*

*No. 9.
3rd
Witness.
Mahommed
Saleh
Bhaloo,
31st
October
1951.*

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

*Plaintiffs'
Evidence.*

No. 9.
3rd
Witness.
Mahommed
Saleh
Bhaloo,
31st
October
1951,
continued.

or the purchaser. Plaintiff instructed me in first instance. I was acting as agent of Plaintiff. The seller always pays the commission to me. I was not acting as seller's agent in this case. I was buyer's agent. I have made a number of contracts of this nature. I have seen one or two cases of stamps being fixed on such contracts as this. I have seen them affixed in other contracts before this case.

Re-xxd. Talati :

Forms are from a printed bound book. I have a number of contracts like Exh. 1 written in the book. I detach the forms and deliver them to the parties. I have no written and signed contracts remaining in the book. When the goods are weighed, the commission due to me is recorded and the buyer credits that commission to me on my a/c. The buyer pays the seller purchase price less my commission. It is a practice for the seller to pay the commission. In cloves sales the purchaser deducts the commission due to the broker, whereas in other commodities the seller gives the commission to the broker direct. 10

No. 10.
4th
Witness.
Madhavji
Kalidas,
31st
October
1951.

No. 10.

MADHAVJI KALIDAS (Hindu), sworn.

Broker in Zanzibar. Have been a broker 38-39 years. Forward sales of cloves are made in Zanzibar. They are made in written contracts. Brokers have printed forms of contract in their names. They are made in forms like Exh. 1. The buyer tells me he wants cloves, I look for a seller. When both parties have agreed to the price and the terms, then they sign the contract. The broker writes out the contract. The seller gives $\frac{1}{4}\%$ commission. The buyer does not pay any commission. This is the present practice in Zanzibar. I make three copies of contract—one for buyer, one for seller, and one for broker. I have never entered myself into a binding contract of sale on behalf of a party. The broker does not sign on behalf of the parties. He signs as broker. 20

XXd. Hassan :

Negotiations for contract are first of all made by brokers by a verbal bargain. All terms of contract are settled verbally. He acts on behalf of both parties. That is the current practice, which has existed for many years. After verbal contract is made broker puts the contract into writing and, if it is agreed, then it is signed. Broker makes contract out in three copies. 30

Q. Is this a contract made by you ?

(In answer to Court Hassan states he is producing in evidence a contract in similar form on paper with name of witness on heading, which has not been stamped. He wishes to prove that contracts like Exh. 1 are not always stamped.) 40

(The contract is in Gujarati and no translation has been supplied. I would refer to *Hollingham v. Head* (1858), 27 L.J.C.P. 241 where it is

held that the conduct of parties on other occasions, unconnected with the act or conduct in question, is irrelevant. I understand neither buyer nor seller in that case is a party to this case. *A fortiori* this document is irrelevant and should be rejected in evidence.

(Sgd.) J. M. GRAY,
C.J.)

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

When I make a memorandum of contract, there is no regular practice as to who should sign first. We may go either to seller or to buyer first.

10 *Q.* The signature of seller and buyer is obtained to the note or memorandum in confirmation of terms set out in note or memorandum ?

A. After knowing terms and conditions have been agreed, we set out terms in writing. The parties sign in confirmation. If either seller or buyer does not sign, the bargain would not be considered as concluded.

I have never myself affixed a stamp to a contract like Exh. 1 when signing. I do not know the practice of other brokers.

Re-xxd. Talati :

Printed portions of Exhs. 1 and 5 are the same except for the heading. My evidence in respect of Exh. 1 applies to Exh. 5.

*Plaintiffs'
Evidence.*

No. 10.
4th
Witness.
Madhavji
Kalidas,
31st
October
1951,
continued.

No. 11.

20

MOHANLAL KARUNSHANKAR JANI (Hindu), sworn.

No. 11.
5th
Witness.
Mohanlal
Karun-
shankar
Jani,
31st
October
1951.

Clove dealer, I buy cloves. I am a partner in Karimjee Jiwanjee & Co. Ltd., I see Exhs. 1 and 5. They are forms for buying and selling cloves. Forward sales of cloves in Zanzibar are carried out on forms like this. I buy cloves on a contract like Exhs. 1 and 5. I instruct a broker how much I require. When the price is settled, a contract like Exh. 1 and Exh. 5 is made. Broker writes out the contract. Buyer is given one copy and seller is given another. Both buyer and seller sign the contract. Three copies are made of contract. On all three copies there must be the signatures of the parties. A contract of this nature is not complete unless the parties sign. Generally the seller pays broker's commission and the buyer deducts the commission from the purchase price and pays it to the broker.

30

XXd. Hassan :

Terms of purchase are settled verbally between the seller and buyer through the broker. Broker acts for both parties—buyer and seller. When broker delivers copy of contract to buyer or seller, I cannot say if he puts a stamp on contract.

Q. No signature of buyer or seller obtained in confirmation of terms of the memorandum or note of contract ?

40

A. Yes.

The broker has no authority after he has made the contract.

Q. If broker has written out terms of contract, have you ever heard of buyer or seller repudiating contract ?

A. I do not know of any instance.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

Re-ard. Talati :

If seller or buyer refused to sign, the contract would not be complete.

CASE FOR PLAINTIFF.

Hassan calls no evidence.

Advocates agree to admission of C.G.A. weekly reports for 24.11.50 and 1.12.50 showing price of cloves.

*Plaintiffs'
Evidence.*

No. 12.

DEFENDANT'S COUNSEL.

Hassan :

Repeats argument as in Case 15/51.

Zanzibar Stamp Decree Section 7 is subject to provision of Section 6. Hands in record of lower court in E.A.C.A. Appeal 3/49 Zanzibar Evidence Decree Sections 91 and 92 (extraneous evidence inadmissible).

10

No. 11.
5th
Witness.
Mohanlal
Karun-
shankar
Jani,
31st
October
1951,
continued.

No. 13.

PLAINTIFFS' COUNSEL.

Talati :

Repeats argument in Case 15/51.

Evidence Decree Sections 91 and 92 (evidence admissible to show nature of document for purposes of Stamp Duty).

E.A.C.A. Appeal 3/49 distinguishable.

C.A.V.

(Sgd.) J. M. GRAY, C.J.,
31.10.51.

20

No. 12.
Defen-
dant's
Counsel,
31st
October
1951.

No. 13.
Plaintiffs'
Counsel,
31st
October
1951.

28.11.51.

Talati for Plaintiff.
Defendant in person.
Judgment delivered.

No. 14.

JUDGMENT.

HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.

In the High Court.

Holden at Zanzibar.

30

Civil Case No. 21 of 1951.

M. TAKIM & COMPANY

and

FAZAL KASSAM VELJI.

The Plaintiffs in this case rely upon a document which is partly printed and partly in manuscript.

No. 14.
Judgment,
28th
November
1951.

The printed heading to the document is "Local Contract Note." Below this are the printed words "Mohamed Saleh Bhaloo Broker—Zanzibar." In the left-hand top corner are the printed words "Contract Note No." with the figures "24/50" inserted in manuscript.

Below the broker's name are the words "Seth F. K. Velji has, on the following conditions, sold the goods mentioned in this contract to Seth M. Takim & Co. through Broker Mohamed Saleh Bhaloo." The names of the vendor and purchaser respectively are in manuscript. The rest of this sentence is printed in Gujarati.

10 Below this sentence there appear in tabular form the particulars of the contract. On the left-hand side there appears printed in Gujarati a number of headings, such as "Kind of goods," "quantity" &c. and opposite to each heading has been inserted in manuscript the particulars relating to the particular contract.

The last of these headings translates "Other conditions." The last two sentences in the manuscript portion opposite to this heading translate "the seller and buyer have made bargain with signature. That is all."

Below this appear the printed words "Signature of Broker" and the broker's written signature.

20 Yet again below this appear the following printed words:—

"Note. The above-mentioned goods have been sold on the conditions written above, which are acceptable to us. (If) any goods do not arrive due to reasons of war or accident, then seller does not remain responsible, but when goods arrive according to shipment written in the contract, then buyer is to remove."

Below this the seller and buyer have signed in the spaces provided for this purpose.

30 The broker filled up the form down to the space provided for his signature on 19th June, 1950. At the time of signing he did not affix any stamp on the document. Next day—that is, the date appearing at the top of the document on the right-hand side thereof—he took the document, firstly, to the seller and then to the buyer, each of whom signed in that order.

The document was made out and signed by all the parties in triplicate. One copy was retained by the seller, one by the buyer and one by the broker. After receiving and signing his copy the buyer affixed a shilling stamp thereto a few minutes later.

40 For the Defendant it is alleged that the document is liable to the stamp duty payable under Article 41 of the First Schedule to the Stamp Decree, 1940. That Article deals with a "Note or Memorandum sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal" (*inter alia*) "of any goods of the amount or value of forty shillings or over." The stamp duty in respect of such a note is twenty cents. As the proviso to section 19 of the Decree shows, the Note must be stamped at or before the time of execution. As section 2 (ii) shows, "execution" means "signature." As proviso (a) to section 39 shows, an instrument chargeable with duty of twenty cents cannot be admitted in evidence even after payment of the proper stamp duty and penalty.

50 If the Defendant's contention is correct, the Plaintiffs have no evidence which entitles them to enforce their claim under section 3 of the Sale of Goods Decree.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 14.
Judgment,
28th
November
1951,
continued.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 14.
Judgment,
28th
November,
1951,
continued.

The Plaintiffs, however, contend that the document is an Agreement within the meaning of Article 5 of the First Schedule of the Stamp Decree. An "agreement or memorandum of agreement (*inter alia*) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 41" is exempt from stamp duty.

I have been referred to the decision of the East African Court of Appeal in *Vagani & Company v. Lakhani Limited* in Civil Appeal 3/49, where that Court by a majority held that a somewhat similar document was a Broker's note as defined in the corresponding Article in the Kenya Stamp Ordinance and consequently was inadmissible in evidence, as it had not been stamped 10 at the time of execution.

I have been supplied with what purports to be a copy of the document forming the subject-matter of that appeal. It is not entirely in the same form as the document in the present case. The document in the *Kenya* case is headed:—

" THE EAST AFRICAN PRODUCE DEALERS & EXPORTERS
ASSOCIATION "
" SALE NOTE."

Then follow the words "Sellers" and "Buyers" with the names of those persons respectively. Their names are followed by particulars of 20 the terms of the sale somewhat similar to those set out in the document in the present case.

At the foot of the Kenya Note appear the words "Confirmed by Sellers," and "Confirmed by Buyers" and "Brokers" with the respective names of those persons. There is no printed note of an agreement such as appears at the foot of the document in the present case.

The question therefore to be decided is whether certain words in the document in the present case make that document something else than ordinary Broker's Note or whether this is just a case of a difference without a distinction. 30

The all important words in the present document are firstly those at the beginning thereof, which read "Seth F. K. Velji has, on the following conditions, sold &c." There have also to be considered the words appearing under "other conditions," which translate as "The seller and buyer have made bargain with signature." Finally, there are the concluding words, to which buyer and seller have both subscribed, which begin with the words "The above named goods have been sold on the conditions written above" &c.

As I understand the decision of the East African Court of Appeal in *Vagani & Company v. Lakhani Limited*, it was not suggested that, by 40 reason of the fact that the parties had appended their signatures to the note beneath the words "Confirmed," the document had not become a contract for sale and purchase. But the majority of the Appeal Court held that the document had begun life as a Broker's Note as defined in Article 42 of the Kenya Stamp Ordinance, which corresponds to Article 41 of the Zanzibar Stamp Decree, 1940.

In other words, the document was an instrument "comprising or relating to several distinct matters," namely, the sending of a Broker's Note and the subsequent confirmation of the transaction set out in that Note. Such being the case, it was chargeable under section 6 of the 50 Kenya Stamp Ordinance (Cap. 259 of Revised Edition) and section 6

of the Zanzibar Stamp Decree, 1940, with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable. A Broker's note of the nature described in Article 42 of the Kenya Ordinance and Article 41 of the Zanzibar Decree is chargeable as already said, with a duty of twenty cents.

Therefore, if the document in the present case is a Broker's Note of the nature defined in Article 41 in the Zanzibar Decree, it is perfectly clear that the failure to stamp it at the prescribed time is fatal to its reception in evidence.

- 10 The Stamp Decree is a taxing law. As said by Lord Brougham in *Stockton & Darlington Rly. Co. v. Barrett* (1848), 7 M. & G. 870, at p. 879, "in *dubio*, you are always to lean against a construction which imposes a burthen on the subject; the intention of the legislature to impose a tax must be clear." Again, in *Cox v. Rabbits* (1878), 3 App. Cases 473, at p. 478, Lord Cairns, L.C., said: "A Taxing Act must be construed strictly: you must find words to impose the tax, and if the words are not found, it is not to be imposed." In *Whiteley, Ltd. v. Burns* [1908] 1 K.B. 705, at p. 709, Lord Alverstone, C.J., said a Taxing Act "must in my opinion be construed strictly and the onus lies upon the Crown to show
- 20 that the persons whom it is sought to tax fall clearly within its operation." Where, as in the present case, one of the parties to a suit takes upon himself the role usually performed by the Crown, the burden imposed upon him is precisely the same as that imposed upon the Crown.

The relevant words in Article 41 of the Zanzibar Decree (Article 42 of the Kenya Ordinance) are "Note or Memorandum, sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal of (a) any goods of the amount or value of forty shillings or over."

- 30 Neither the word "purchase" nor the word "sale" is defined in the Decree, but it must be assumed that the two words are co-relative and that, whatever the expression "sale" may mean in its context, it implies a purchase of the like nature. As said by Buckley, J., in *Rosenbaum v. Belson* [1900] 2 Ch. 267 at p. 269, "a sale *prima facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing." That, as I conceive, is the correct interpretation to be placed on the word "sale" in Article 41 of the Zanzibar Decree. If the document in question records an effectual sale or an effectual contract for sale, then one must hold that the document cannot be received in evidence in this case for want of a stamp.

- 40 From my perusal of Benjamin on Sale (1920 Edition), pp. 321-338, I gather that in the ordinary case a Broker's "Bought and sold note" is receivable as evidence of an effectual contract of sale on the ground that the Broker is acting as agent for both seller and purchaser and therefore binds each of them by his signature to the note but, as the learned editor of that work shows, there may be exceptions to this general rule.

- Here, evidence has been called as to what is locally regarded as the tenor and effect of a Broker's Note such as that exhibited in this case. But in *Vagani & Co.'s* case, the learned President of the Appeal Court (Sir Barclay Nihill) held that the peculiarities of a local law merchant
- 50 custom cannot be allowed to disguise the real nature of the document.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 14.
Judgment,
28th
November
1951,
continued.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 14.
Judgment,
28th
November
1951,
continued.

In view of that ruling, by which I am bound and with which I respectfully agree, I do not think I am entitled to look *dehors* the document itself to ascertain its meaning and purport.

In the present case it is true that the document in question is headed "Local Contract Note," but those words appear in print, and as held by Crompton, J., in *Gumm v. Tyrie* (1864), 4 B. & S. 680, at p. 707, "if the instrument consists partly of a printed formula and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the written words are entitled to have greater effect in the interpretation than those which are printed." 10

If we turn to the written words in the present case, we find under the heading "other conditions" the words "The seller and buyer have made bargain with signature and that is all." These words are followed by the Broker's signature.

Below this come the printed words declaring that "The above-mentioned goods have been sold on the conditions written above, which are acceptable to us" and which have been subscribed to by both seller and buyers.

These final words and signatures convert the document, whatever it may have been previously, into an effectual contract of sale. But in order to determine whether this document is liable to duty under Article 41 of the Stamp Decree, we must look at the words appearing above the broker's signature. Do those words record an effectual purchase and sale or an effectual contract for purchase and sale of goods? I am of opinion that the words "The seller and buyer have made bargain with signature" clearly show that they do not. The broker is not seeking by his Note to bind either party. He is submitting the proposed terms of the contract to the parties for them to sign, if they agree thereto. As said by the English Court of Appeal in *Rossiter v. Miller* (1877), 5 Ch. 649, if on a true construction of a document the signing of a formal contract is a condition precedent to the parties being bound, specific performance of the alleged contract ought not to be decreed. As said by Parke, B., in *Kingston-upon-Hull Guardians v. Petch* (1854), 156 E.R. 583, at p. 584, where it is clearly the intention of the parties that there should be no binding engagement until a written contract has been executed, there is no binding contract upon which one party can sue the other. 20

On the evidence before me I am of opinion that the document in question is not the record by the Broker of an effectual sale and purchase or of an effectual contract of sale and purchase and that consequently it does not come within the purview of the Article 41 in the First Schedule of the Stamp Decree, 1940, and is therefore not liable to the stamp duty therein set out. Consequently it can be received in evidence by me. 40

The Defendant has offered no other defence to the Plaintiff's claim. He did not deliver the goods and the Plaintiff is clearly entitled to the damages set out in Illustration (a) to section 73 of the Contract Decree. The contract price was 95/- per 100 lbs. and purchase price of cloves on the due date of delivery was 138/75 to 142/- per 100 lbs.

I therefore give judgment for Plaintiffs for 8,750/- and costs with interest on the decretal amount as prayed.

(Sgd.) J. M. GRAY, 50
C.J.,
28.11.51.

No. 15.

DECREE.

HIS BRITANNIC MAJESTY'S COURT FOR ZANZIBAR.

In the High Court.

Holden at Zanzibar.

Civil Suit No. 21 of 1951.

M. TAKIM & CO., a Firm carrying on Business in
Partnership at Kiponda, Zanzibar Plaintiffs

versus

10 FAZAL KASSAM WELJI Defendant.

THIS SUIT coming on this day for final disposal before The Honourable Sir John Milner Gray, Kt. Chief Justice of this Court in the presence of Mr. K. S. Talati Advocate for the Plaintiffs and of Mr. S. F. Hassan Advocate for the Defendant IT IS ORDERED that the Defendant do pay to the Plaintiffs the sum of Shs.8,750/- and Shs.1,298/25 the costs of this suit with interest at the rate of six per cent. per annum on the total amount of this decree from this date to the date of realization total Shs.10,048/25.

| | | | | | | Shs. | Cts. |
|----|-----------------|----|----|----|----|--------|------|
| 20 | Principal | .. | .. | .. | .. | 8,750 | — |
| | Interest | .. | .. | .. | .. | — | — |
| | Court costs | .. | .. | .. | .. | 391 | — |
| | Counsel's costs | .. | .. | .. | .. | 904 | 25 |
| | Cost of Decree | .. | .. | .. | .. | 3 | — |
| | | | | | | <hr/> | |
| | Total | .. | | | | 10,048 | 25 |
| | | | | | | <hr/> | |

Given under my hand and the Seal of the Court this 28th day of November, 1951.

(Sgd.) J. M. GRAY,
Chief Justice.

*His
Britannic
Majesty's
Court for
Zanzibar.
In the
High
Court
Holden at
Zanzibar.*

No. 15.
Decree,
28th
November
1951.



MEMORANDUM OF APPEAL.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 40 of 1952.

(From Original Civil Case No. 21 of 1951 of His Britannic Majesty's High Court of Zanzibar.)

FAZAL KASSAM VELJI Appellant
(Original Defendant)

versus

M. TAKIM & COMPANY Respondent. 10
(Original Plaintiff)

The above Appellant hereby prefers this Appeal to this Honourable Court from the Judgment of His Britannic Majesty's High Court of Zanzibar in Civil Case No. 21 of 1951 on, *inter alia*, the following grounds :—

1. That the Learned Chief Justice erred in holding that the Agreement sued upon was not a " Note or Memorandum sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal."

2. That the Learned Chief Justice erred in holding that the Agreement sued upon was not liable to Stamp Duty in accordance with Article 41 20 of the Zanzibar Stamp Decree 1940.

3. Whatever may have been the effect of the final paragraph headed " Note " in the Local Contract Note as between the parties, the fact remains that the document came into existence and was executed as a " local Contract Note " evidencing an effective sale of goods and the conditions of such sale.

4. That the Learned Chief Justice erred in holding that the document sued upon could in law be distinguished from the document sued upon in Civil Appeal No. 3 of 1949 (Haridas Mathurdas Vagani trading as Vagani & Company, Appellant—*versus*—Lakhani Limited, Respondent) of this 30 Court and further erred in Law in not following the decision of this Court in that Appeal.

5. That the Judgment is against the weight of Law and evidence.

WHEREFORE the Appellant humbly prays that this his Appeal be allowed and that the Judgment of the Learned Chief Justice be set aside with costs in His Britannic Majesty's High Court of Zanzibar and in this Court.

Dated at Mombasa this Fifteenth day of January, 1952.

O'BRIEN KELLY & HASSAN,
Advocates for the Appellant. 40

Filed by :—O'BRIEN KELLY & HASSAN,
Advocates,
Mombasa.

No. 17.

PRESIDENT'S NOTES.

Civil Appeal No. 40 of 1952.

NOTES OF ARGUMENTS: (NIHILL, P.)

27.10.52.

CORAM: NIHILL, P.

WORLEY, V.P.

PELLY MURPHY, Ag. C.J.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 17.
President's
Notes,
27th
October
1952.

- 10 *O'Brien Kelly* for Appellant.
Talati for Respondents.

O'Brien Kelly :

Action for damages for breach of contract.

C.J. Zanzibar said document was admissible in evidence and therefore awarded damages.

20,000 lbs. coffee. Contract made June, 1950. Contract Note is Ex. A1. Not we refer facts all in judgment. Article 41 to schedule of Decree 5 of 1940. Stamp duty 20 cents. Exemption in item 5. EACA Civil Appeal 3 of 1949. No printed note of the agreement in note.

- 20 In both case something was added by the Brokers Note. In this case there is something more than confirmation.

C.J. wrong at p. . Only question does document purport to be a brokers note. Question whether document was a complete and binding contract does not arise.

C.J. thought test was did the document record a valid contract which could be sued on. If not then not chargeable, Mulla Stamps Act 3rd Edition at p. 5.

- 30 The duty is on the instrument not the transaction.
There was a definite offer and acceptance through a broker.
Refer to certain evidence (A) at p. 3 of record. Case cannot be distinguished for previous case. Main question was it at one time a Broker's note.

Mulla p. 199.

Even if it was a contention that signatures were to be appended later it would still be a brokers note that a sale had been effected.

XVI EACA 5.

So here can you say here, this is not a broker's note and has now been a broker's note.

- 40 If it was not a broker's note it has no meaning at all. This case distinguishable from *Royal . . . of Scotland v. Tottanham*. Here the document was totally changed from B. of E. payable at future date to cheque payable on demand. In present case its previous identity as a broker note is not extinguished.

The document in *Tottanham* case was not appealed by act of parties but by effluxion of time.

Kenya Civil Case 84/1947.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 17.
President's
Notes,
27th
October
1952,
continued.

Clearly intention of stamp.
Decree to give merchants a right by *themselves* to enter into unstamped transaction but not if they employed a broker.

(Adjourned to 2.30 p.m.)

J. H. B. NIHILL, P.

2.30 p.m. Bench and Bar as before.

Talati :

It is or is it not a broker's note. What type of intimation is meant. 29 Halsbury 39 para. 41 onwards. This note as signed by the Broker was not complete. 10

6th Benjamin on Sale 319 also p. 331 also 337. A broker's note should bind parties if broker only arranges preliminaries. Sale of good Decree Cap. 81 see 3 (1) document Ex. I. Document must be read as a whole.

Document not meant to be complete until parties had signed it.

In *Vagani's* case the document was meant to be a binding contract.

Document by itself makes it clear not intended to be of any binding effect until signed by parties.

In *Vagani's* case the parties merely confirmed did not add anything to terms. Even will not confirmation there was a supplement binding note. 20

I lay great emphasis on Seller & Buyer have made bargain if one of the parties had refused to sign it any Court have had contract enforceable.

1871. L.R. 7 Ex. 211 at p. 214.

Question is real and true meaning and character of the writing : 9 Edition Indian Stamp Law at p. 386 (1856) 19 E.R. p. 154 P.C. Case *Hanooman Persaad Panlays* case.

When a document comes before the Court then it is the duty of the Court to see which item in the schedule it comes under.

If it was an intimation of a conditional sale only could not be a Broker's Note under para. 41. 30

With reference to intention of the Legislature broker only liable to S.D. when he has completed sale. Question whether Broker has authority to bind principals must be tested by looking at document itself.

Ex. I bears 1/- stamp but see Sec. 19 proviso.

"at or before time of execution." 1887 35 Ch. D 579 at p. 581. Submit that if it is a Broker's note it was not stamped too late because it was stamped at the time that the buyer received the intimation. Learned C.J. believed the buyers evidence on the point at p. 9 buyers evidence.

Re : Vagani's Case.

Evidence in present case made it quite clear broker not authorised to make binding contracts. See p. 9. 40

O'Brien Kelly :

Meaning of "at or before" see Sec. 19. Execution must mean signature. 29 Halsbury 39 para. 47. *Re* document not being complete.

Re : "Seller and buyer have made bargain" this only meant "Seller and buyer must honour this." Does not matter whether broker had

authority or not. Actually Plaintiff. At p. 9 said "I confirmed the bargain" this before the document was brought up. 14 Bombay L.R. (1890) 107 Bottom of p. 106.

Judgment reserved.

J. H. B. NIHILL, P.

In the Court of Appeal for Eastern Africa.

1.11.52.

CORAM : NIHILL P.
WORLEY V.-P.
PELLY MURPHY Ag. C.J.

No. 17.
President's Notes,
27th October 1952,
continued.

10 *Ahmed Ayub* for *Kelly* for Appellant.
Talati for Respondent.

Judgment read. Appeal allowed. Judgment of H. B. M. High Court set aside and judgment for the Defendant-Appellant substituted with costs. Appellant to have the costs of this appeal.

(Sgd.) J. H. B. NIHILL, P.

No. 18.

JUDGMENT.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 40 of 1952.

20 (From original Decree in Civil Case No. 21 of 1951 of H.B.M. High Court for Zanzibar at Zanzibar.)

FAZAL KASSAM VELJI Appellant

versus

M. TAKIM AND COMPANY Respondent.

No. 18.
Judgment,
1st November 1952,
Nihill, J.H.B.,
President.

JUDGMENT.

NIHILL—President :

This is an appeal from a judgment of H.B.M.'s High Court of Zanzibar. The short point for decision is whether the learned trial Judge was right in his finding that the document (Exhibit 1) was not a broker's note or memorandum of the nature to attract stamp duty under Article 21 of the First Schedule to the Zanzibar Stamp Decree (No. 5 of 1940). The Plaintiff-Respondent sued the Appellant for damages for failure to deliver to him 20,000 lbs. of cloves at Shs.95 per 100 lbs. and pleaded Exhibit 1 as evidence of the contract. In reply the Defendant-Appellant pleaded that Exhibit 1 was inadmissible in evidence. Although the document now bears a one shilling stamp, it is admitted that this was affixed, not by the broker, but by the Plaintiff-Respondent, and it is not now seriously disputed that this stamp was not affixed "at or before the time of execution" as required by section 19 of the Stamp Decree on instruments chargeable

*In the
Court of
Appeal for
Eastern
Africa.*

No. 18.
Judgment,
1st
November
1952,
Nihill,
J.H.B.,
President,
continued.

with duty of ten cents or twenty cents. If in fact then the document Exhibit 1 is a broker's note within the meaning of Article 41 of the First Schedule, it was inadmissible in evidence by reason of section 39 of the Stamp Decree. Again, if this is the case, the Plaintiff-Respondent's claim for damages must fail, since he has no other evidence by which to prove the contract.

The learned trial Judge had before him and considered most carefully the decision of this Court in *Vagani & Coy. v. Lakhani, Ltd.* (16 E.A.C.A.5), but he felt able by reason of certain words which appear on the document Exhibit 1 to distinguish it from the document held to be a broker's note in *Vagani's* case. It may be as well to recall that in *Vagani's* case the majority decision of the Court was that the document there in question being at least *ab initio* a note or memorandum sent by a broker or agent to his principals intimating a purchase or sale on account (Article 40 of the First Schedule to the Kenya Stamp Ordinance) it attracted a stamp of 20 cents, notwithstanding that the buyer and seller by affixing thereafter their signatures in confirmation of the sale may have added something to the document which made it also an agreement or memorandum of agreement relating to the sale of goods. The then learned Chief Justice of Uganda (Edwards, C.J.) who took the majority view, pointed out that to come within the exemption from duty allowed for by Article 5 the document had to relate "exclusively" to a sale of goods or merchandise "not being a note or memorandum chargeable under Article 40" (which Article corresponds to Article 41 of the Zanzibar Stamp Decree). The then learned Chief Justice of Tanganyika (Graham Paul, C.J.) dissented from the majority view on the ground that the subsequent signature of the principals had changed the character of the document and that since at the time of its production in Court it was an agreement or memorandum of agreement relating to a sale of goods which was tendered for the purpose of proving the contract of sale, it was admissible unstamped. The learned Chief Justice of Zanzibar was of course bound by the decision in *Vagani*, and there is every indication in his judgment that he would have followed it had he not thought that the document Exhibit 1 was distinguishable in form from the document in *Vagani*. Since I was one of the majority in *Vagani's* case, perhaps I should say that I am still of the opinion that the decision in that case was a correct one.

All that remains therefore for me to do in the instant case is to examine whether the learned trial Judge was justified in drawing the distinction which he did. The document in *Vagani's* case was not quoted *in extenso* in any of the judgments of this Court. The learned Judge had a copy of the document before him, however, so that I consider that we are justified in looking at it also. The two documents have this in common, that they both purported to come from brokers: in *Vagani* the document was called a "Sale Note"; in this case a "Local Contract Note." Both documents set out above the signature of the broker the terms and conditions of a sale of goods. In *Vagani's* case, below the signature of the broker, are the signatures of the seller and the buyer beneath the words "confirmed by sellers" and "confirmed by buyers." In the instant case, at the bottom of the document, beneath a note printed in Gujarati, which is clearly a part of the broker's form, appear the signatures of the seller and buyer. Up to this point I consider that the two documents can be fairly described as almost precisely similar. Now comes what

may be a distinction. Immediately above the signature of the broker are words written in Gujerati, which, according to the agreed translation, mean this in English : " The seller and the buyer have made bargain with signature." It is clear from the judgment of the learned trial Judge that it was these words which caused him to conclude that the document above the broker's signature did not record an effectual purchase and sale or an effectual contract for purchase and sale of goods. It is a nice point of construction and admittedly it is difficult to assess the exact meaning in English of a translation from Gujerati. Mr. Talati has prayed in aid a citation from a Privy Council appeal from India decided in 1856, where Lord Justice Knight Bruce said :—

" Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses."

(*Hunoomanprasad Panday v. Munraj Koonwen*, 19 E.R., at p. 154.)

I accept this guidance unhesitatingly, but I still should feel great difficulty in construing the words " have made bargain " as " will make bargain hereafter." Regarding the document as a whole, I can see no distinction between it and the sale note in *Vagani's* case. The words " Kassam Velje has, on the following conditions, sold the goods mentioned in the contract " seem to me manifestly to make it an intimation of a sale sent by the broker to his principals, who in this case, as in *Vagani's*, were both the buyer and the seller. I concede of course that the broker expected and desired the parties to append their signatures. That, as in *Vagani's* case, appears to be a matter of local merchant custom. Nevertheless, as I said in my judgment in *Vagani's* case, " I do not see how the peculiarities of a local merchant custom can be allowed to disguise the real nature of the document." Where a merchant has something to sell and employs a broker to find him a buyer on certain terms and this is done, it seems to me that the note or memorandum from the broker intimating that it has been done can only be regarded as a document which comes within the ambit of Article 41. If I am right in this, then it is an instrument upon which, if the value of the goods sold amount to more than forty shillings, a stamp duty of 20 cents is chargeable, and it is a requirement of law that the stamp should be affixed at or before the time of execution, or the date of the instrument, whichever shall be the earlier. (See proviso to section 19.)

Mr. Talati has argued, but, only faintheartedly, that even if Exhibit 1 is a broker's note, there is evidence from which it can be reasonably inferred that Exhibit 1 was stamped " at or before the time of execution." In order to accept this argument, one would have to hold that a broker's note is not executed until it has reached the party or parties concerned. This is manifestly impossible. A broker's note is executed at the moment of signature by the broker. The document Exhibit 1 is dated 20th June, 1950, but it is not in dispute that the broker prepared his note and signed it on the evening before. Let it be accepted that it was stamped by the buyer's clerk on the day following, this was too late to satisfy the requirements of the proviso to section 19 of the Stamp Decree.

In my opinion, therefore, which, as in *Vagani's* case, I reach with reluctance, the learned trial Judge was wrong in his view that exhibit 1 was not on the face of it at least *ab initio* a broker's note within the ambit

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Court of
Appeal for
Eastern
Africa.*

No. 18.
Judgment,
1st
November
1952,
Nihill,
J.H.B.,
President,
continued.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 18.
Judgment,
1st
November
1952,
Nihill,
J.H.B.,
President,
continued.

of Article 41. With great respect, where I think he went wrong was in assuming that the document above the broker's signature had necessarily to record "an effectual purchase and sale or an effectual contract for purchase and sale of goods." That is the test the learned Judge applied and it is clear that he thought that without the signatures of the buyer and seller the contract might not have been enforceable. That might have been so, for the broker might have exceeded or misinterpreted his instructions. But does this possibility change the fact that the broker was purporting to act for both parties and purporting, when he filled in his *pro forma* note, to intimate to his principals that he had arranged a purchase and sale on their account? I do not think it does, because I consider that the document exhibit 1, when it left the broker, was just this and nothing more. It should have been stamped by the broker with a 20 cent. stamp, and it was not. In the result, the Plaintiff-Respondent having no other evidence sufficient in law to support the contract must fail. 10

This is hard on him, but as was said in *Vagani's* case, "it is the duty of the Courts to protect the revenue and to see the intentions of the Legislature are carried into effect." The reason for strictness and rigidity in the law as regards the stamping of instruments chargeable with a low rate of duty need hardly be pointed out, for without the sanctions that a defect cannot be cured or any use made of the unstamped instrument in a court of law, the legal obligation to affix a stamp would rarely be observed. 20

In my opinion, this appeal should be allowed, the judgment of the Supreme Court should be set aside, and judgment for the Defendant-Appellant with costs substituted therefor. The Appellant must also have the costs of this appeal.

J. H. B. NIHILL,
President. 30

N. A.
Worley,
Vice-
President.

WORLEY—Vice-President :

I have had the advantage of reading the judgment prepared by the learned President and agree with the conclusions reached therein. This Court is bound by the judgment in *Vagani's* case, as was the Court below, so that the only issue in this appeal is whether the learned trial Judge was correct in putting upon the document in question in this case a construction different from that given to a similar document in *Vagani's* case. For the same reasons as given by the learned President, I do not consider that the two instruments are capable of different constructions.

This appeal must therefore be allowed and an order should be made in the terms proposed by the learned President. 40

N. A. WORLEY,
Vice-President.

J. Pelly
Murphy,
Acting
C.J.

PELLY MURPHY—Acting Chief Justice :

The judgment of the learned President expresses exactly my opinion in this case and accordingly I concur in that judgment and have nothing to add.

J. PELLY MURPHY,
Acting Chief Justice.
(Zanzibar.) 50

Zanzibar.
1st November, 1952.

No. 19.
DECREE.

*In the
 Court of
 Appeal for
 Eastern
 Africa.*

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 40 of 1952.

(From Original Decree in Civil Case No. 21 of 1951 of H.B.M. High Court of Zanzibar at Zanzibar.)

No. 19.
 Decree,
 1st
 November
 1952.

FAZAL KASSAM VELJI Appellant
 (Original Defendant)
versus

10 M. TAKIM & COMPANY Respondent
 (Original Plaintiff)

This Appeal coming on 1st November 1952, for hearing before Her Majesty's Court of Appeal for Eastern Africa in the presence of O'Brien Kelly, Esquire, on the part of the Appellant and of K. S. Talati, Esquire, on the part of the Respondent.

IT IS ORDERED that (1) the appeal be and is hereby allowed (2) the judgment of the High Court of Zanzibar dated 28th November 1951, be and is hereby set aside and judgment for the Defendant-Appellant with costs be substituted therefor, (3) the Respondent do pay the Appellant
 20 the costs of this appeal.

C. G. WRENSCH,
 Registrar H.M. Court of Appeal for
 Eastern Africa.

Dated this 1st day of November 1952.
 Issued this 11th day of January 1954.

No. 20.

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO PRIVY COUNCIL.

No. 20.
 Order
 granting
 Conditional
 Leave to
 Appeal to
 Privy
 Council,
 23rd May
 1953.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
 At Dar Es Salaam.

30 Civil Appeal No. 40 of 1952.
 (From Original Decree in Civil Case No. 21 of 1951 of H.B.M. High Court of Zanzibar at Zanzibar.)

FAZAL KASSAM VELJI Appellant
 (Original Defendant)
versus

M. TAKIM AND COMPANY Respondent
 (Original Plaintiff).

1. This is an application for leave to appeal to the Privy Council from a judgment of this Court given in Civil Appeal 40 of 1952. The point

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continued.

of law is the same as that which arose in the judgment of this Court given in Civil Appeal 47 of 1952, concerning which we have to-day granted conditional leave to appeal to the Privy Council under Section 3 (a) of the East African Court of Appeal (Appeals to the Privy Council) Order in Council 1951. The respondent to this application is also the same but the applicant is different and the subject matter of the suit is different, in the sense that the contract sued on was different. In this case an appeal does not lie of right as the value of the subject matter of the appeal is less than £500.

We consider however that we are justified in allowing conditional leave to appeal under the discretion conferred on this Court by Section 3 (b) of the Order in Council for the following reasons :—

(A) the point at issue, namely, whether a form of contract note as used by brokers in Zanzibar is or is not of the nature to attract Stamp Duty under Article 21 of the First Schedule to the Zanzibar Stamp Decree (No. 5 of 1940) is one, in our opinion of great general importance to the mercantile community in Zanzibar and on the Coast of East Africa generally, indeed it might be said to be of public importance also because the point is one which affects the public revenue.

20

(B) The judgment in this case, namely in Civil Appeal 40 of 1952 was used as the basis of the judgment in Civil Appeal 47 of 1952 which followed in consequence, and that judgment will in any event have to be before their Lordships. Mr. Hassan for the Respondent in opposing this application has made the point that since the question of great general or public importance will be decided on the appeal which lies as of right, the same consideration cannot logically be urged in support of this application. This submission however in our view overlooks the fact that conditional leave to appeal only has been granted and there can be no certainty at this stage that the applicant will in fact pursue his right of appeal.

30

2. We have considered whether this is a proper case for consolidation under Section 10 of the Order in Council but we are doubtful whether the two appeals can be said " to arise out of the same matter " although the point of law is the same.

In Bentwich's Commentary on Privy Council Practice at page 15 (Third Edition) there is a passage which suggests that when a number of causes turn on the same point the Court can allow them to be consolidated so as to bring them within the appealable amount, but the learned author does not state whether this principle can be applied where the applicants are different and there are separate judgments.

40

We note further that the practice in Appeals from India referred to at page 92 of the same Commentary seems to indicate that consolidation is not permissible where suits have been decided by separate judgments notwithstanding that the judgments involve substantially the same questions for determination. We therefore prefer to leave the question of consolidation open for their Lordships' directions in due course when the

appeals come before them. Furthermore we would add that in these two cases little expense would be saved by consolidation as in any case the records of both cases will have to be printed.

In the Court of Appeal for Eastern Africa.

10 For the above reasons conditional leave to appeal to the Privy Council is granted, the applicant to furnish security to the satisfaction of the Court in a sum of £400 within three months from to-day for the due prosecution of the appeal and for any costs payable by the applicant in the event of the applicant not obtaining an order for final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the applicant to pay the costs of the appeal.

No. 20.
Order granting Conditional Leave to Appeal to Privy Council, 23rd May 1953, *continued.*

The applicant to take the necessary steps for preparation of the record and despatch thereof to England within three months of to-day.

As regards a stay of execution in respect of the order of this Court allowing the appeal in so far as it affects costs will be granted pending the determination of the appeal to the Privy Council on condition that the costs as taxed be paid into Court within fifteen days. The costs of this application to be costs in the cause.

(Sgd.) J. H. B. NIHILL,
President.

20

(Sgd.) ENOCH JENKINS,
Acting Vice-President.

(Sgd.) G. M. MAHON,
Acting Chief Justice.

Dar Es Salaam.
23rd May 1953.

No. 21.

ORDER GRANTING FINAL LEAVE TO APPEAL TO PRIVY COUNCIL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.
At Zanzibar.

30

Civil Appeal No. 40 of 1952.

(From Original Decree in Civil Case No. 21 of 1951 of H.B.M. High Court for Zanzibar at Zanzibar.)

No. 21.
Order granting Final Leave to Appeal to Privy Council, 7th January 1954.

FAZAL KASSAM VELJI Appellant

versus

M. TAKIM AND COMPANY Respondents.

40 This is an application to this Court for leave to file a security bond out of time. The matter arises in this way. The applicant on the 23rd of May 1953 obtained a conditional order from this Court for leave to appeal to the Privy Council from a judgment of this Court dated the 1st of November 1952 on appeal from the High Court of Zanzibar. It was a condition of the order that the applicant should furnish security to the satisfaction of the Court in a sum of £400 within three months of the

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23rd of May 1953. The security as ordered was not furnished to the Deputy Registrar of this Court at Zanzibar by the 22nd of August 1953, but on the 28th of August the applicant deposited £400 in Court. In an affidavit filed with this application Sultan Rashid Nathani, a partner in the applicant firm, has sworn that he had made arrangements to obtain a surety of unquestionable means to sign a surety bond in the sum of £400 before the Deputy Registrar at Zanzibar on the 22nd of August but that on account of illness the intended surety was unable to attend on that day.

The question that now arises for our decision is whether this Court has a discretion to allow the appeal to go forward although there has been a breach of the conditions of the conditional order. 10

The procedure for regulating appeals from this Court to Her Majesty in Council is governed by the East African (Appeal to Privy Council) Order in Council, 1951. The section relevant to the point we have now to consider is section 5 (a) which is as follows:—

“ 5. Leave to appeal under section 3 of this Order shall, in the first instance, be granted by the Court only—

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the appellant to pay costs of the appeal (as the case may be).” 20

Prima facie the above provisions would seem to be mandatory rather than directory. At least it is clear that this Court in fixing a time within which security is to be entered cannot initially give the Appellant longer than ninety days. Does it follow that where there has been a failure to comply with the order for a good and reasonable cause this Court cannot grant relief? We have been unable to discover any reported instance where their Lordships have had this question before them in the case of a Colonial appeal. 30

We have considered the case of *Retemeyer v. Obermuller*, 2 Moore P.C.C. 93, but obtain no assistance therefrom, as the wording of the Order in Council there applicable was materially different from that which governs us. We have no reports here of the cases of *Pearson v. Russell* (1889) 15 Victoria L.R. 89, or of *Chan Wo v. Chan Tam* (1908), 3 Hong Kong L.R. 179, which may well be in point. 40

In the case of appeals from India, however, the matter has been considered by the Privy Council (see *Burjore and Bhawani Pershad v. Bhagwana* reported in 11 I.A.7 and in 10 I.L.R. (Calcutta) 557). In this case the preliminary point was raised as to whether the Court of the Judicial Commissioner of Oudh had a right to extend the time for giving security under section 602 of Act X of 1877. Their Lordships held that the provision relating to the giving of security was directory only, and, although

not to be departed from without cogent reason, they held in the particular case before them that the Commissioner had exercised a right discretion. Their Lordships cited with approval a case decided by the Full Bench of the Court at Calcutta in which a similar view had been taken. The case in question as appears from the Calcutta series report, though not from the Indian Appeals report, is “*In re the petition of Soorjmukhi Koer*, 2 I.L.R. (Calcutta) 272. It was decided in 1877 and turned on the wording of section 11 of Act VI of 1874. We are handicapped by not having available here the text of either of the Indian Acts in question, and can only infer, somewhat unsafely, from short quotations in the reports that this section was substantially in *pari materia* with section 602 of Act X of 1877. The Full Bench relied on the absence in this case of any provision requiring dismissal of the appeal in the event of non-compliance and contrasted section 10, where such a provision is found.

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In 1884, a year after the decision of the Privy Council, a Full Bench of the High Court of Allahabad attempted, in *Fazul-un-Nissa Begam v. Mulo and another*, 6 I.L.R. (Allahabad) 250, to analyse that decision. After stating that the words of section 602 were *prima facie* mandatory, the Court found indications in three subsequent provisions from which it could be inferred that section 602 was intended to be read as directory only. The passage is as follows:—

“ But the meaning of this section is considerably modified if we read it, as I think we may, with ss. 603, 604, and 605. S. 603 provides that:—‘ When such security has been completed and deposit made,’ not *as before provided*, but ‘ to the satisfaction of the Court, the Court may declare the appeal admitted, &c. &c.’ Then by s. 604 it is provided that ‘ at any time before the admission of the appeal, the Court may upon cause shown, revoke the acceptance of any such security and make further directions thereon.’ Then s. 605 is still more significant, providing as it does, that:—‘ If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate, or further payment is required for the purpose of translating, transcribing, printing, indexing, or transmitting the copy of the record, except as aforesaid, the Court may order the appellant to furnish ‘ not within six months or six weeks,’ but ‘ within a time to be fixed by the Court, other and sufficient security, or to make within like time the required payment.’ ”

The wording of section 602 of Act X of 1877, later incorporated as section 602 of the Indian Procedure Code, is not the same as that of section 5 (a) of the Eastern African (Appeal to Privy Council) Order in Council 1951, but it contains an equally mandatory provision, namely, that security should be given within six months from the grant of the certificate.

We are aware of the dangers of adopting a principle declared in respect of the provisions of one enactment to the provisions of a different enactment, but nevertheless we have come to the conclusion that their Lordships’ ruling in the Indian case is good and sufficient authority for this Court to

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assume that it has a similar discretion in respect of section 5 of the Order in Council. In section 8 of the Order in Council there is provision that during the preparation of the record this Court may give such directions as the justice of the case may require on any disputed question. Admittedly this section does not relate specifically to the furnishing of security, but we think that it may reflect a directory meaning on section 5 (a). Section 11 contains provisions somewhat similar to those of the Indian section 604, and section 5 (b) is somewhat analogous to section 605. In spite of the wide differences of wording, we think the general situation of an apparently mandatory provision bearing a modified meaning by reason of subsequent related provisions obtains here, as it did in India, and we think that the Allahabad Full Bench must have described correctly the reasoning underlying the decision of the Privy Council in *Burjore's* case. It is worth observing that, although in India the Code of Civil Procedure and not an Order in Council governed the matter, it was not suggested that any general power given by the Code to extend time could modify the effect of section 602. Had that been the case, the authorities would clearly not have been relevant for our purposes. 10

Considering as a whole the procedure governing appeals to their Lordships as laid down in the Order in Council, we think we should be right, following the Indian cases, in holding that the term of ninety days beyond which security cannot ordinarily be furnished is not intended in any rigorous or exact sense, but could within limits be extended for cogent reason. If we are right in this, and if we are wrong we can no doubt be corrected by their Lordships if a preliminary objection is taken, we are satisfied that on the Appellant's affidavit now before us, which has not been challenged, a good ground exists for the exercise of discretion. The Appellant had made arrangements for lodgment of the security on a day within time and had no control over the illness of the surety. Furthermore he was able within four days to make a cash deposit into Court. 30

We are therefore prepared to accede to the Appellant's prayer and to make an order for the acceptance of the sum of £400 as security for the due prosecution of his appeal. We also grant final leave to appeal, the record to be despatched within thirty days of to-day's date.

As regards the costs of the motion now before us, since the Appellant has been granted an indulgence, we order that these shall be paid by the Appellant in any event.

(Sgd.) J. H. B. NIHILL,
President.

(Sgd.) F. A. BRIGGS, 40
Justice of Appeal.

(Sgd.) J. M. GRAY,
Acting Judge.

Zanzibar.

7th January 1954.

PLAINTIFFS' EXHIBITS.

No. 1.

TRANSLATION OF LOCAL CONTRACT NOTE No. 24/50.

LOCAL CONTRACT NOTE.

| | |
|------------|--------|
| Original | } Copy |
| Duplicate | |
| Triplicate | |

Plaintiffs'
Exhibits.

No. 1.
Translation
of
Local
Contract
Note
No. 24/50,
20th June
1950.

Broker MOHAMED SALEH BHALOO.
MOHAMED SALEH BHALOO Broker,
Zanzibar.

Zanzibar D.20.6.50.

10

Seth F. K. Velji has, on the following conditions, sold the goods mentioned in this contract to Seth M. Takim & Co. through Broker Mohamed Saleh Bhaloo.

| | | |
|---------------------------|-------|--|
| Kind of goods | .. .. | Zanzibar or Pemba cloves. |
| Quantity | .. .. | Nett 20,000 lbs. in words twenty thousand complete. |
| Size or weight | .. .. | — |
| Packing | .. .. | In gunny bags. |
| 20 Delivery | .. .. | Customs or godown. |
| Samples | .. .. | Fair quality. |
| Dutiable or transshipment | | — |
| Price | .. .. | Shs.95/- in words ninety-five complete, for 100 lbs. |
| Period | .. .. | — |
| Ready or coming | .. .. | November seller's option. |
| Shipment | .. .. | — |
| Other conditions | .. .. | Cloves nett 20,000 lbs. in words twenty thousand of the current year from D. 1st November up to 20th November 1950, whenever seller gives delivery buyer is to weigh at the above price. During the period whatever delivery seller gives the buyer is to pay the account of that much. In the end the seller is to give complete delivery up to the date written in contract. The seller is to give the buyer two days notice in advance. The seller and the buyer have made bargain with signature. That is all. |
| 40 Signature of Broker | .. .. | (Sgd.) MOHAMED SALEH BHALOO. |

NOTE.—The above-mentioned goods have been sold on the conditions written above, which are acceptable to us (If) goods do not arrive due to the reasons of war or accident then seller does not remain responsible but when goods arrive according to shipment written in the contract then buyer is to remove.

| | | |
|--------------------|-------|---------------------------------|
| Seller's Signature | .. .. | (Sgd.) FAZAL KASSAM VELJI. |
| Buyer's Signature | .. .. | (Sgd.) M. TAKIM & CO. Akbar. |

Plaintiffs'
Exhibits.

LETTER, Plaintiffs' Advocates to Defendant.

No. 2.
Letter,
Plaintiffs'
Advocates
to
Defendant,
24th
January
1951.

P.S. Talati.

24th January, 51.

Mr. F. K. Velji,
Zanzibar.

Dear Sir,

We are instructed by our clients Messrs. M. Takim & Co. to write to you as follows :—

By a Contract dated 20th June, 1950, you agreed to sell and deliver 10 to our clients 20,000 lbs. of fair quality cloves at the rate of Shs.95/- per 100 lbs. The said 20,000 lbs. of cloves were to be delivered to our clients during the period 1st November, 1950, to 30th November, 1950.

Our clients state that you have failed to deliver to our clients the said 20,000 lbs. of cloves.

Our clients also state that they have suffered damage on account of breach of the said Contract by you and that they are entitled to damages at the rate of Shs.44/- per every 100 lbs. being the difference between Shs.139/- the Market Price on 30th November, 1950, and Shs.95/- the Contract Price.

20

We are therefore instructed by our clients to demand from you payment of Shs.8,800/- being damages at the rate of Shs.44/- per 100 lbs. for the said 20,000 lbs. of cloves which you agreed to deliver to our clients under the Contract dated 20th June, 1950.

Please note that unless you pay to our clients the said sum of Shs.8,800/- within 4 days of the receipt of this letter by you, our clients shall be compelled to take such steps against you in the matter as they may be advised when costs will be incurred.

Yours faithfully,

No. 3.
Carbon
copy of
Exhibit
No. 1.

No. 3.

30

CARBON COPY of Exhibit No. 1.

(See Record, page 33.)

No. 4.
Carbon
copy of
Exhibit
No. 1.

No. 4.

CARBON COPY of Exhibit No. 1.

(See Record, page 33.)

TRANSLATION of Local Contract Note No. 316/50, and Gujarati Writing on Reverse thereof.

No. 316/50.

Original
Duplicate } Copy.
Triplicate }No. 5.
Transla-
tion of
Local
Contract
Note
No. 316/50
dated
5th July
1950.

LOCAL CONTRACT NOTE.

POPAT MITHA POONJA Broker.

Phone No. 377.

P.O. Box No. 400.

10

Tel. Add. : Parbtani.

Zanzibar D. 5th July, 1950.

Seth Fazal Kassam Velji has, on the following conditions, sold the goods mentioned in this contract to Seth Popatbhai Hirji through Broker Popat Mitha :—

| | | | |
|--------------------------|----|----|---|
| Kind of goods | .. | .. | Those that the seller gives Pemba or Zanzibar Cloves. |
| Quantity | .. | .. | 10,000 lbs. in words ten thousand lbs. nett. |
| Size or weight | .. | .. | Nil. |
| Packing | .. | .. | In gunny bags. |
| 20 Delivery | .. | .. | Ex godown or Customs. |
| Samples | .. | .. | Fair quality. |
| Dutiable or transhipment | | | — |
| Price | .. | .. | Shs.110/- in words Shillings one hundred ten for one hundred lbs. |
| Period | .. | .. | Immediate cash. |
| Ready or coming | .. | .. | On 31st March, 1951, weigh with (and obtain) signature. |
| Shipment | .. | .. | — |
| 30 Other conditions | .. | .. | The buyer is to weigh cloves ten thousand lbs. nett from the seller on 31st March, 1951. The seller and the buyer have made bargain with signature. |
| Broker's signature | .. | .. | (Sgd.) POPAT MITHA POONJA. |

Plaintiffs' Exhibits.

No. 5.
Translation of
Local
Contract
Note
No. 316/50
dated
5th July
1950,
continued.

NOTE.—The above-mentioned goods have been sold on the conditions written above, which are acceptable to us. (If) goods do not arrive due to the reasons of war or accident then seller does not remain responsible, but when goods arrive according to shipment written in the contract then buyer is to remove.

Seller's Signature : FAZAL KASSAM VELJI.

Buyer's Signature : POPAT HIRJI.

I certify this to be a true translation of the Local Contract Note filed in High Court Civil Case No. 15 of 1951 made by me.

(Sgd.) H. M. NAZARALI, 10
Interpreter.

Zanzibar 30th October, 1951.

[REVERSE]

Have bought from Seth Fazal Kassam Velji cloves b. (bag) 100 in words hundred, thousand pounds 10,000/- at Shs.110/- in words hundred ten. Are to be weighed on March D.31.

I have sold to-day D.23.12.50 the cloves of this contract to Khoja Bhanji Hirji and Khoja Janmohamed Somji the cloves of this contract ten thousand pounds in words ten thousand that (I) purchased from Khoja Fazal Kassam Velji, the cloves of this contract. Get profit 20 Shs.5,000/- in words Shilling five thousand on complete price. That money (I) have received.

Stamp of 10 cents.

(Sgd.—on the stamp) POPAT HIRJI.

I certify this to be a true translation of the Local Contract Note filed in High Court Case No. 15 of 1951 made by me.

Zanzibar.

30th October 1951.

(Sgd.) H. M. NAZARALI,
Interpreter. 30

EXHIBIT No. 6.

PRODUCE MARKET REPORT.

*Exhibits.*No. 6.
Produce
Market
Reports,
weeks
ending
24th
November
1950
and 1st
December
1950.

P.O. Box 26.

CLOVE GROWERS ASSOCIATION.

Zanzibar.

PRODUCE MARKET REPORT.

Week ending 24th November 1950.

| | | | | | SUPPLIES | EXPORTS |
|----|------------------------|--|--|--|----------------|----------------|
| | Cloves | | | | 1,273,772 lbs. | 2,193,374 lbs. |
| | Copra | | | | 158,521 lbs. | — |
| 10 | Chillies | | | | — | 3,280 lbs. |
| | Mangrove Bark | | | | — | — |
| | Clovestems | | | | 265,704 lbs. | — |
| | Clove Oil | | | | — | 11,200 lbs. |
| | Coconut Oil | | | | — | 233,866 lbs. |
| | Copra Oil Cake | | | | — | — |

| | | Destinations of Exports | Cloves Bales (140 lbs. nett) | Clove Oil Drums | Coconut Oil Drums | Chillies Bags (80 lbs. nett) |
|----|----------------------------|-------------------------|------------------------------|-----------------|-------------------|------------------------------|
| | India | | 12,693 | — | — | — |
| 20 | United States of America | | 1,360 | 23 | — | — |
| | Sudan | | 683 | — | 11 | — |
| | Pakistan | | 516 | — | — | — |
| | South Africa | | 146 | — | 212 | — |
| | Continental Europe | | 129 | — | — | — |
| | Aden | | 66 | — | — | — |
| | Burma | | 48 | — | — | — |
| | East Africa | | 26 | — | 76 | — |
| | Somalia | | — | — | 249 | — |
| | United Kingdom | | — | — | — | 41 |
| 30 | | | <u>15,667</u> | <u>23</u> | <u>548</u> | <u>41</u> |

PRICES.

Cloves : Open market prices Shs.137/- to 137/25 per 100 lbs. with buyers.
Prices lower.

London quotation (Mail) Zanzibar on the spot 26d. sellers. For
Nov./Dec. shipment, 21d. sellers c.i.f. U.K. Madagascar spot 24d.
Shipment, Nov./Dec. 20d. c.i.f. (Price per lb.).

Copra : Prices per 100 lbs. at the close of business :—

50/- 51/43

F.M. Shs. to F.M.S. Shs. to B.S.D. No arrivals.

40 61/43 62/86

Prices higher.

Coconuts : Shs.120/- to Shs. 140/- per 1,000 on heap unhusked ex
plantations. Prices higher.

Chillies : The Association's guaranteed minimum price is Shs. 120/- per
100 lbs. effective until further notice.

London quotation (Mail) Mombasa, spot Shs.325/- value. For
shipment Shs. 310/- c.i.f. (Prices per cwt.). Prices higher.

Mangrove Bark : No Sales.

Exhibits.

PRODUCE MARKET REPORT.

No. 6.
Produce
Market
Reports,
weeks
ending
24th
November
1950
and 1st
December
1950,
continued.

P.O. Box 26.

CLOVE GROWERS ASSOCIATION.

Zanzibar.

PRODUCE MARKET REPORT.

Week ending 1st December 1950.

| | | | | | SUPPLIES | EXPORTS |
|----------------|----|----|----|----|----------------|----------------|
| Cloves | .. | .. | .. | .. | 1,596,967 lbs. | 2,001,830 lbs. |
| Copra | .. | .. | .. | .. | 155,525 lbs. | — |
| Chillies | .. | .. | .. | .. | — | — |
| Mangrove Bark | .. | .. | .. | .. | — | — |
| Clovestems | .. | .. | .. | .. | 611,951 lbs. | — |
| Clove Oil | .. | .. | .. | .. | — | 6,720 lbs. |
| Coconut Oil | .. | .. | .. | .. | — | 340,651 lbs. |
| Copra Oil Cake | .. | .. | .. | .. | — | 781,447 lbs. |

| Destinations of Exports | Cloves Bales (140 lbs. nett) | Clove Oil Drums | Coconut Oil Drums | Copra Oil Cake Bags |
|-------------------------|------------------------------|-----------------|-------------------|---------------------|
| Straits Settlements | 9,977 | — | — | — |
| India | 2,161 | — | — | — |
| Indonesia | 1,039 | — | — | — |
| United Kingdom | 770 | 15 | — | — |
| Aden | 264 | — | — | — |
| Hongkong | 48 | — | — | — |
| South Africa | 32 | — | 105 | — |
| Portuguese East Africa | 8 | — | — | — |
| East Africa | — | — | 698 | — |
| Continental Europe | — | — | — | 4,128 |
| | <u>14,299</u> | <u>15</u> | <u>803</u> | <u>4,128</u> |

PRICES.

Cloves : Open market prices Shs.139/- per 100 lbs. with buyers. Prices 30 higher.

London quotation (Mail) Zanzibar on the spot 26d. sellers.

For Nov./Dec. shipment, 22½d. sellers c.i.f. U.K. Madagascar spot 24d.

Shipment, Nov./Dec. 20d. c.i.f. (Prices per lb.).

Copra : Prices per 100 lbs. at the close of business :—

48/57 50/-

F.M. Shs. to F.M.S. Shs. to B.S.D. No arrivals.

60/- 61/43

Prices lower.

Coconuts : Shs.130/- to Shs.150/- per 1,000 on heap unhusked ex 40 plantations. Prices higher.

Chillies : The Association's guaranteed minimum price is Shs.120/- per 100 lbs. effective until further notice.

London quotation (Mail) Mombasa, spot Shs.325/- value. For shipment Shs.310/- c.i.f. (Prices per cwt.). Prices unchanged.

Mangrove Bark : No sales.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

M. TAKIM & COMPANY (Plaintiffs) *Appellants*

AND

FAZAL KASSAM VELJI (Defendant) *Respondent.*

RECORD OF PROCEEDINGS

BIRCHAM & CO.,
WINCHESTER HOUSE,
100 OLD BROAD STREET, E.C.2,
Solicitors for the Appellants.

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20 COPTHALL AVENUE,
LONDON WALL,
LONDON, E.C.2,
Solicitors for the Respondent.