

M. Takim & Company - - - - - Appellants

v.

Fazal Kassam Velji - - - - - Respondent

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA  
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 19TH APRIL, 1955

*Present at the Hearing:*

- LORD TUCKER
- LORD COHEN
- LORD SOMERVELL OF HARROW
- MR. L. M. D. DE SILVA

[Delivered by LORD SOMERVELL OF HARROW]

This is an appeal from the Court of Appeal in Eastern Africa reversing a decision given by the High Court at Zanzibar. The plaintiff and defendant are both Indian merchants carrying on business *inter alia* as clove dealers in Zanzibar. The plaintiff sued for damages for failure to deliver 20,000 lbs. of cloves under a contract alleged to be in writing. Before Gray, C.J., the plaintiff succeeded and was awarded 8,750/- with costs and interest. No question arises as to quantum of damage. The decision was reversed by the Court of Appeal and the plaintiff appeals.

The contentions put forward by the respondent in answer to the claim are based on the following statutory provisions:—

*Sale of Goods Decree (Laws of Zanzibar, 1934, cap. 81)*

3.—(1) A contract for the sale of any goods entered into after the first day of October, 1921, of the value of one hundred rupees or upwards shall not be enforceable by suit in any court in the Protectorate unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay not less than ten per cent. of the price thereof in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

*Stamp Decree, 1940*

*A. Of the liability of Instruments to Duty*

4. Every instrument described in the First Schedule hereto shall, unless expressly exempted therefrom by this Decree, be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor—

\* \* \* \* \*

*C. Of the Time of Stamping Instruments*

19. All instruments chargeable with duty and executed by any person in the Protectorate shall be stamped within thirty days of execution:

Provided that any instrument chargeable with duty of ten cents or twenty cents or promissory notes and bills of exchange shall be stamped at or before the time of execution, or the date of the instrument whichever shall be the earlier.

\* \* \* \* \*

*Instruments not Duly Stamped.*

\* \* \* \* \*

39. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that—

(a) any such instrument not being an instrument chargeable with duty of ten cents or twenty cents only (other than a cheque) or a bill of exchange (other than a bill of exchange presented for acceptance, accepted or payable elsewhere than in the Protectorate), or a promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of twenty shillings, or, when ten times the amount of the proper duty or deficient portion thereof exceeds twenty shillings, of a sum equal to ten times such duty or portion ;

\* \* \* \* \*

#### FIRST SCHEDULE

##### Stamp Duty on Instruments

<i>Description of Instrument</i>	<i>Proper Stamp Duty</i>
* * * * *	*
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT—	
(a) if relating to the sale of a bill of exchange ;	Twenty cents.
(b) if relating to the sale of a Government security, or share in an incorporated company or other body corporate ;	Twenty cents.
(c) if not otherwise provided for	One shilling.

##### Exemptions

(1) Agreement or memorandum of an agreement—	
(a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 41 ;	
* * * * *	*
41. NOTE OR MEMORANDUM, sent by a Broker or Agent to his Principal intimating the purchase or sale on account of such Principal—	
(a) of any goods of the amount or value of forty shillings or over ;	Twenty cents.
* * * * *	*

The respondent did not dispute that if the document was admissible it contained or evidenced a contract binding on him which he had broken but he submitted (1) that the document was a broker's note or memorandum within paragraph 41 of the first Schedule, (2) that it was not duly stamped and therefore could not be admitted in evidence for the purpose of the Sale of Goods provision. The appellant admits that if both these propositions are established he cannot bring himself within section 3 (1) of the Sale of Goods decree and the claim must fail.

The appellant submits that it is not a broker's note within paragraph 41 and the learned trial Judge so held. He further submits that if it is, it was duly stamped. Further statutory provisions are relevant on the second point but their Lordships will consider first whether the document was exempt from the necessity of being stamped under paragraph 5 (1) (A) of the Schedule.

The original of the document was in Gujarati. The case below proceeded on the basis of an agreed translation which it is desirable to set out in full:—

LOCAL CONTRACT NOTE.

Contract Note No. 24/50.

Original }  
Duplicate } Copy  
Triplicate }

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

Zanzibar D.20.6.50.

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.
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.

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.

Gray, C.J., had compared the translation with the original and it appears from his judgment that the opening sentence apart from the names of the parties is printed; that the list of terms on the left is printed and what appears on the right opposite to these terms is in writing; that the note below the broker's signature and above the parties' signatures is printed. The broker was acting for the buyer and not for the seller.

Gray, C.J., in a carefully reasoned judgment referred first to the principle that the words of a taxing Act must clearly cover what is sought to be taxed. There was a previous decision binding on him in which a document similar in some respects had been held to be a "broker's note" within paragraph 41 (*Vagani & Company v. Lakhani Ltd.* (1949) 16 E.A.C.A., p. 5. Gray, C.J., distinguished that case and held that the present document did not intimate a purchase or sale, but was a draft of

proposed terms to which the parties by signing could if so minded agree. If either party refused to sign there would be no contract and not a contract which was unenforceable because of the absence of a note or memorandum.

He relied on the words which appear just above the broker's signature: "the seller and the buyer have made bargain with signature." He construed these words not as referring to some other signed document but as anticipating the signatures at the foot which would alone make the document a contract.

The Court of Appeal felt unable to distinguish the case from *Vagani's* and dismissed the claim. In neither court does much reliance appear to have been placed on the important term which is introduced in the latter part of the note below the broker's signature. As a matter of construction this term is, in the opinion of the Board, outside anything that the broker has dealt with and has therefore to be accepted by the parties if there is to be a contract. In other words this makes clearly right Gray, C.J.'s conclusion that the document until signed was not an intimation by the broker of a purchase or sale. It is therefore outside paragraph 41; and is exempt from stamping under paragraph 5 (1). The respondent's contention fails and he was liable for his breach of contract.

It is unnecessary to rely on or consider the admissibility of the surrounding circumstances which were given in evidence. The broker in fact personally took the document first to the seller who was not his principal and obtained his signature before taking it to the buyer. This is the course of events which would be anticipated on the construction of the document set out above.

It was sought to rely on evidence of custom but this does not arise in the view which the Board take on construction.

The appellant submitted that apart from the "new term" and the words relied on by Gray, C.J., the form of the document took it outside the words of Article 41. Normally a broker's note is a bought or sold note reciting a sale or purchase according to the party to whom it is sent. It is not as this is bilateral in form. It is unnecessary to decide this point but brokers might be well advised to reconsider a form of document which has given rise to the present litigation and to *Vagani's* case. It is difficult to say anything useful about that case as the document construed is not set out in the report.

The second point does not therefore arise, but in view of one or two observations made below and the points taken before the Board it is desirable to deal with it briefly.

The broker made out and signed the document on the evening of the 19th. He did not himself stamp it. It was not suggested he was trying to defraud the revenue. It is reasonable to suppose that he adopted the same view as that taken by Gray, C.J., and the Board. The appellant when it was handed to him on the 20th signed it and then handed it to his clerk for stamping, the broker being still in the office. He seems to have taken the view that it was or might be a broker's note. The following provisions of the Stamp Decree are relied on:—

#### STAMP DECREE

Section 2.—In this Decree, unless the context requires—

\* \* \* \* \*

(10) "duly stamped," as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the Protectorate;

(11) "executed" and "execution" used with reference to instruments, mean "signed" and "signature";

\* \* \* \* \*

(13) "instrument" includes every document by which any right or liability is or purports to be, created, transferred, limited, extended, extinguished or recorded ;

\* \* \* \* \*

Reading these provisions with section 19 the argument runs as follows. This instrument being chargeable with duty of twenty cents had to be stamped at or before the time of execution. That means at or before the time of signature, namely the evening of the 19th, whereas it was not stamped until the following day. Various submissions were made on the other side. A "note" is not within paragraph 41 until sent and a note is not sent until it leaves the sender. It did not in the present case leave the sender until the morning of the 20th just before it was stamped. The provision as to the meaning of execution is "unless the context otherwise requires". The word "at" in the phrase "at or before" in the proviso to section 19 cannot mean simultaneously with signing, and must therefore cover a reasonable time after signing. The Board was referred to *Pool's* case, 35 Ch. D. 579, in which North, J., construed the word "at" in the phrase "at or before the issue of such shares" as covering what was done if done as substantially part of one and the same transaction. Other cases were referred to. In the courts below Gray, C.J., regarded it as perfectly clear that if the document was a broker's note it was not properly stamped. The leading judgment by the learned President in the Court of Appeal says that the contrary was argued but faintheartedly. The matter has been clearly more fully argued before the Board and their Lordships have found the point a difficult one. It would be undesirable to decide it on a document which does not raise it, but should a similar point arise in the future, the arguments referred to, particularly, as to the scope of the preposition "at" in its context in section 19, will require careful consideration.

The Board will humbly advise Her Majesty that this appeal should be allowed the judgment of the Court of Appeal for Eastern Africa set aside with costs and the judgment of Gray, C.J. restored. The respondent must pay the costs of this appeal.

In the Privy Council

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M. TAKIM & COMPANY

v.

FAZAL KASSAM VELJI

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[DELIVERED BY LORD SOMERVELL  
OF HARROW]

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