
(1958) 03 AP CK 0011
In the Andhra Pradesh High Court
Case No : Appeal No. 478 of 1953

Kotharaju Narayana Rao

APPELLANT

Vs

Tekumalla Ramachandra Rao

RESPONDENT

Date of Decision : 19-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 8
Contract Act, 1872 — Section 10, 219, 23
Negotiable Instruments Act, 1881 (NI) — Section 118, 4, 5

Citation : AIR 1959 AP 370

Hon'ble Judges : Umamaheswaram, J; Krishna Rao, J

Bench : Division Bench

Advocate : D. Narasaraju, C. Suryanarayana and P.P. Surya Rao, for the Appellant; M.S. Ramachandra Rao and M. Krishna Rao, for the Respondent

Final Decision : Allowed

Judgement

Krishna Rao, J.—This is an appeal by the defendant and arises out of a suit brought by the respondent-plaintiff to recover from him a sum of Rs. 13,600/- being the principal and interest due on a promissory note Ex. A-I dated 30-7-1949- The promissory note was executed by him in favour of one Sri G. Ch. Venkatachalam and was endorsed by the latter on 27-7-1953 to the plaintiff for collection. The main dispute between the parties relates to the truth of the consideration for the instrument.

2. The facts necessary to appreciate the dispute are briefly as follows: The defendant as the manager of his joint family owns a site measuring Ac. 1-98 cents at Guntur. It was being leased out on a rent of Rs. 2,000/- per year to the I.L.T.D., Company Ltd., (hereinafter called the "Company"). They were occupying it as lessees continuously since 1926. It was a strip of land situated between two plots owned by them. So they desired to purchase the site from the defendant. Negotiations were carried on from about May 1949 through D. W. 1 on the one hand, and the plaintiff on the other. D. W. 1 was a barrister practising at Guntur

and the standing counsel of the Company.

The plaintiff was a vakil practising at Masulipatam and negotiated on behalf of the defendant. The proper price of the site was about Rs. 72,000/-, because a similar site, measuring Ac. 0-96 cents and at a distance of about 50 yards from it, was sold in May 1949 by one N. Radhakrishnamurthy to the Company for Rs. 35,000/-. But the defendant wanted to exploit the anxiety of the Company to purchase his site and get a net price of a lakh of rupees. The correspondence between the plaintiff and D. W. 1 shows that on 29-7-1949 as per Ex. A5, the Company agreed to the price of Rs. 575/-per cent., at which the site was offered in the plaintiff's letter, Ex. B-I dated 9-7-1949.

The price works out to a little over Rs. 1,12,000/- for the entire extent of the site. The plaintiff says that the Company agreed to this exorbitant price, because of the intervention of his cousin (mother's sister's son), Sri G.Ch. Venkatachalam, with Mr. Johns ton, the Manager of the Guntur Circle of the Company and that Sri G. Ch. Venkatachalam intervened because at a meeting earlier in the first week of June 1949 the defendant and his brother had agreed to pay Rs. 10,000/- for his services, provided that a lakh of rupees was secured for themselves.

We find that on the very next day after the price was accepted on behalf of the Company as per Ex. A-5, the defendant executed the suit promissory note Ex. A-1 for Rs. 10,000/- to Sri G.Ch. Venkatachalam. Ex. A-1 was admittedly written by the plaintiff and signed by the defendant and runs as follows:

"Promissory note by Ketharaju Narayana Rao, son of Sitaramaiah Garu of Chemmanagiripeta, Musulipatnam to Sri G.Ch. Venkatachalani Garu (now at Rajahmundry) camp: Masulipatnam.

I agree to pay you or to your order on demand the sum of Rs. 10,000/- (rupees ten thousand) only being the amount my brother Ketharaju Jagannadha Rao and I have agreed to pay you for bringing about the sale to the I. L. T. D. Co. Ltd., Guntur. of our site in Guntur (which is now leased out to the said company) with interest thereon at 12 per cent., (twelve per cent.) per annum from this day till realisation.

Executed this 30th day of July, 1949.

Sd. Ketharaju Narayanarao."

The sale of the site, however, did not actually come off. As there were no less than seven minors in the defendant's joint family, D. W. 1 wanted a portion of the consideration to be utilised for discharging antecedent debts and sufficient Immovable property to be furnished as security for the minors' share of the consideration. But the defendant did not produce the antecedent debt books. Therefore, apart from the question of the adequacy of the security, D. W. 1 was not satisfied that the defendant had a marketable title and dropped the negotiations in 1950 or 1951.

3. The plaintiff's case is that Venkatachalam had done everything in his power to bring about the sale and that the sale fell through because the defendant backed out of the transaction. He brought the suit on 80-7-1952 to enforce the defendant's liability under the promissory note.

4. The defendant admitted that he executed Ex. A-I, but contended that it was not a promissory note and was not enforceable as such. His version was that he did not know any G.Ch. Venkatachalam at all and that he executed Ex. A-I nominally in or about August, 1950 on the advice of the plaintiff, in order to serve as an antecedent debt to justify the sale of the site and to prevent his brother from resiling from the transaction. According to him, the sale was not completed only because the company was not satisfied with the security offered by him and not because of any default on his part,

5. The learned Subordinate Judge held that Ex. A-I contained an unconditional undertaking to pay and was therefore a promissory note. He rejected the defendant's story that it is a sham and antedated document, because its recitals are such that nobody could have possibly regarded it as an antecedent debt binding on the minors and it could never have deterred the defendant's brother if he wanted to resile. He accepted the plaintiff's version about the execution of Ex. A-I, as the defendant had no explanation for the exorbitant price agreed to by the Company.

He accordingly found that the services rendered in inducing the company to accept the exorbitant price formed the consideration for the instrument. He felt a doubt as to whether it was Venkatachalam or whether it was the plaintiff or his brother that influenced Mr. Johnston. The reason for this doubt as between Venkatachalam and the plaintiff's brother appears to be the plaintiff's evidence that his brother was a closer friend of Mr. Johnston. However he was of opinion that it made no difference as to the truth of the consideration.

He held further that the non-examination of Venkatachalam by the plaintiff was immaterial, as the defendant had to rebut the presumption u/s 118 of the Negotiable Instruments Act. The noncompletion of the sale was also in his view immaterial as neither the plaintiff nor Venkatachalam were responsible for it. On these grounds, he decreed the suit against the defendant as prayed for.

6. The appellant's contentions are: (1) that Ex. A-I is not a promissory note as it does not contain an unconditional undertaking to pay and therefore, no presumption of consideration u/s 118 of the Negotiable Instruments Act arises in its favour; (2) that even if Section 118 applies, it is proved that, as a matter of fact, the promissory note is not supported by consideration; (3) that Ex. A-I was really executed in favour of the respondent himself, who was the appellant's vakil and it is therefore vitiated by undue influence and unenforceable and (4) that the real consideration for it is unlawful within the meaning of Section 23 of the Contract Act and it is therefore void.

7. The first contention has to be decided upon a construction of Ex. A-I. Leaving

out for thfl moment the phrase dealing with interest, the operative sentence in the instrument may be paraphrased thus: "I agree to pay you or to your order on demand the sum of Rs. 10,000/- only (because) it is the amount my brother Ketharaju. Jagannadha Rao and I have agreed to pay you for bringing about the sale to the I. L. T. D. Company Ltd., Guntur of our site in Guntur." The first sentence in the paraphrase contains the undertaking to pay and the second sentence recites the consideration forming the clause of reason in the original sentence.

The recital of consideration mentions an antecedent liability, in substitution for which the promisee accepts the promisor's present undertaking to pay. The question whether as a matter of fact the liability existed is only germane to the question whether the recital is true. It falls for decision when dealing with the second contention of the-appellant that in fact the consideration was absent. The second sentence of the paraphrase shows that for some reason or the other the parties treated the liability under the earlier agreement as having already arisen. What we are immediately concerned with is the nature of the undertaking to pay, viz., whether it is unconditional or subject to a condition.

That depends on what is expressed in the first sentence of the paraphrase. We could not be justified in leaving out the intervening clause and reading the sentences as "I agree to pay you or to your order on demand the sum of Rs. 10,000/- only for bringing about the sale to the I.L.

T.D. Company Ltd., Guntur of our site in Guntur." That would make the intervening clause redundant and of no effect. In my opinion, it would be unreasonable to say that the intention of the parties was nothing more than to create evidence of the previous agreement and to confirm it so far as the defendant was concerned.

If so they would have styled the document as an agreement and not as a promissory note, which is a well understood expression. We cannot therefore regard the undertaking or obligation to pay in Ex. A-I as not intended to take effect until the fulfilment of some condition. A demand could have been made by the promisee immediately and this is emphasized by the stipulation at the end of the instrument for the payment of interest from the date of execution.

The time for payment was not postponed, in which case alone, the appellant could have called in aid paragraph 2 of Section 5 of the Negotiable Instruments Act. I have therefore no doubt that Ex. A-I is a promissory note as defined in Section 4 of the Act. It follows that the respondent is entitled to the benefit of the presumption u/s 118 of the Negotiable Instruments Act.

8. The next question is whether notwithstanding that presumption, it is proved by the evidence that there is no consideration for Ex. A-I. The scope of the presumption u/s 118 of the Negotiable Instruments Act was explained by Varadachariar J., in *Narasamma v. Veerraju*, AIR 1935 Mad 765), and may be stated thus; The Court is bound to start with the presumption that a promissory

note, the genuineness of which is admitted or proved, was made for consideration. But it is a rebuttable presumption and the recitals in the instrument are only prima facie evidence against the parties thereto, the weight to be attached to them varying with the circumstances.

The recitals may operate to shift on to the party pleading the contrary, the burden of rebutting the inference raised by them. But the question of burden is of subordinate importance after both the parties have adduced all their evidence, unless evidence is evenly balanced and conflicting. Even in suits on negotiable instruments, the debtor can press into service facts and circumstances disclosed by the plaintiffs evidence. The inequality of position, between the borrower and the lender may also be a circumstance which helps the borrower to rebut the presumption u/s 118.

9. The learned Advocate General did not seek to maintain that Ex. A-1 was nominally executed, as was alleged in the written statement. He conceded that there must have been some kind of a previous agreement between the parties to pay a remuneration or rather a reward of Rs. 10,000/- for services rendered "for bringing about the sale to the I. L. T. D. Company" of the appellant's site. His contention is that even if we accept the plaintiff's evidence about the previous agreement, the conditions thereof were not fulfilled. The services bargained for were to bring about a sale and not a mere offer. Therefore the reward was not earned or at any rate was not payable as long as the services did not fructify in a completed sale. On these grounds he argued that the promissory note was devoid of consideration.

(After discussion of the evidence His Lordship proceeded:)

We are of opinion therefore that under the agreement what Venkatachalam had to do was merely to speak to and bring round Mr. Johnston to be willing on behalf of the company to purchase the site for a price of the lakh.

10. On the second point, as to the time when, Venkatachalam became entitled to the reward under the terms of the agreement, P. W. 1 says nothing explicitly, But P. W. 2's evidence clearly shows that the defendant and his brother agreed to pay Venkatachalam only if Venkatachalam's services fructified and resulted in their getting rupees one lakh. P. W. 1 was undoubtedly conscious of this because he said in paragraph 4 of the plaint that Venkatachalam got the sale transaction ready, but the defendant at first postponed the sale and then backed out. It may be mentioned here that the correspondence does not show that the appellant was at any time unwilling to complete the sale.

The evidence of D. W. 1 decisively establishes that the negotiations fell through only because he was not satisfied with the title which the appellant was in a position to convey. We may note from P. W. 1's evidence that the defendant was from the outset unwilling to sell the site, unless he realised one lakh by the sale. The sole purpose of bringing in Venkatachalam was to enable the defendant to get an extra Rs. 29,000/- over and above the Rs. 71,000/- offered by D.W. 1. A

reward of as much, as Rs. 10,000/- was agreed to be paid, for benefiting the defendant to the extent of Rs. 29,000/-at the most & for the small exertion on the part of the defendant of speaking to and influencing Mr. Johnston.

The price was then altered so as to include this reward, which implies that the agreed intention was to pay the reward out of the price. Taking all the facts and circumstances into consideration, there can be no doubt that one of the terms of the agreement imposed a condition precedent to Venkatachalam's right to the reward, viz., that the vendors secured one lakh net as the price. This could only be upon completion of the sale. Until that event happened there could be no question of any liability under the agreement to pay the reward of Rs. 10,000/-.

11. Sri M. Krishna Rao for the respondent contended that the promissory note Ex, A-1 was made for an executed consideration. This is not correct because the consideration was not expressed as consisting of the performance of something by the promisee. It was expressed to be the antecedent debt or liability under a previous agreement. The truth of the consideration therefore depends on the existence of the liability under the terms of the previous agreement.

12. The legal position in regard to remuneration of agents is stated in Halsbury's Laws of England (Third Edition, Volume I, Pages 196-197 thus;

"An agent has no right to receive remuneration from his principal unless there is a contract express or implied to that effect In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, and all conditions imposed by the contract must have been fulfilled."

These principles govern the truth of the consideration here. Section 219 of the Indian Contract Act merely lays down that "in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act." It does not prevent the parties from contracting that the payment will not be due until some event takes place.

13. Mr. Krishna Rao says that unless under the terms of the previous agreement, the time had come for payment the appellant would not have signed and delivered Ex. A-1. This amounts to merely restating the presumption of consideration arising u/s 118 of the Negotiable Instruments Act. Why did the appellant execute and deliver Ex. A-1 if he was not actually liable at the time to pay the sum of Rs. 10,000/- and if all the conditions of their previous agreement had not been already fulfilled? Some light on the question is thrown by P.W. 2 and by the respondent's letter Ex. A-6 dated 30-7-1949. P. W. 2 says in his cross-examination that even at the time of the agreement in the first week of June 1949, Venkatachalam wanted the appellant and his brother to execute a document and the appellant replied that he would execute it after Venkatachalam met Mr. Johnston.

Obviously, as soon as the respondent received the communication Ex. A-5 dated 29-7-1949, which showed that Venkatachalam had spoken to and influenced Mr.

Johnston, the appellant was asked to keep his word and he therefore executed Ex. A-1. On the very date of Ex. A-1, the plaintiff wrote Ex. A-6 in reply to D. W. 1's letter Ex. A-5. He says in Ex. A-6, "My clients presume that your clients have completed their investigation and are satisfied with my clients" title etc.". He ends the letter by saying that his clients did not see the need for an agreement to sell, but if one must be executed the terms of course would have to be settled.

Obviously, both the plaintiff and the defendant, who was his client, thought on 30-7-1949 that the negotiations had reached a stage when there could be no impediment to the sale. They felt that the completion of the sale was imminent and that it did not therefore matter if the defendant executed Ex. A-1 a few days in advance. This erroneous assumption on their part would not in any way lead to the conclusion that their intention was to alter the terms of their previous agreement and cancel the condition precedent thereunder.

14. Sri M. Krishna Rao had cited a number of decisions relating to contracts for the employment of agents. But in applying these decisions, we have to bear in mind that the real question in each case is; what were the terms of the contract between the parties, and this is a question depending on the particular facts and circumstances of the case. In trying to determine the terms of a given contract with the help of decisions in other cases, we must avoid the danger of ignoring its actual terms and importing into it new terms. As observed by Lord Wright in *Luxor Ltd. v. Cooper*, (1941) 1 All 33 at p. 48.

"I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent the decisions on one contract may help by way of analogy and illustration in the decision of another contract, but, however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract read in the light of the material circumstances of the parties in view of which the contract is made."

The contract here was not with a person carrying on the business of a broker or an estate agent, in which case the question of implied terms in order to give business efficacy to the contract or of implied terms incidental to the usage or custom of the trade might have arisen. Venkatachalam was not a broker or an estate agent but was a person employed as the Agent of the Andhra Bank. The contract was not to introduce or to find a purchaser because the purchaser was already secured. It was an ad-hoc contract, the sole purpose of which was to get the defendant one lakh net as the price of his site from specified purchaser and which incidentally provided for the payment of a reward out of the aggregate price for Venkatachalam's services in that connection.

15. In the cases of *Green v. Lucas*, (1875) 33 LT 584; *Fisher v. Drewett*, (1878) 39 LT 253 and *Harris v. Petherick*, (1878) 39 LT 543, the question that had to be decided was whether the agent had earned his remuneration by performing his

part of the bargain. The first decision is authority for the position that the agent does not forfeit his right to remuneration on account of the transaction not proving beneficial to the principal. The principle applied in the other two decisions is that the agent is not deprived of the right of remuneration vested in him owing to the transaction having subsequently fallen through. No question of a term in the contract, postponing the right to remuneration until an event took place, arose in those cases.

The position here is similar to that in (1941) 1 All 33. That was a case in which the agent was promised his commission of ₹. 10,000/- out of the purchase price of ₹. 1,85,000/-, which was fixed by adding the commission of ₹. 10,000/- to the net purchase price of ₹. 1,75,000/- wanted by the principal. It was held by the House of Lords that the agent was promised a reward in return for the event of the completion of the sale and the right to the reward was not vested in the agent as the event did not take place. There was no room even for implying a term that the principal will not dispose of his property otherwise or prevent the agent otherwise from earning his commission.

16. In the cases of *Jones v. Lowe*, (1945) 1 KB 73; *Dennis Reed L.D. v. Goody*, (1950) 2 KB 277 and *Boots v. E. Christopher and Co.*, (1952) 1 KB 89, the contracts were to pay commission to the agent if he introduced or found able and willing purchasers for the properties of the principals. In the case of *Murdoch Lownie Ltd. v. Newman*, (1949) 2 All 783, the agent was promised a commission "in the event of business resulting." In the case of *Gade Rosi Reddi and Another Vs. Gade Kristna Reddi and Others*, , the agreement was that the defendant should pay commission to the plaintiff "after the expiry and conclusion of the business." The business referred was the contract between the customers introduced by the plaintiff and the defendant's suppliers.

It was held that the expression meant payment only after the completion of the contract and did not entitle the plaintiffs to the commission when the contract was not fulfilled. In the case of *Abdulla Ahmed Vs. Animendra Kissen Mitter*, , the contract was construed by Patanjali Sastry J., as one by which the agent had to "negotiate the sale "and" secure a buyer" who made a firm offer. This the agent had done thereby acquired the right to the payment of commission. Mahajan J., construed the contract as one for the introduction of a willing buyer to the principal and held that the agent had done that and the commission therefore became payable. It is not necessary to enter into any elaborate discussion of these cases, as they dealt with contracts the terms of which have no resemblance to the contract here.

17. In the case of *P. Ayyannah Chetty Vs. P.K. Subramania Iyer*, , there was a verbal contract between the commission agent and an intending purchaser of a house. The terms were that the agent should negotiate for the purchase at a commission of 2 per cent on the purchase price. It was held that the intention of the parties was that the agent was to have his commission only on the completion of the sale. It was further held that very clear words were necessary

to make the court find that the intention of the parties was that the commission would be payable by the intending purchaser whether he actually became the purchaser or not. This principle is applicable to the present case, which is concerned with an intending seller instead of an intending purchaser. There is no evidence of any words in the agreement that the commission should be payable whether the intending seller actually became the seller or not.

18. In my opinion, the consideration for Ex. A-I was the antecedent liability of the appellant to pay the reward under the previous agreement. That liability never arose because of the condition in the previous agreement that the reward would be payable only when the defendant secured a net price of one lakh of rupees by the sale, an event which did not happen. I find it to be proved therefore that there was no consideration for Ex. A-I.

19. The third contention of the appellant is that the real promisee under Ex. A-I was the respondent himself, who was the appellant's vakil and that the consideration was only a remuneration for respondent's own services. It is said that a presumption of undue influence arises as the respondent was in a position to dominate the appellant's will and that it was an unconscionable bargain. The decision in *Brojendra Nath Mullick v. Luckhimoni Dasse*, ILR 29 Cal 595, is called in aid for the submission that the promissory note is unenforceable. In order to prove that the plaintiff was himself the real promisee and that Venkatachalam took no part in the transaction, reliance is placed on a number of circumstances, but in my Opinion they are quite inconclusive.

As regards the point that Venkatachalam was at Rajahmundry, and could not have had knowledge of Ex. A-5 dated 29-7-1949 which was delivered at Masulipatnam to the plaintiff by a special runner, and would not have therefore gone to Masulipatnam and asked for the execution of the promissory note, the answer is that Venkatachalam might have had his own means of contact with the office of the company or of D. W. 1 at Guntur. I do not consider that there is anything inherently impossible in the respondent's story that Venkatachalam arrived at Masulipatnam at about 8 P. M. on Saturday, the 30th July, 1949 after closing his Bank at Rajahmundry at about noon that day.

As regards the delay in filing the promissory note into the Court until some time after 2-9-1952 although the plaint was filed on 30-7-1952 the plaintiff's explanation that he retained the promissory note for the purpose of settlement out of Court is quite probable. The delay does not necessarily point to the inference, invited on behalf of the appellant, that the plaintiff was keeping Ex. A-I with him all the time until the last date of limitation and obtained the endorsement for collection thereafter during the interval before filing it into Court.

The trump card put forward by the appellant is the non-examination of Venkatachalam, who was the real plaintiff and whose evidence was necessary to explain the several matters, such as those already commented upon above and how he was able to influence Mr. Johnston. Sri M. Krishna Rao explained that

Venkatachalam was stationed at Amalapuram at the time of the trial, that an application was made to the lower Court for examining him on commission and that it was opposed and was dismissed. He finally added that Venkatechalam is not prepared to give evidence. In these circumstances, a strong presumption undoubtedly arises that the examination of Venkatachalam would have proved very unfavourable to the respondents case.

But the short point we have to consider is whether the plaintiff obtained the promissory note benami in the name of Venkatachalam. There was no special reason for his selecting Venkatachalam, instead of some other accommodating relative. On a perusal of the defendant's evidence I am inclined to think that he is an ingenious and resourceful person, who is not likely to have been influenced by the plaintiff into executing a promissory note with totally false recitals. I therefore reject the appellant's contention that the plaintiff & not Venkatachalam was the real promisee under Ex. A-I.

20. Finally, it was contended that the object of the previous agreement between the parties was fraudulent and that Ex. A-I is therefore vitiated and is void. The suggestion is that either Venkatachalam or the plaintiff through his brother must have conspired with Mr. Johnston to defraud the company and share the Rs. 10,000/- gained. Such a defence was never put forward at the trial. The plaintiff's evidence shows that Mr. Johnston died in March or April 1950 and that the plaintiffs brother died in June 1950, long before the institution of the suit. They had no chance to explain their conduct and it would be most unfair to surmise that they were parties to a fraud on the company.

So far as the parties to Ex. A-I are concerned, it is difficult to say whether they meant by the word "influence" merely "good offices" or "influence of a sinister character. No doubt we have every justification for drawing a strong adverse inference from the non-examination of Venkatachalam and holding that so far as the plaintiff was concerned, he intended to use sinister influence on Mr. Johnston. But I am unable to think of a concrete form of such a wicked influence which would not reflect on Mr. Johnston. I would therefore negative this contention of the appellant, although we feel that the method by which Mr. Johnston was persuaded to offer the exorbitant price remains a mystery.

21. As we found that Ex. A-I is not supported by consideration we allow the appeal and dismiss the suit with costs throughout.

Umamaheswaram, J.

22. I have perused the judgment of my learned brother, and I agree that the liability under the promissory note did not arise inasmuch as the sale was not effected and the defendant did not realise a net price of one lakh of rupees. The agreement between the parties was that a sum of Rs. 10,000/- should be paid by the appellant to Venkatachalam "for bringing about the sale to the I. L. T. D. Co. Ltd., Guntur of his site in Guntur". It is admitted that the sale did not take place. From the evidence it is clear that the sale fell through as the appellant was not in

a position to convey a valid title to the I. L. T. D. Co. Ltd., Guntur.

23. As pointed out by my learned brother, the real question in each case is as to what are the terms of the contract between the parties and that is a matter entirely depending on the particular circumstances and facts of each case. Though in J.941 AC 108 at p. 130, Lord Wright deprecated in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law, there can be no doubt that to some extent decisions of one contract may help by way of analogy and illustration in the decision of another contract. Denning LJ has rightly stated in (1950) 2 KB 277 at p. 284 that

"So many cases have now come before the Courts on claims by house agents to commission that the document cannot be interpreted in vacuo. It must be interpreted in the light of the general law on the subject.

According to him, "when a house owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale; but if not, he is entitled to nothing". He points out further that the common understanding of men is that the agent's commission is payable only out of the purchase price. At p. 286 he observes:

"The commission is a substantial remuneration based not on the time labour or money expended -- which may be little -- but on a percentage of the purchase price. Remuneration on such a scale cannot be justified except on the footing that it is to come out of the purchase money; and it should therefore in reason only be payable on completion of the purchase."

The difficulties that might arise in taking a different view are stated by Denning LJ in *Mccallum v. Hicks*, (1950) 2 KB 271 at p. 275, in the following terms:

"Once such a form is signed, they say, they are entitled to commission if they introduce a man who makes an offer but does not sign a binding contract. If this is correct, it means, that where a number of house agents induce a house-owner to let them put his house on their books as they often do the house-owner may find himself liable to pay commission not only on the sale which is completed through one agent, but also on offers which have been made through other agents and have never reached a binding contract." There may be cases where it is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price. But such a construction of the contract would, according to Lord Russell at page 129 in 1941 AC 108, require clear and unequivocal language.

24. Though in some of the earlier decisions, the English Courts leaned in favour of the view that the commission agent was entitled to commission on the introduction of a party who was ready, willing and able to purchase the property on terms acceptable to the vendor, there is no doubt that subsequent to the decision of the House of Lords in 1941 AC 108, the swing of the pendulum has

been to the other extreme, viz., that the commission is not payable unless the sale is completed and the sale price is received by the vendor. Though on the particular facts of the case, in *Midgley Estates v. Hand*, (1952) 1 All 1394, the Court of appeal came to the conclusion that the plaintiffs, who introduced a person who within the time specified, had signed a legally binding contract to purchase the property, were entitled to commission notwithstanding that the sale was never completed, Jenkins L.J., summed up the law as follows:

"So far as any general principle is deducible from the authorities, their effect may, I think, be thus summarised. The question depends on the construction of each particular contract, but *Prima Facie*, the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and, generally speaking he contemplates that, if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price.

That is broadly speaking, the intention which, as a matter of probability, the Court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of the agent "finding a purchaser" or "selling the property" have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing to purchase the property."

Applying those observations to the facts of the case, there can be no doubt that the promissory note-amount was payable only in the event of the sale being put through and the appellant realising the net price of one lakh of rupees, I am not inclined to agree with the contention of Sri M. Krishna Rao that the amount became payable when Johnston agreed to pay Rs. 57½ per cent. So, the promissory note fails and is not enforceable.

25. I am also inclined to dismiss the suit on another ground viz., that the suit violates the provisions of Section 23 of the Indian Contract Act. In my opinion the object of the agreement is immoral and is consequently not lawful within the meaning of Section 23 of the Indian Contract Act. According to paragraph 4 of the plaint, the consideration was payable to Venkatachalam for directing his energies and influence to bring about sale of the site to the I. L. T. D. Company. According to the evidence of the plaintiff, Venkatachalam exercised his influence on Johnston and made him agree to pay Rs. 575/- per cent. P. W. 2 also deposed to the same effect, viz., that the appellant requested Venkatachalam "to speak to the I. L. T. D. Dora and use his influence to get rupees one lakh."

The question that arises for consideration is whether the agreement to pay Rs. 10,000/- to Venkatachalam if he should exercise his influence on Johnston, the Managing Director of the I. L. T. D. Company and induce him to pay a net price

of one lakh of rupees in regard to a property worth only Rs. 71,000/- is not immoral. It is no doubt true that the objection based on Section 23 of the Indian Contract Act was not raised in the written statement. But, as pointed out in *Montefiore v. Men-day Motor Components Co. Ltd.*, (1918) 2 KB 241 at p. 244, it is well settled that--

"When it is apparent on the face of a contract that it is unlawful, it is the duty of the Judge himself to take an objection, and that too, whether the parties take or waive the objection. This was so decided by Lord Mansfield in *Holman v. John. son at law*, (1775) 1 Cowp 341 and by Lord Eldon in *Evans v. Richardson*, (1817) 3 Mer 469, and has been consistently acted on ever since per Farwell L.J. in *North Western Salt Co. v. Electrolytic Alkali Co.*, (1913) 3 KB 422 at p. 424. The same principle applies to the illegality being disclosed in the evidence. As early as 1800 Lord Eldon applied it in *Norman v. Cole*, (1800) 3 Esp 253. to which I shall have to refer later."

It is therefore open to this Court even without a pleading to consider the question whether the agreement relied on or proved in the case is immoral. The evidence in the case disclosed that as a result of the exercise of the influence by Venkatachalam or the brother of the plaintiff, Johnston, the Managing Director of the I. L. T. D. Co. Ltd., agreed to purchase the site at an exorbitant sum, i.e., at Rs. 575/- per cent., i.e., Rs. 1,12,000/- and odd even though its real worth was not more than Rs. 71,000/-. Is not an agreement on the part of any individual to exert or exercise influence on another occupying a fiduciary position such as a Managing Director of a Company and to receive excessive consideration immoral within the meaning of Section 23 of the Indian Contract Act? The learned Advocate-General referred to illustrations (f) and (j) to Section 23 of the Contract Act as having a bearing on this question, and they are as follows:

"(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000/- rupees to A. The agreement is void, as the consideration for it is unlawful.

(j) A who is B's Mukhtar promises to exercise his influence as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral." Illustration (f) has no application as it refers to the obtaining of an employment in the public service by exercise of one's influence or authority. It is clear law that the sale of a recommendation, nomination or influence in procuring a public office is illegal, and void, for trafficking in offices would inevitably tend to official corruption. Vide *Ledu Coachman v. Hiralal Bose* ILR 43 Cal 115 : (AIR 1916 Cal 266). In my opinion, illustration (j) is more pertinent. It states when an agreement is immoral. It is not necessary that the section should be confined only to cases where the influence is exercised by the mukhtar on his client. In my opinion the section has a wider and general application. What has to be decided is whether the agreement is opposed to morals.

Whenever the object of the agreement is to exercise one's influence on a person occupying a fiduciary position and thereby cause detriment or loss to the beneficiary of Cestui Quo Trust, it is, in my opinion, immoral. In this connection, it might be mentioned that the bane of the modern society is the faith in the efficacy of recommendation or influence on public officers or persons occupying high positions for the purpose of achieving their own ends to the detriment, loss or injustice to others who are not in a position to command such influence. Such a pernicious practice of seeking to influence others in the discharge of their duties or recommending to others should be rooted, Out as in my opinion, it saps the foundations of society and is akin to corruption.

26. The decision of a single Judge (Pandurang Row J.) in *Manikka Mooppanar and Others Vs. Peria Muniyandi Pandithan*, is one such instance. As it was clear from the plaintiff's own admission that the object of the agreement and in fact the consideration so far as the defendants were concerned, had been that the plaintiff should see that the sale was settled in favour of the defendant even for less price though better prices were offered by others, it was held that the contract to pay commission to the plaintiff was unenforceable in view of illustration (j) to Section 23 of the Contract Act.

The decision of the Patna High Court in *"Shiv Saran v. Kesho Prasad*, AIR 1917 Pat. 92 does not, with great respect, lay down the correct law. It was held that where a large sum of money was paid to various persons in order to induce, them to use their influence with the Government in connection with private or quasi political concerns the transaction could not be regarded as immoral or contrary to public policy. There is no discussion in the case and no reference is made by Chamier, C.J. to the two illustrations referred to supra.

It must, however, be pointed out that the learned Chief Justice guarded himself by saying that it did not appear from the facts that "those people were expected to intercede or use their influence in an underhand or improper manner". I am clear in my mind that the object of the agreement in the instant case. viz.. to exercise influence and induce Johnston to pay such a heavy price to the detriment of the company is clearly immoral and is governed by Section 23 of the Contract Act.

27. I do not wish to rest my judgment on the ground that the agreement is opposed to public policy as the heads of public policy are all fairly well defined. I am fully alive to the warning sounded that public policy is "a very unruly horse which may carry its rider he knows not where; as a branch of the law which should not be extended, for "judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" Vide Cheshire and Fifoot on Law of Contract, 4th edition, at page 277.

28. I do not wish to differ from the conclusion of my learned brother that Venkatachalam and not the plaintiff is the real promisee under the note. though I have grave doubts that the plaintiff-advocate obtained the promissory note in the

name of his relation, Venkatachalam for bringing about the sale by influencing Johnston. the Managing Director of the I. L. T. D. Co. Ltd. The non-examination of Venkatachalam, the transferor of the note to the plaintiff, raises considerable doubt that the plaintiff's case is not true. Having regard to the above conclusions, it is unnecessary for me to express my opinion whether Exhibit A-1 is a promissory note and whether the presumption u/s 118 of the Negotiable Instruments Act applies to the case.