

1921.

Present : Ennis J.

AMARASEKERA v. PERERA et al.

81—C. R. Colombo, 74,391.

Agreement to survey lands showing encroachments, jungle, &c.—Want of bona fides on the part of the surveyor—Action to recover fee.

Good faith by a contractor is essential to support a claim for payment for the work actually done under a contract which has not been fully executed.

The plaintiff, a surveyor, undertook to make a survey of several lands showing encroachments, jungle, and lowland, and to partition the same. The plaintiff took some perfunctory steps to ascertain whether the title plan correctly represented the lands, and did not perform his work in accordance with the agreement.

Held, that plaintiff's want of *bona fides* prevented him from recovering the amount agreed upon.

THE facts appear from the judgment.

R. L. Pereira, for appellants.

Hayley, for respondent.

September 8, 1921. ENNIS J.—

The plaintiff in this case claimed Rs. 300 in the following circumstances:—He entered into an agreement with the defendants to survey 19 lands, to prepare a plan of each, and to partition same for a sum of Rs. 500. He received an advance of Rs. 150, and says that the defendants prevented him from making partition, which he estimated would cost about Rs. 50. He accordingly deducted Rs. 200, and claimed the balance. The learned Judge held that the plaintiff was entitled to recover the value of the work he had done in accordance with the agreement, and said: "I consider that a fair estimate of the services would be Rs. 160," for which sum he entered a decree. The defendants appeal. It is not clear whether the learned Judge meant this as a valuation of all the work done by the plaintiff, because, if so, the decree should have been for Rs. 10 only. But the learned Judge had answered the fourth issue, viz.: "What sum, if any, is the plaintiff entitled to claim for work done?" by saying that he is entitled to Rs. 160. He has further answered the fifth issue "Is the defendant entitled to claim a refund of Rs. 150?" in the negative.

I do not consider it necessary to send this case back for a clear adjudication, as I find that the plaintiff undertook to make a survey in each case showing encroachments, jungle, and lowland D 3 shows that this was the agreement, and the plaintiff says his work was to enable a partition to be made among the defendants. The plaintiff denied that he undertook to show what was in jungle; he is, however, contradicted by D 3. The defendants asserted that as regards three lands, the plaintiff merely made a copy of the Government survey plan, and made no independent survey, in consequence of which the plans do not show the configuration as existing to-day. The Superintendent of Surveys was deputed to ascertain whether a survey of one of the lands had in fact been made within the year, and as a result of his inspection he has testified that no survey was made which could produce the plan D 6. On the evidence the learned Judge has expressed a belief that the plaintiff visited the land and took some perfunctory steps to ascertain whether the title plan correctly represented the land, and that he had not performed his work in accordance with the agreement. This being so, it is clear that the plaintiff has not acted in good faith. The case of *Hauman v. Nortje*¹ indicates that good faith by a contractor is essential to support a claim for payment for the work actually done under a contract which has not been fully executed. There is, however, another principle of Roman-Dutch law, viz., that a person cannot benefit at the expense of another, and as the defendants have not returned the plans which they received, they have presumably made use of them. I find that the plaintiff said that, "excluding my work on the three lands, the value of my work in respect of the other lands is Rs. 300."

1921.

ENNIS J.

*Amarasekera
v. Perera*

It is not clear to what he refers to as "the three lands," but presumably they are the lands which the defendants say were not surveyed at all, while the learned Judge has found that a fair estimate of the value of the services performed by the plaintiff is Rs. 160. In my view the plaintiff's want of *bona fides* prevents him from succeeding, and his claim should have been dismissed. The defendants, however, counter-claim for a return of Rs. 150, and in view of the Judge's finding that they had some advantage out of the agreement, I would not interfere with his finding that the defendants cannot recover this amount. In the result I would set aside the decree with costs, and dismiss the plaintiff's action and the defendants' claim in re-convention, each party to pay his own costs in the Court below.

Set aside.

¹ S. A. L. R. App. Div. 293.