
(1911) 08 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Decree No. 232 of 1909

Kishan Prosad Singha and others

APPELLANT

Vs

Purnendu Narain Singha and others

RESPONDENT

Date of Decision : 01-08-1911

Acts Referred:

Citation : (1911) 08 CAL CK 0009

Judgement

1. This appeal is directed against a decree in a suit for recovery of money due on a brokerage contract. On the 17th April 1904, three persons, by name Kashi Prosad, Krishna Prosad and Ram Chandra. Prosad, executed a letter of authority in favour of two persons, Harendra Narain and Purnendu Narain, in the following terms :? We authorise you to raise a loan of eleven lakhs (or less, if so required) to clear all our present debts on mortgage of our entire estate at an interest of 7 per cent, per annum within the period of one month. We agree to pay you a commission of 5 per cent, on such amount as may be advanced by the capitalist to us. In case the loan succeeds we further agree to appoint Babu Harendra Narain Singh our Manager, on an initial pay of Rs. 200 a month rising to Rs. 400 as funds permit.

On the day following the agents authorised one Troilokhya Nath Chatterjee as their sub-agent to act for them in this transaction :?"We are authorised by the agreement of Rai Kashi Prosad Singh, Rai Krishna Prosad Singh and Rai Ram Chandra Prosad Singh, dated the 17th April 1904, in our favour to appoint you as a broker to raise a loan of eleven lakhs or less for the said Rai Shaheb, at an interest of 7 per cent, per annum. You are to raise the loan within one month, you will get a commission of 2 per cent, for yourself, and the balance you (we ?) may divide just as you (we ?) like. The Rais will soon hand you a statement showing that the annual income of the properties to be mortgaged is not less than a lakh of rupees. The valuation of the properties is not less than twenty lakhs."

2. Before we proceed further, it is desirable to observe that there is no evidence

to show that the terms of this agreement between the agents and their sub-agent were ever brought to the notice of the borrowers. On the other hand there is good reason to believe that although the borrowers were aware that a sub-agent had been employed they were not apprised of the terms on which his services had been engaged. It will further be noticed that, although the letter of authority to the sub-agent states that the writers were authorised to appoint a broker the original contract was silent upon this point. It may further be remarked that there is an assertion by the agents that the value of the properties to be given by way of security was not less than twenty lakhs of rupees and that the borrowers would soon furnish a statement of the income which was alleged to be not less than one lakh of rupees a year. There was, however, no statement upon these points in the original contract, and there is no evidence to show that the borrowers had ever represented that their estate was worth twenty lakhs. The sub-agent, furnished with this authority, entered into negotiations with a firm of bankers of this City, and one of the officers of the borrowers as also Harendra Narain came down to Calcutta to assist in the completion of the transaction. The capitalists, as might have been anticipated, insisted upon satisfactory proof of the value of the security, and Harendra, as also the officer of the borrowers was for a considerable time engaged in the preparation of a statement of the assets of the estate. Meanwhile the period of one month specified in the letter of authority of the agents and of their letter to the sub-agent expired. The borrowers, however, were in a situation of considerable embarrassment as a portion of their estate was about to be sold in execution of a decree held by one of their creditors in the Monghyr Court to the extent of two and a half lakhs of rupees. To save the properties from the impending sale, was a matter of pressing and paramount necessity. This was fully realised by the agents, and they endeavoured to obtain from the capitalists the sum needed even before the negotiations with them had been brought to a completion. But the capitalists were inexorable and would not part with their money unless Purnendu Narain and Gajadhar Prosad, both leading members of the Patna Bar, consented to stand as surety. This they declined to do. Purnendu Narain about this time on the 19th May 1904 sent a letter to one of the borrowers in which it was stated that the capitalists were willing to deposit the whole of the decretal money in Court, and to take two months' time to complete the enquiry and the transaction. Purnendu Narain, however, realised that this could not be done, unless the Subordinate Judge in whose Court the execution proceedings were pending would agree to give time on such deposit. It is not clear, upon the evidence, whether any reply was sent to this letter, there is none in the record ; but Ram Chandra Prosad who has been examined in this case states that he replied to the letter to the effect that the loan was not required. The transaction with the capitalists was not completed and on the 27th May 1904 Gajadhar Prosad, on behalf of the intending borrowers, telegraphed to Purnendu Narain who was apparently then in Calcutta that he had accepted the terms of the Maharaja of Darbhanga. It has been stated to us that, as a matter of fact, the transaction with the Maharaja of Darbhanga also fell through and that the

borrowers were ultimately obliged to place their creditor in possession of their estate for a term of years, so as to enable him to satisfy his dues from the usufruct. The substance of the matter therefore was that nothing came of the negotiations with the Calcutta capitalist and they must be taken to have been discontinued after the 27th May 1904. On the 27th May 1907, that is on the last day for the institution of a suit for recovery of money due on the contract of agency, Purnendu Narain and the infant sons of Harendra Narain who had meanwhile died commenced the present action for recovery of Rs. 28,000 from Kishen Prosad, Ram Chandra Prosad and the infant son of Kashi Prasad who had also died in the interval. The infant sons of the second Defendant, Ram Chandra Prasad, were also joined as parties Defendants, but it is difficult to appreciate how any claim could be put forward against them even with the least show of plausibility. The plaint recites that the Plaintiffs were entitled to receive Rs. 55,000 as brokerage on the contract of the 17th April 1904, but that as the Defendants were in straitened circumstances the claim was limited to Rs. 28,000. The Defendants resisted the claim substantially on the ground that the Plaintiffs had not earned the remuneration and that they had not performed their part of the agreement within the time specifically prescribed. The Subordinate Judge laid down four issues of which the first and the fourth were of a fundamental character, namely, first, whether the agreement between the parties was that the Plaintiff should merely find out a capitalist within one month or raise the amount wanted, and, fourth, whether time was of the essence of the contract, and whether the Plaintiffs performed their part of the contract within the time fixed. The Subordinate Judge answered those questions in favour of the Plaintiffs and as Purnendu Narain stated that he did not want any money out of the amount claimed for his own sake, the Subordinate Judge made a decree for Rs. 14,000 in favour of the other two Plaintiffs, the sons of Harendra Narain. The Defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, first, that upon a true construction of the agreement of the 17th April 1904 the agents undertook not merely to find a capitalist but the money itself, and, secondly, that time was of the essence of the contract. These positions have been strenuously controverted on behalf of the Plaintiffs-Respondents and the learned Vakil who has appeared for them has further argued in the alternative that if the Respondents cannot succeed in their contention, a decree should be made in their favour for compensation for the labour and expense they had undergone in the course of their negotiations with the capitalists.

3. In support of the first contention of the Appellants it has been argued that the plain meaning of the contract is that the agents should find the money and not merely a capitalist. It has been pointed out that the borrowers were deeply embarrassed, their creditors were pressing hard in all direction, and what was urgently needed, as was well-known to Purnendu Narain himself, was not merely a capitalist but actual money to save the Defendants from the peril of an execution sale which had been already proclaimed. In answer to this argument it

has been contended by the learned Vakil for the Respondents that the expression "to raise a loan" has a well-known technical meaning and that the agent who is engaged to raise a loan discharges his duty as soon as he finds a creditor who is able and willing to advance money. In support of this proposition reliance has been placed upon the cases of *Green v. Lucas* 31 L. T. 731 ; 33 L. T. N. S. 584 (1875), *Prickett v. Badger* C. B. N. S. 296 ; 107 R. R. 668 (1856) and *Fisher v. Drewett* 48 L. J. Ex. 32 (1878). These cases are authorities for the proposition that if the person proposing to negotiate a loan brings the principals together and if nothing remains for him to do, he is entitled to his commission. It must be remembered however that at least on one occasion dissatisfaction was expressed by a learned English Judge with this rule of construction. In *Fuller v. Eames* 8 T. L. R. 278 (1892), Mr. Justice Smith observed that if he had construed the agreement without the authorities of the cases cited [*Roberts v. Bernard* 1 Cab. and El. 336 (1884), *Green v. Read* 8 L. T. 83 (1863), *Green v. Lucas* 31 L. T. 731 ; 33 L. T. N. S. 584 (1875) and *Fisher v. Drewett* 48 L. J. Ex. 32 (1878)] he might have held that the commission was only to be recovered if the money was actually paid. It is undesirable that a rule of construction should be imported in the interpretation of contracts in this country which is obviously artificial and may very often defeat the true intention of the parties [See *Stokes v. Soondernath* I. L. E. 22 Bom. 540 at p. 547 (1898)]. In the case before us there is the additional weighty circumstance that the agreement which the principals were made to sign was written in English, a language of which they had a very imperfect knowledge. In fact, the agreement had to be explained to them in their vernacular Hindi and Ram Chandra who has been examined, states definitely that he certainly understood that they should pay the commission if the money was actually advanced. He adds that he took the contract to be that the money should be advanced to them within one month and not merely that a capitalist should be found willing to advance the money. We must express our surprise, in view of the position of one of the agents, that he should have made the principals execute such a contract in a language of which they had a very imperfect knowledge. We are therefore not prepared to accept the interpretation put by the Plaintiffs upon this agreement. But it is not necessary to rest our decision upon this view of the matter, because even if it be conceded that the agents undertook to find a creditor able and willing to advance the money, they did not perform that agreement. It need not be disputed that where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent. Illustrations of this principle are furnished by the cases of *Green v. Lucas* 31 L. T. 731 ; 33 L. T. N. S. 584 (1875) and *Fisher v. Drewett* 48 L. J. Ex. 32 (1878). But it is essential, as was pointed out by Mr. Justice Chitty in *In re Salter's claim* 7 T. L. R. 602 (1891), that the

agent procures a person ready and willing to make the loan on the terms proposed; it is obviously not sufficient that he procures a person willing to negotiate about the matter. Now, in the case before us, the Defendants had granted a letter of authority to the Plaintiffs to raise a loan of eleven lakhs on a mortgage of their entire estate; they did not undertake to find security for twenty lakhs for a loan of eleven lakhs ; they were prepared to give their estate as security for whatever it might be worth. But the Calcutta capitalists, with whom the agents and the sub-agent entered into negotiations, were not ready and willing to advance eleven lakhs upon the security of the whole estate, unless its value was established to be twenty lakhs ; in other words, the capitalists were not prepared to advance the money on the terms offered by the borrowers ; they imposed a condition which was never accepted by the borrowers and which in fact, was introduced by the agents in their letter of authority to the sub-agent entirely on their own responsibility. The position is completely covered by one of the illustrations given by Mr. Justice Chitty in *In re Salter's Claim* 7 T. L. R. 602 (1891). The learned Judge observed: "if A. employs B. to procure a loan of ? 1,000 on his bond, and B. finds C. who says that he is willing to make the advance if A. will pay C.'s solicitor a fee for negotiating the loan to which A. does not agree, the commission is not earned." The same view was affirmed by the Court of Appeal in *Cassingham v. King* 14 T. L. R. 390 (1898) [See also *Peacock v. Freeman* 4 T. L. R. 541 (1888)]. The view we take is not inconsistent with the decision in *Elias v. Govind Chunder Khatick* I. L. R. 30 Cal. 202 (1902), which was accepted as good law in *Annaswami v. Zemindar of Ayakudi* 1 Mad. W. N. 199 ; 8 Mad. L. T. 40 (1910). There the broker employed to negotiate for a loan of money brought a creditor who was willing to advance the amount and actually placed money in the hands of the Attorney : the transaction, however, fell through by reason of the inability of the borrower to make out his title to the property offered as security. The case of *Martyrose v. Courjon* 3 C. W. N. clxxviii (1889), which followed the decisions in *Prickett v. Badger* 1 C. B. N. S. 296 ; 107 R. R. 668 (1856) and *Grogan v. Smith* 7 T. L. R. 132 (1890), also supports the view we take. In the case last mentioned, Lord Escher made the following observations :?"The agent, in order to earn a commission, was to get a purchaser, an actual purchaser, not, merely a person who might become a purchaser but one who would enter into a binding contract, binding him to purchase the house. It was true that the Plaintiff had an alternative right of action if he could show that he did obtain a person who was ready and willing to enter into a binding contract, if he could show that the two parties, vendor and purchaser, were really agreed as to all the terms of the contract, that it was prevented from becoming a binding contract only by reason of the fault or default of the Defendant in refusing to make the agreement valid and binding. This view also receives support from the judgment of their Lordships of the Judicial Committee in *Burchell v. Gowrie* [1910] A. C. 614, where Lord Atkinson stated the rule in the following terms :?"In the words of Erle, C.J., in *Green v. Bartlett* 14 C. E. N. S. 681 (1863), if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the

actual sale has not been effected by him, or, in the words of later authorities, the Plaintiff must show that some act of his was the cause causans of the sale, *Tribe v. Taylor* 1 C. P. D. 505 (1876), or was an efficient cause of the sale" [*Millar v. Radford* 19 T. L. R. 575 (1903)]. In the same case the learned Judge added an observation from the judgment of Willes, J., in *Inchbald v. Western Nilgiri Coffee Co.* 17 C. B. N. S. 733(1864):?"I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it." In the case before us, it is indisputable upon the evidence that the agent never found a capitalist willing to advance eleven lakhs upon the security of the estate. The capitalists brought forward imposed a condition as to the margin of security never proposed or accepted by the borrowers. Under these circumstances, it is impossible to hold that the Plaintiffs ever earned the remuneration claimed by them. The Defendants were, therefore, entitled to repudiate the offer made in the letter of the 19th May 1904. There are two other circumstances in connexion with this branch of the case which deserve special mention. The sub-agent, Troilakhya Nath, in his evidence seeks to make out that another contract by which the estate was to be leased to the capitalists rather than given by way of mortgage was accepted by the borrowers. The plaint, however, is not based on the allegation that the claim was laid for the recovery of compensation for services in connexion with the alleged substituted contract. Troilakhya Nath also makes assertions as to the progress of the negotiations with the capitalists for the advance of the money. It is a matter for legitimate comment, however, that no one has been examined amongst the capitalists themselves to corroborate this part of the story, and we are not prepared to place implicit reliance upon the assertions of Troilakhya Nath who is admittedly at the root of this litigation and whose evidence as that of a person deeply interested does not always show a scrupulous regard for truth. Our conclusion, therefore, upon this branch of the case may be summarised in the manner following. In our opinion, the agents undertook not merely to find a capitalist able ready and willing to advance the money but also to procure funds for the satisfaction of the debts of the borrowers ; but even if this interpretation of the agreement be discarded, and if it be assumed that they undertook only to find a person able, ready and willing to advance the money, they have not done so. The capitalists whom they found insisted upon a margin of security which the borrowers had not covenanted to offer, and at no stage of the negotiations were the capitalists ready to accept the entire estate as security for the loan; in other words no capitalist was found able ready and willing to advance the funds on the terms prescribed by the principals. The transaction was never completed, and the failure could not be attributed to any default on the part of the principals. In fact, Purnendu Narain who had previously employed his son-in-law to survey the properties and ascertain their value, assumed that they were worth twenty lakhs of rupees, but the capitalists were not to be satisfied without full scrutiny and Purnendu Narain found them more exacting than he had anticipated. Consequently, the Plaintiffs cannot be

held to have earned the remuneration claimed on account of their unsuccessful effort to negotiate the transaction which they had been employed to negotiate. The first contention of the Appellants must therefore prevail.

4. In support of the second contention of the Appellants, it has been argued that time was of the essence of the contract and that whatever interpretation might be put upon the agreement, as it was not carried out within the prescribed time, the Plaintiffs did not earn the remuneration claimed. In our opinion, time was of the essence of the contract in the case before us. The rule of equity, which now is the general rule of English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract, *Lennon v. Napper* 2 Sch. and Let 684 (1802), *Roberts v. Berry* 3 DeG. M. and G. 289 ; 98 R. R. 146 (1853), *Tilley v. Thomas* L. R. 3 Ch. App. 61 (1867). The same principle is formulated in sec. 55 of the Indian Contract Act. In the case before us, the agents knew, quite as well as the principals, the purpose for which the loan was required ; the creditors of the principals were insistent for payment, and one of them had already obtained the sale proclamation issued for the sale of properties valued at several lakhs of rupees. The sale was to take place early in May, and although the Court might possibly show some indulgence, the matter was of the gravest urgency and importance to the principals. Even if, therefore, no time had been specified for the performance of the contract, the Court would have inferred from its nature and from the surrounding circumstances that time was intended to be of its essence to this extent at any rate that the agents were bound to use the utmost diligence to perform their part of the contract [*Macbryde v. Weekes* 22 Beav. 533 ; 111 R. R. 471 (1856)]. We do not feel any doubt whatever that time was of the essence of the contract, and that the agents were bound to find, not merely a capitalist, but also the money within the time prescribed. This, indeed, is shown by the letter of Purnendu written on the 19th May 1904. But even if it be assumed that time was not intended to be of the essence of the contract, it had to be performed in a reasonable time, *Houghton v. Orgar* 1 T. L. R. 653 (1884) and *Nosotti v. Auerbach* 15 T. L. R. 41 ; 15 T. L. R. 140 (1899). In the circumstances of the present case, the agreement was not performed even within a reasonable time ; of what use would the money be to the borrowers if it was provided after their creditors had sold their estate, which they were, so anxious to save ? The second contention of the Appellants must consequently prevail.

5. We may add that the learned Vakil for the Respondents suggested that the time prescribed was extended by the continuance of the negotiation, and he relied upon the cases of *Wood v. Bernal* 19 Ves. 220 (1812), *Webb v. Hughes* L. R. 10 Eq. 281 (1870) and *Bruner v. Moore* [1904] 1 Ch. 305. The principle deducible from these cases, namely, that the time originally fixed may be extended by the continuation of bona fide negotiations for completion has, however, no application to the case before us. There is no reliable evidence to show that negotiations were continued for the purpose of completion after the

expiry of the prescribed date; the presence of the officer of the Defendants at Calcutta did not amount to a continuance of the negotiation. In fact, the letter of Purnendu written on the 19th May 1904 shows that there was no prospect of completion of the agreement within any reasonable time, and all that he was able to offer at that stage was a quarter of the sum required, and even that on condition that the Subordinate Judge agreed to a postponement for another two months. This clearly can be of no assistance to the Plaintiffs.

6. The learned Vakil for the Respondents finally contended that the Plaintiffs were entitled to receive some remuneration for the trouble they have taken and referred to the decisions in *Companion v. Woodburn* 15 C. B. 400 ; 100 R. R. 406 (1854) and *Simpson v. Lamb* 17 C. B. 603 ; 104 R. R. 806. The answer to this argument is that no such claim was put forward in the plaint. The Plaintiffs claimed remuneration according to the contract ; that case has completely failed. As Lord Justice Lindley observed in *Lott v. Outhwaite* 10 T. L. R. 76 (1893) in answer to a contention that there was an implied contract to pay the agents a quantum meruit for his services, there could be no implied contract where there was an express contract [*Battams v. Tompkins* 8 T. L. R. 707 (1892), *Barnett v. Isaacson* 4 T. L. R. 645 (1888), *Martin v. Tucker* 1 T. L. R. 665 (1884)]. It is not necessary for us, however, to hold that if a special contract is not executed, it can never give rise to a claim for quantum meruit. Assume that remuneration for services rendered may be claimed ; but the evidence shows that so far as Purnendu is concerned, he was paid in advance for his visits to Calcutta in connexion with this matter, and it is probable that Harendra also was similarly paid. At any rate, as no evidence has been given to show upon what scale remuneration could be calculated quantum meruit, we cannot make a decree in favour of the Plaintiff on that basis. It follows, consequently, that the claim cannot be supported from any point of view. The result, therefore, is that this appeal is allowed, and the decree of the Subordinate Judge discharged. The suit will stand dismissed ; the Plaintiffs-Respondents will pay the Defendants-Appellants their costs in this Court, but there will be no order as to the costs in the Court below.