

1938

Present : Poyser S.P.J. and Koch J.

## GUNATILEKE v. LIPTON, LIMITED.

344—D. C. Colombo, 7,082.

*Principal and agent—Sale of land—Agent, the efficient cause of the sale—Right to commission—Land agent not a broker—Ordinance No. 15 of 1889, s. 13.*

Where an agent brought an intending purchaser of a property into relation with his principal and was the efficient cause of the sale, he is entitled to the commission, although the actual sale was not effected by him.

A land agent is not a broker within the meaning of section 13 of Ordinance No. 15 of 1889.

THE plaintiff, a broker and land agent sued the defendant company for the recovery of a sum of Rs. 6,500 which he alleged was due to him in respect of his services in bringing about a sale of an estate belonging to the defendant. The defendant company denied that any commission was due to the plaintiff and pleaded that the sale of the estate was effected by another person. The learned District Judge held that the plaintiff did not bring about the sale and that he was not the direct cause of the transaction going through.

*Hayley, K.C.* (with him *A. C. Z. Wijeratne* and *Barr Kumarakulasinghe*), for the plaintiff, appellant.—The law applicable to the subject of agency is the English law—Ordinance No. 22 of 1866. What has to be proved in this case is that some act of the plaintiff was the *causa causans* of the sale. Though the *causa proxima* may have been the act of a third person, the plaintiff will yet be entitled to recover his commission if he can establish that he was the efficient cause of the sale.\* See *Murray v. Currie*<sup>1</sup>; *Green v. Bartlett*<sup>2</sup>; *Millar, Son & Co. v. Radford*<sup>3</sup>; *Tribe et al. v. Taylor*<sup>4</sup>; *Burchell v. Gowrie and Blockhouse Collieries, Ltd*<sup>5</sup>.

*H. V. Perera, K.C.* (with him *F. C. W. VanGeyzel*), for defendant, respondent.—This case does not deal with a contract between a broker and his principal whereby the broker is to find a purchaser. In the present case, the defendant was considering offers for the sale of the estate from any person. Each offer should be considered as a separate transaction. Whoever was immediately responsible for the offer which

<sup>1</sup> (1836) 7 C. & P. 584.

<sup>2</sup> (1868) 14 C. B. (N. S.) 681.

<sup>3</sup> (1903) 19 T. L. R. 575.

<sup>4</sup> (1876) 1 C. P. D. 505.

<sup>5</sup> (1910) A. C. 614; 80 L. J. (P. C.) 41.

was finally accepted was entitled to the commission. There must not only be a casual, but also a contractual relation between the introduction of the purchaser and the ultimate transaction of sale. *Millar, Son & Co. v. Radford* (*supra*) ; *Perera v. Soysa*<sup>1</sup> ; *Tudawe v. Keppitigala Rubber Estate Co.*<sup>2</sup> ; *Brinson v. Davies*<sup>3</sup>.

The plaintiff in this case not being a licensed broker cannot maintain this action—Section 13 of Ordinance No. 15 of 1889. Non-compliance with a statutory requirement makes the contract unenforceable—*The Municipal Council, Galle v. Cassim*<sup>4</sup> ; *Cope v. Rowlands*<sup>5</sup> ; *Sockalingam Chettiar et al. v. Ramanayake et al.*<sup>6</sup>

*Hayley, K. C.*, in reply.—Brokers' licence is not necessary in this case. See section 1 (c) of Ordinance No. 15 of 1889. A licence is necessary only where the broker carries on business within the Municipal limits of any town. There is no evidence that Balapitiya, where the plaintiff resides, has a Municipality. Further, the plaintiff is really in the position of a land agent and not of a broker—*Chadburn v. Moore*<sup>7</sup> ; *Kirkwood v. Gadd*<sup>8</sup> ; *1 Halsbury 152* (1st ed.) ; *Boustead on Agency*, p. 4 and p. 156 (4th ed.) ; *25 Halsbury 138* ; *Leake on Contracts 373* (8th ed.).

*Cur. adv. vult.*

April 4, 1938. POYSER S.P.J.—

In this action the plaintiff, who described himself as a broker and land agent residing and carrying on business at Balapitiya, sued the defendant company for a sum of Rs. 6,500 which he alleged was due to him in respect of his services in effecting the sale of an estate known as Eadella Group to one Ibrahim Lebbe Marikar.

The defendant company denied that they were liable to pay the plaintiff any commission or remuneration and pleaded that the sale of the said estate was effected by another person who carried on business under the name of VanGeyzel & Company.

The facts briefly are as follows : At the beginning of 1936 it seems to have been generally known that the defendant firm were prepared to receive offers for the purchase of the estate known as Eadella Group, and, on February 18, 1936 (P 1), the plaintiff wrote to the defendant firm asking if it was true that they had an idea of selling this estate. On February 25 of the same year the plaintiff again wrote (P 2) to the defendant firm asking whether the estate was for sale and, if so, requesting that particulars of production and a permit to inspect it be given to him.

The defendant firm (P 3) stated they could not provide the information required, but later, on June 5 (P 4), wrote to the plaintiff enclosing a letter of authority to inspect this estate. On July 26 the plaintiff writes the following letter (P 5) :—“I am glad to inform you that my client wishes me to make a firm offer of Rs. 150,000 cash, for the above property. This offer is subject to my commission of 2½ per cent. on the said amount. This offer holds good till August 15, 1936. If you are pleased to cable this offer I am prepared to pay the cable charges on hearing from you. P.S.—We visited the estate yesterday”.

<sup>1</sup> (1910) 13 N. L. R. 85.

<sup>2</sup> (1929) 30 N. L. R. 389.

<sup>3</sup> (1911) 105 L. T. 134.

<sup>4</sup> (1906) 9 N. L. R. 108.

<sup>5</sup> (1836) 2 M. & W. at p. 157.

<sup>6</sup> (1933) 35 N. L. R. 33 at 42.

<sup>7</sup> (1892) 61 L. J. (Ch.) 674.

<sup>8</sup> (1910) A. C. 422.

The defendant firm replied to this letter on July 30 (P 6) stating that the offer of Rs. 150,000 is too low to be of the slightest interest to them.

Subsequently, on September 20, 1936, the plaintiff wrote to the defendant firm as follows (P 7) :—“I have the honour to inform you that my client, Mr. E. L. Ibrahim Lebbe Marikar, who visited the estate with your permit along with me has made an offer for the above without my knowledge and thereby getting behind me. So I beg you to safeguard my commission if he were to buy it. Further I got another client who is prepared to make an offer of two lakhs cash subject to confirmation after his visit. So I shall be much thankful to you if you would kindly post me a permit of inspection after the 26th instant, as expressed by your good selves through the 'phone on last Friday”.

Subsequently the plaintiff was granted a further permit to inspect the property at any time and on October 14 he again wrote to the defendant firm stating that a client of his, T. A. J. Noorbhai, was prepared to pay Rs. 200,000 for the property. This offer was not accepted and the plaintiff on December 18, 1936, made a further offer of Rs. 227,000 (P 20), but did not state on whose behalf the offer was made.

On January 13, 1937, the defendant firm wrote to the plaintiff (P 22), stating that they are prepared to consider an offer of Rs. 280,000. The plaintiff replies to this letter the following day (P 23), stating that the maximum his client is prepared to offer is Rs. 250,000. This offer is not accepted, and on February 7, 1937, the plaintiff again writes to the defendant firm (P 28), stating that Ibrahim Lebbe Marikar is his client, that he had taken him to the defendants' office and that he had learnt that Messrs. VanGeyzel & Company were the brokers in regard to the sale. He also asked that his interests be safeguarded.

Actually the sale of this estate for a sum of Rs. 260,000 was effected in the month of February through Messrs. VanGeyzel & Company, Ibrahim Lebbe Marikar being the purchaser.

In regard to the letter P 23, written by the plaintiff offering Rs. 250,000 on behalf of an unnamed client, the plaintiff in his evidence stated that this client was Marikar. The District Judge, however, does not accept that evidence and finds that after the offer of Rs. 150,000 had been made (P 5), the plaintiff had nothing to do with Marikar and the latter then commenced negotiations through the firm of Messrs. VanGeyzel & Company.

Mr. Hayley argued that the evidence, both documentary and oral, did not justify this finding of fact of the District Judge. However, I do not think there are sufficient grounds disclosed for setting aside the findings of the District Judge on questions of fact and for the purpose of this appeal, I propose to take the facts as found by him. In this connection I would refer to Marikar's evidence. Marikar had first stated that he had an estate adjoining Eadella Group, that he knew that this estate was in the market before the plaintiff spoke to him and that he visited the estate in company with the plaintiff. He admitted making an offer of one and a half lakhs to the defendant firm through the plaintiff.

Subsequently in cross-examination he admitted that the estate he owned was twenty miles away from Eadella Group and he also stated, “I had not been to Eadella Group before plaintiff came and saw me. I

had no intention of buying it. It is the plaintiff who induced me to make an offer. He obtained a permit to inspect the place from the defendant company. He accompanied me to the estate". He further stated that he made a second visit by himself and after such visit got the plaintiff to make an offer. He also admitted that he is sharing any commission paid to VanGeyzel & Company by the defendant company.

Mr. Doudney, who is the local manager of the defendant company, stated that the sale of this estate was effected by VanGeyzel & Company, and his opinion was that the plaintiff was not entitled to any commission, but decided that he would refer the matter to his proctors. He denied that the plaintiff had brought Marikar to see him but did not seem very certain about it. He admitted however that the plaintiff asked him to safeguard his interests both in September, 1936, and after the sale was concluded in February, 1937.

The District Judge has held that the plaintiff is only entitled to commission on the sale of this estate if he brought about a binding contract between Marikar and the defendant company. He also held "that the plaintiff did not find a purchaser ready and willing to pay the price which the defendant firm was prepared to accept; that he did not in fact bring about the sale, nor was he the direct cause of the transaction going through. All that is said to his credit is that he made an offer and obtained a permit".

In regard to Marikar's action, he held that he was not called upon to adjudicate on any sly action of his and he "saw no default on the part of the defendant firm in regard to Marikar making an offer, which was eventually accepted, through another broker, and considered they could not be held responsible for Marikar's conduct".

The above are the facts. The law applicable to questions of agency is the English law. See Ordinance No. 22 of 1866.

We were referred to a number of English authorities, the latest of which was *Burchell v. Gowrie and Blockhouse Collieries, Limited (supra)*. In that case the Privy Council held that where an agent had brought his principal into relation with the actual purchaser he was entitled to recover commission although the principal had sold behind his back on terms which he had advised them not to accept. In that case earlier authorities were referred to with approval, namely, *Green v. Bartlett (supra)*, where Erle C.J. held, "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".

In later cases it was held that "the plaintiff must show that some act of his was the 'causa causans' of the sale (*Tribe v. Taylor*)", or was an efficient cause of the sale (*Millar v. Radford*)" (*supra*).

A passage in the judgment of Lord Atkinson, *Burchell v. Gowrie and Blockhouse Collieries, Limited (supra)*, which strongly supports the plaintiff's case is found at page 625, "The answer to the second contention is, that if an agent such as Burchell who brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind

the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale".

None of the other authorities cited are in any way in conflict with the cases above cited. The question therefore is, was the plaintiff the efficient cause of the sale of Eadella estate to Marikar ?

In my opinion, the evidence of Marikar, as accepted by the District Judge, conclusively proves that he was. As previously stated, Marikar stated: "It is the plaintiff who induced me to make an offer", and the plaintiff in fact did make the first offer on behalf of Marikar. Subsequently Marikar, who must have made up his mind to purchase this property if possible, went to the firm of VanGeyzel & Company, the sole proprietor of which is the witness Mansoor, a relation of his, and made his final offer through Mansoor in order that he might share in the commission the defendant firm had agreed to pay. That fact does not, in my opinion, relieve the defendant firm of their liability to pay the plaintiff commission if he was responsible, as I hold he was, for bringing Marikar into relations with them and doing the most effective part of the work.

This case is I think within the principles enunciated in *Burchell v. Gowrie and Blockhouse Collieries, Limited (supra)*, and the plaintiff is entitled to succeed.

In regard to the amount the plaintiff claims, it was admitted in the lower Court that the plaintiff is entitled to the amount he claims, namely, a commission of 2½ per cent. if the property was sold through his instrumentality. As stated before, I think it was sold through his instrumentality and he is therefore entitled to the amount he claims. It is not quite clear whether the defendant firm had in fact paid commission to VanGeyzel & Company. According to the witness Mansoor, such commission had not been paid to them, but it was stated in the course of the argument that such commission had been paid after judgment in the District Court. However that may be, the defendant firm is not relieved from liability. They were warned in October, 1936 (P 7), that the plaintiff claimed Marikar as his client, and after the property had been sold the plaintiff also asked that his interests in regard to commission should be safeguarded.

If the defendant firm have paid commission to the wrong person, that does not excuse them from paying what is due to the right person.

There is one further point which arises on the appeal, namely, the District Judge's adjudication on the fourth issue, which is as follows:— "Can the plaintiff maintain this action in view of his failure to procure a broker's licence under Ordinance No. 15 of 1889?" The District Judge only dealt briefly with this issue as he found in favour of the defendant on the other issues. This issue he found in favour of the plaintiff. In my opinion he rightly so found.

Ordinance No. 15 of 1889, section 13, requires that any person who carries on the trade or business of an auctioneer or broker within the limits of any town in which a Municipal Council is or shall be established or shall be brought under the operation of various Ordinances shall obtain a licence to practise as such.

It was argued on behalf of the defendant firm that as the plaintiff did not obtain such a licence, he was not entitled to maintain the action. In support of this argument the case of *Cope v. Rowlands* (*supra*) was cited. In that case Baron Parke held that "a broker cannot maintain an action for work and labour and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne. c. 16". This case has been considered in many later cases many of which are set out by my brother Koch in a case reported in 35 N. L. R. at p. 33, and the deductions which may be made from these cases are that if a contract or transaction is expressly prohibited by law, whether such prohibition was for the protection of the revenue or otherwise, or if such contract was forbidden by implication, for example, by the infliction of a penalty, the contract is void and cannot be enforced.

I think, however, that this point may be decided without reference to any of these authorities.

In the first place, as the Judge points out, the plaintiff describes himself in paragraph 1 of his plaint as a broker and land agent carrying on business at Balapitiya. The defendant firm admitted that averment. It has not been proved that there was a Municipal Council established for Balapitiya, or that it was brought under the operation of the Ordinances referred to in section 13 of Ordinance No. 15 of 1889. Consequently it was not proved that a broker in Balapitiya requires a licence.

Further, the plaintiff effected the contract between Marikar and the defendant company in his capacity as a land agent and not as a broker. A broker is a person who executes contracts in such a way as to be legally binding on both parties for whom he acts. A land agent is not such a person and a land agent need not be licensed. There is consequently no statutory provision to bar the plaintiff maintaining his action.

The appeal will be allowed and judgment entered for the plaintiff as prayed. The plaintiff is entitled to costs in both Courts.

Koch J.—I agree.

*Appeal allowed.*

