

(1916) 09 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 577 of 1915

Jekisondas and Harkisondas	Vs	APPELLANT
Ranchoddas Bhagvandas		RESPONDENT

Date of Decision : 05-09-1916

Acts Referred:

Citation : AIR 1916 Bom 51 : (1917) 19 BOMLR 12

Hon'ble Judges : Heaton, J;Beaman, J

Bench : Division Bench

Judgement

Beaman, J.—This case has given rise to a very interesting argument. The suit was brought by the plaintiff to recover damages from defendant No. 1, the father of a girl who had been promised in marriage to the plaintiff and actually betrothed and from defendant No. 2, on the allegation that he had procured the breach of the prior contract with the plaintiff and induced the defendant No. 1 to consent to the marriage of his daughter with the defendant No. 2's son.

2. The lower Courts found that although the son of the defendant No. 2 was a major, the defendant No. 2 had, to use the words of the Court of first appeal, a hand in bringing about the breach of the first contract.

3. The case is virtually the same in principle as that of Khimji Vasanji v. Narsi Dhanji(1914) 17 Bom. L.R. 225., in which sitting alone on the Original Side of this Court I examined critically the whole English case-law out of which the present doctrine has been slowly evolved. Looked at merely as a theoretical discussion I see no reason yet to modify any part of the reasoning or conclusions which I then used and reached. Though that point did not engage my attention in Khimji's case, it struck me in the course of the argument here that an additional difficulty would be caused if the plaintiff in actions of this kind joined a mere tort-feasor with the breaker of the contract. I find that this was done in two comparatively recent cases, De Francesco v. Barnum (1890) 45 Ch. D. 430 and Fred Wilkins and Bros Limited v. Weaver (1915) 2 Ch. 322. The question does not appear to have been even raised much less to have occasioned the learned

Judges concerned any doubt or difficulty. The least examination will show that the causes of action are totally different. I should have thought that on objection taken to the array in such a suit the plaintiff would surely have been put to his election either to proceed against one defendant for breach of contract, or against the other on the case.

4. Both the cases, *Fred. Wilkina and Bros, v. Weaver and De Francesco v. Barnum* were founded upon *Blake v. Lanyon* (1705) 6 T.R. 221., an old case of 1795, where it was held that continuing a servant in employment after notice that he was in the service of another gave a good cause of action, *Lumley v. Gye* (1896) 1 Q.B. 147. first RA: extended the old rule of law governing all master and servant fit eases of the kind, to analogous relations, not strictly of the kind originally contemplated by the Statute of Labourers, And in *Be Francesco v. Barnum* the facts were, so far as the contract went, virtually the same as in *Lumley v. Gye*.

5. But in the case of *Exchange Telegraph Company v. Gregory & Co.* (1853) 22 L.J.Q.B. 463, decided in 1896, *Rigby L.J.*, in the course of his judgment, gave exactly such a case as we have before us, *mutatis mutandis*, after making allowances for the differences between the marriage customs of England and India, as a *reductio ad absurdum* of the contention that the principle of *Lumley v. Gye* should be extended to all contracts. Whatever then is now to be said, merely from a theoretical point of view for or against the decision in *Lumley v. Gye* I adhere emphatically to the opinion I expressed in *Khimji's* case that it" should not be extended anywhere, least of all in India where it is not a binding authority, to contracts of every kind irrespective of their own special features and character. I am still of opinion that a person who induces a girl betrothed to another to break that engagement and marry him, has committed no tort which would give the aggrieved party a cause of action against him. Nor can I see that the principle is affected by substituting first the father of the betrothed girl for the girl herself and next the father of the boy or man whom in fact she marries for the husband.

6. In the case of *South Wales Miners' Federation v. Glamorgan Coal Co.* *Earl Halsbury* says: " to combine to procure a number of persons to break contracts is manifestly unlawful". This takes us back at once to the element of conspiracy with which I dealt fully in my former judgment. But it is plain that where the element of conspiracy is wanting the principle of such cases is materially impaired and it will be an open question whether it can be applied at all and if it can, then how far ? If we next turn to *Lord Lindley's* judgment in the same case we shall see still more clearly that the old law of conspiracy is the foundation of the decision. The learned Lord goes on to say: " to break a contract is an unlawlul act, or in the language of *Lord Watson* in *Allen v. Flood* (1898) A.C.I a breach of contract is in itself a legal wrong". The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract, Any party to a contract can break it if he chooses; but in

point oil law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach". This goes to the root of the matter and would need very careful and subtle analysis before its whole content could be exhausted. It is of course true that breaking a contract in doing a "wrong" in the ordinary legal sense. The law provides a remedy which in itself presupposes a wrong. But when we turn back to Erle Chief Justice's formula we see that what he says is "procuring the violation of an existing right, etc...." And the question thus opened is what is a man's legal right under a contract? Certainly not always to have it performed. In a vast majority of cases it goes no further than to have money compensation for any loss which the promisee may have suffered owing to nonfulfilment. In dealing with cases of conspiracy it is very necessary to insist upon the object of the conspirators being unlawful and that is why in the case I am considering the learned law Lords declared that a combination to compel people to break their contracts is a conspiracy to do an unlawful thing. For before a conspiracy can be actionable it must be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. Eliminate the element of conspiracy and it becomes extremely difficult, if not impossible, to say that being the instrument (I use that phrase in preference to "procuring" which implies knowledge) of breaking an existing agreement per se makes such instrument liable in tort. But if not, then knowledge at any rate becomes essential and again it becomes extremely difficult, remembering the wide reach of legal malice, to distinguish this from malice. But the point of theoretical importance is that from the purely legal standpoint the injury done to the first promisee is exactly the same whether he in whose favour the intended contract is in fact performed knew or did not know of the prior agreement. To take the case before us. A girl is betrothed to A...X persuades her to marry him. Now if X knew of the girl's engagement to A; he would be liable under the principle of *Lumley v. Gye*. But if he did not, he would not. In either case the injury to A would be exactly the same and that is the only "wrong" of which the law has any knowledge. Morally X might be more culpable in one case than in the other, but so far as A is concerned the "wrong" would be exactly the same. So that it appears that if the old doctrine of conspiracy, procuring or enticement is to be extended to such cases, then "malice" remains, as it always was considered to be before certain dicta of the most eminent judges in the *Lumley v. Gye* string of decisions, the gist of the action. There is a passage in Erle Judge's judgment in *Lumley v. Gye* which suggests that long before that case the wide principle on which it rests had been recognised and given effect to. Two cases are cited in support of this: *Green v. Button* (1835) 2 M. & R. 707 and *Shepherd v. Wakeman* (1661) 1 Sid. 79, (unreported), but both were actions on the case for false and malicious misrepresentations and have nothing whatever to do with the case limited to merely persuading one bound by contract to break it. But if we survey the whole

field of English law before *Lumley v. Gye* I do not believe that a single case can be found in which (a) there was not conspiracy; (b) or the use of unlawful means; (c) or the act complained of was unlawful in itself; and (d) where in cases of procuring the breach of a contract of service a joint action lay against the breaker and him who procured the breach, On that last point I may be wrong. It is not of the first importance. The recent cases to which my attention was drawn in the course of the argument show that it has not been considered to be so. But the other points are of capital importance in considering whether (a) the doctrine of *Lumley v. Gye* is suitable to Indian conditions and need be adopted here at all; (b) whether, if in proper cases it should, that doctrine could possibly be so far extended as to take in every form of contract. I am aware that as recently as July of this year a division bench of this High Court (Scott C.J. and Heaton J.) on a first appeal (1916) F.A. No. 56 of 1913. found facts, in a case almost exactly the same as this, which led them to the conclusion that the person situated there as the defendant appellant is here, was liable. And that judgment is of course, not only entitled to the highest (unreported), respect but is binding as far as it goes. It is clear, however, that it turned upon the facts found in the case and those facts are expressed in the judgment in terms of conspiracy.

7. I would only add that after having on more than one occasion studied the case of *Lumley v. Gye* I can find no answer to the reasoning of Coleridge J. in his weighty dissenting judgment. Although it was against the majority of the Court and the decision of the majority was again affirmed by a majority in the House of Lords, (*Bowen v. Hall* (1881) 6 Q.B.D. 333 as a mere question of theoretical reasoning I shall always remain, with respect, of the opinion that the true principles governing this class of cases are to be found correctly stated in the judgment of Coleridge J. And this at least might give us, in the Courts of this country, pause before being too ready to introduce the rule laid down in *Lumley v. Gye*, As far as I can see we are not bound to adopt it at all, much less to extend it in all directions. No Court in England yet has ever gone the length or anywhere near the length of doing what we are asked to do in this case. Speaking for myself I am very strongly of opinion that there is no good cause of action against the defendant-appellant.

8. Coming now to what is common ground between my learned brother and myself having regard to the essential ingredients of the action in tort brought against defendant No. 2, we are not satisfied that the findings in either Court below, badly expressed as they are, amount to what is necessary to be found before damages can be awarded in such an action on the case. As far as we can gather from the judgment of the learned Judge of first appeal, what he does find is that the son of defendant No. 2 married the daughter of defendant No. 1 who was at the time betrothed to the plaintiff and thereby rendered the fulfilment of the contract between the plaintiff and the defendant No. 1 impossible of fulfilment. He further appears to find upon a process of inference from materials given, that defendant No. 2 had a hand in this matter. But when we look at those materials and the vague manner in which the conclusion has been expressed, it

seems to us that he meant no more than to find that defendant No. 2 approved and encouraged the action of his grown-up son in obtaining the defendant No. 1's daughter in marriage. Now if this were the real limit of the finding of fact in both the Courts below, it will not amount in our opinion, to that fact of knowingly procuring the breach of an existing contract by the defendant No. 2 which alone would make him liable under the principle of *Lumley v. Gye*. We do not understand that the Court of first appeal either did find or meant to find that the defendant No. 2 directly and personally attempted to influence the defendant No. 1 to break his contract with the plaintiff. We do not understand that the Court meant to find that there was anything like conspiracy between the defendant No. 2 and his son to bring about that result. In the absence of such findings we must suppose, particularly having regard to the grounds of inference shown, that the learned Judge of first appeal meant no more than what he said and that is that the defendant No. 2's part in this matter was limited to an encouragement, more or less tacit at first, to his son in what that son was doing of his own accord. That being so, there would be no sufficient foundation for a verdict against this defendant in a suit of this kind.

9. Upon that ground I am in entire agreement with my learned Colleague. We ought not to accept the decree of the lower Court as regards defendant No. 2, while of course we do accept it as regards defendant No. 1 and we must now reverse so much of the decree of the Court below as is adverse to and affects defendant No. 2 and direct that the suit against him be dismissed with all costs throughout.

Heaton, J.—I will assume for the purpose of this case that if it be proved that defendant No. 2 procured the breach of the contract for the marriage of the daughter of defendant No. 1 to the plaintiff, then defendant No. 2 would be liable in damages. The question, therefore, is whether it has been found as a fact by the lower appellate Court that defendant No. 2 did procure the breach of this contract.

2. The first Court found in the affirmative on this issue : whether defendant No. 2 is proved to have had a hand in bringing about the breach of the contract ? Then in appeal the appellate Court raised this point: whether the lower Court erred in holding that defendant No. 2 was responsible for the acts of his son ?

3. I do not understand that the trial Judge based the liability of defendant No. 2 on the fact that he was responsible for the acts of his son, the person who eventually did marry the daughter of defendant No. 1. I gather that the trial Court based the liability on the finding that defendant No. 2 had some hand in bringing about the breach. If the Judge in appeal was under the impression that defendant No. 2 would be liable in damages not for a thing that he himself had done, but because in some unexplained way he was responsible for what his son had done, then I think he was entirely wrong. However in his judgment he also finds, as we see when we come to read it in detail, that defendant No. 2 had a hand in the matter, the matter being the breach of the contract. What that

means again is difficult to understand. If it means that defendant No. 2 personally had taken an active and effective part in the proceedings or negotiations, whatever they might be, which had induced defendant No. 1 to break off the contract with the plaintiff then it is a finding which properly supports the decree. But I find it very difficult to believe that the appellate Court by its expression did mean anything of this kind, because the circumstances he enumerates as the basis of his inference do not in my judgment at any rate in any way justify such a conclusion as that defendant No. 2 did personally take an active and effective part in bringing about the breach of contract. There are two matters in particular which, it seems to me, it would be very important to consider in dealing with this matter. The first is, what price, if any, was paid on the occasion of the girl's marriage to defendant No. 2's son and who it was who provided the money; and the second matter would be the extent to which defendant No. 2's son was dependent on his father and under his influence; and whether the circumstances suggested that it would be improbable that defendant No. 2's son would be taking an active part of his own in the matter and probable that the active part would be taken by the father.

4. Neither of these points has been considered in the judgment of the appellate Court and from the points it has considered I am unable to find that the appellate Court meant to find as a fact that defendant No. 2 did take an active and effective part in the matter which resulted in the breach of the contract. Therefore I am unable to find from the judgment appealed against that those facts are established which would justify throwing any portion of the damages on defendant No. 2.

5. Therefore I agree to the order proposed.