

Present: Ennis A.C.J. and Loos A.J.

1919.

FERNANDO v. PERERA HAMINE.

29—D. C. Negombo, 12,798.

Action by broker for commission—Negotiation falling through—Broker must prove default of vendor on a binding agreement by vendee.

A broker to entitle himself to a commission in a negotiation that has fallen through must either prove a direct default on the part of the vendor or a binding agreement by the vendee to buy the property.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *H. V. Perera*), for appellant.—Default on the part of the vendor or the vendee does not affect the broker, and he is entitled to his commission (*Perera v. Soysa*¹).

[ENNIS A.C.J.—If the negotiation falls through by the fault of the vendee, the broker is not entitled to his commission, unless there is a binding agreement by him to buy the property.]

A binding agreement by the vendee is not necessary. In *Perera v. Soysa*¹ there was no binding agreement by vendee. Vendor is liable to pay the brokerage even when he is not in a position to sue the intending purchaser (*Green v. Lucas*²). P 1 discloses a contract sufficient to entitle us to our commission.

There is no authority for the statement that when negotiations fall through owing to the caprice of vendor, no action is maintainable without a binding contract. The broker introduced a willing purchaser, and the vendor was in default in this case. He represented the estate to be 180 acres when it was only 172 acres.

[ENNIS A.C.J.—The default must be on the part of the person with whom the broker stipulated.]

The plaintiff merely introduced both the parties. As he introduced a willing purchaser, he is entitled to his commission.

Samarawickreme (with him *F. de Zoysa*), for respondent, not called upon.

June 16, 1919. ENNIS A.C.J.—

This was an action by a broker for the recovery of commission. The agreement between the parties is P 1, the material parts of which are that the plaintiff is authorized to negotiate the sale of Mangala Eliya estate, in extent 180 acres more or less, for the sum of Rs. 120,000. The agreement was to hold good for ten days from date, and it was dated April 3, 1918. All these cases where there is

¹ (1910) 13 N. L. R. 85.

² (1875) 33 L. T. 584.

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a claim for commission owing to a sale having fallen through must be based in some way on the default of one of the parties to the agreement. Where the vendor has announced his intention not to complete the sale, or where the vendor has put it out of his power to complete the sale, or has a defective title, or has instructed the broker to sell a larger extent than he has, would all be cases where there has been a direct default in the vendor, and in such cases it would be unnecessary for the broker to prove more than this default. But there are other cases where the purchaser may decline to complete the agreement, and in such cases the principle would still apply, that some kind of default must be brought home to the vendor on the agreement with the broker before he could be made liable, and those cases turn, certainly in some instances, on the presence or absence of a binding agreement between the vendor and the proposed purchaser. Should there be a binding agreement, it would be open to the vendor to sue on it, and the broker should not have his commission dependent on the election of the vendor. Should the vendor elect not to compel the completion of the contract, then the default would be in him on the agreement with the broker. This seems to be the principle of our own cases and the English cases. In *Dissanayake v. Rajapakse*¹ and in *Perera v. Soysa*² these principles may be inferred, and it is the same with the English cases cited in the case of *Perera v. Soysa*.² It is, therefore, a question of fact in every case, and in the present case under appeal the learned Judge has found as a fact that there was no complete and binding agreement, and that the default was not in the vendor. That appears to be so. The vendor waited for some days beyond the allotted space of ten days, and his proctor had a draft agreement for the purchaser to sign, but the purchaser delayed and put off signing this agreement. Quite apart from that, it would seem that there is no direct evidence that the proposed purchaser had ever unconditionally accepted the offer. The person with whom the proposed purchaser negotiated was one Mendis, and Mendis in his letter D 1 on April 13, that is, the last day within which the broker had to complete his agreement, wrote that their original talk had been in respect of about 180 acres, and that he had discovered that the land was one of 172 acres, and he asked for a reasonable settlement of the matter. In other words, the evidence, so far as it goes, shows that when the ten days had already expired, the vendor and the purchaser were not in agreement on the price to be paid for the land Mangala Eliya as a whole. In the circumstances, I agree with the learned Judge that the plaintiff has not made out a case from which he could substantiate a claim for commission, and I would dismiss the appeal, with costs.

Loos A.J.—I agree.

Appeal dismissed.

¹ (1918) 20 N. L. R. 353.

² (1910) 13 N. L. R. 85.