

1947 Present: Howard C.J. and Wijeyewardene J.

SUPPRAMANIAM CHETTIAR, Appellant, and
SAUNDARANAYAGAM, Respondent.

10—D. C. Kandy, 1,301.

Principal and Agent—Secret profit acquired by agent—Agent's right to sue principal for commission.

Appeal—Burden of proof—Appellant must show that judgment appealed from is wrong.

An agent who, without the knowledge or consent of his principal, receives a commission from the third person with whom he deals on his principal's behalf is not entitled to any commission from his principal.

In appeal the burden lies on the appellant to show that the judgment appealed from is wrong. If all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded.

A PPEAL from a judgment of the District Court, Kandy.

H. V. Perera, K.C. (with him N. E. Weerasooria, K.C., and M. P. Spencer), for the defendant, appellant.

N. Nadarajah, K.C. (with him H. W. Thambiah), for the plaintiff, respondent.

Cur. adv. vult.

March 27, 1947. HOWARD C.J.—

The defendant appeals from a judgment of the District Court awarding the plaintiff a sum of Rs. 10,375, which the latter alleged to be due to him as commission for negotiating the purchase of the Mahakande estate. In his plaint the plaintiff alleged that the defendant at Matale engaged the services of the plaintiff to arrange for the purchase of this estate and promised to pay the plaintiff remuneration at the rate of 2½ per centum on the purchase price on the completion of the purchase by the defendant of the said estate. The plaintiff further alleges that he brought the defendant and the owner of the estate together and on April 2, 1943, the defendant purchased the estate for the sum of Rs. 415,000. The defendant in his answer denied that he agreed to pay the plaintiff any

remuneration on the purchase by the defendant of the Mahakande estate. The defendant further alleged that the owner of the estate had requested Messrs. Keell & Waldock, Brokers of Colombo, to find a purchaser for the said estate and had undertaken to pay Messrs. Keell & Waldock 2½ per cent. commission on the purchase price, and that Messrs. Keell & Waldock had agreed to pay the plaintiff half the said commission if the plaintiff introduced a prospective purchaser to Messrs. Keell & Waldock. In order to earn this commission the plaintiff had requested the defendant to purchase the estate and that any commission on the sale was payable by the vendor and that the plaintiff having received commission from Messrs. Keell & Waldock was not entitled to recover any commission from the defendant. In finding for the plaintiff the learned District Judge after a careful examination of the evidence has held that the defendant agreed to pay the plaintiff 2½ per cent. on the purchase value. Mr. H. V. Perera on behalf of the defendant, whilst conceding that the question at issue was one of fact, contends that the burden of proving the agreement to pay commission rested on the plaintiff and that there was no evidence to justify the finding in the plaintiff's favour.

The plaintiff, who styled himself broker and commission agent, stated in evidence that he did business at Matale and one Marimuttu assisted him. Previous to the negotiations in regard to the Mahakande estate he did not know the defendant who was introduced by Marimuttu as a possible purchaser. According to Marimuttu the defendant who lives at Nawalapitiya came and saw him in the early part of December, 1942, and asked him if there was any estate to be sold. Marimuttu told him that there was an estate at Peradeniya and he should come after a week's time. Marimuttu then communicated with Colonel T. Y. Wright, the owner of the estate, on behalf of the plaintiff. Colonel Wright replied on December 5, 1942 (P 6), stating that the estate was for sale and referring the plaintiff to Messrs. Keell & Waldock. The plaintiff thereupon wrote D 8 of December 7, 1942, to Messrs. Keell & Waldock and obtained particulars of the estate. Subsequent to that letter Messrs. Keell & Waldock undertook to pay the plaintiff half of their 2½ per cent. commission if he found a purchaser for the estate. It would appear that Marimuttu wrote to the defendant on December 10, 1942, and arranged that the plaintiff, defendant and himself should visit the estate on December 22, 1942. The defendant acknowledged this letter by P 5 dated December 17, 1942. On December 22, 1942, the plaintiff, defendant and Marimuttu visited the estate as arranged. On December 23, 1942, the plaintiff says that he wrote the letter P 1 to the defendant. P 1 is worded as follows:—

“ C. Saundaranayagam.
Mr. Y. L. Suppramaniam Chettiar,
No. 75, Gampola road,
Nawalapitiya.

No. 5, Taralanda road,
Matale 23rd December, 1942.

— Mahakande Estate.

Dear Sir,—Yesterday after you visited the above estate with me and Mr. A. K. Marimuttu Pillai and our interview with Col. T. Y. Wright you informed us that you are prepared to purchase same and to do the

needful in connection with this matter. I wish to bring to your information that if you desire me to negotiate this transaction for you, please note that you must pay me my usual 2½ per cent. commission. If my terms are agreeable kindly send me a letter authorising me to negotiate this transaction for you and I shall do my best for you. Thanking you for an early reply.

Yours faithfully,
Sgd. C. Saundaranayagam."

The plaintiff further states that he received letter P 2 from the defendant on December 25, 1942. This letter which is addressed not to the plaintiff but to Marimuttu is worded as follows :—

"A. K. Marimuthu Pillai, Esqr.,
Manoranjithavasa, No. 5, Taralanda road, Matale.

Mahakande Estate.

Dear Mr. Marimuttu Pillai, Esq.,—I am ready and willing to purchase the above estate on the 4th January, 1943, without fail. Please inform Mr. Savundranayagam to arrange with Messrs. Keell & Waldock of Colombo accordingly. I trust you and Mr. Savundranayagam will do everything for me in the above matter and oblige.

(Sgd.) in Tamil.
25.12.42."

The plaintiff states that after receiving P 2 he took steps to complete the sale. The sale was actually completed in Messrs. Keell & Waldock's office on January 8, 1943, when the defendant received D 4 from Messrs. Keell & Waldock. According to the plaintiff the latter when he handed the particulars of the estate to the defendant did not tell him that Messrs. Keell & Waldock had asked him to negotiate the sale and had further promised him half their commission. According to the plaintiff the defendant acquired this information between December 22, 1942, when the estate was inspected and January 8, 1943, when the deal was completed. After the sale was closed the defendant according to the plaintiff said he would pay the commission and a "santosam" in addition.

It is now necessary to examine the evidence put forward by the plaintiff to support his case that the defendant agreed to pay him commission. The plaintiff's story is chiefly remarkable for its inconsistencies. In examination-in-chief he says that the agreement to pay is contained in the letters P 1 and P-2. There was no previous agreement to pay commission. There is also the following passage where he says "On this occasion (that is to say the occasion when they visited the estate) I did not talk to the defendant about the commission nor did he talk to me about the commission." Again in cross-examination he says :—

"At the initial stages there was no mention by the defendant of any commission being paid to me. On the day we went to inspect the estate the question of commission was not discussed at all. On the

day we went to inspect the land I had already received a promise from Messrs. Keell & Waldock that they will pay me half their commission.”

* * * * *

For the first time I indicated to the defendant that he must pay me a commission in this letter P 1.

But later on in the cross-examination the following passages occur :—

“When I got the particulars about this estate and told the defendant about it in Marimuthu’s house somewhere about the second week of December, I did not give the defendant the name of the estate. I gave him all other particulars. Then the defendant asked me to give him the name of the estate and asked me not to fear that he would drop us and close the transaction himself. He said he would pay my usual $2\frac{1}{2}$ per cent. commission. On that occasion I told the defendant that my commission was $2\frac{1}{2}$ per cent. He said he was prepared to pay my commission at $2\frac{1}{2}$ per cent. Thereafter we visited the estate on the 22nd December, 1942. There is no writing by which the defendant has agreed to pay me or Marimuttu $2\frac{1}{2}$ per cent. commission.

Either on the 6th of January, 1943, or on the 8th of January, 1943, defendant promised me verbally to pay me the commission at $2\frac{1}{2}$ per cent. Defendant promised to pay this in the building in which Messrs. Keell & Waldock have their offices. XXd. (contd.): My assistant Marimuttu heard the promise given verbally by the defendant on the 6th or 8th January, 1943, that he would pay me $2\frac{1}{2}$ per cent. commission. Marimuttu heard defendant promising me $2\frac{1}{2}$ per cent. commission about the middle of December, 1942. The first time I asked the defendant in writing to give me commission was when I wrote to him P 1. The defendant’s promise to pay my usual commission of $2\frac{1}{2}$ per cent. plus a ‘santosam’ was made either on the 6th January, 1943, or on the 8th January, 1943.”

It is interesting to discover to what extent the evidence of Marimuttu corroborates that of the plaintiff in regard to the promise to pay commission and the occasion or occasions on which such promise was given. In examination-in-chief Marimuttu stated as follows :—

“After defendant received the purchase note he told us at the office of Messrs. Keell & Waldock that he had learned that we were getting a commission from Messrs. Keell & Waldock. Plaintiff said ‘yes’. Defendant then told plaintiff that he (defendant) was going to give plaintiff a commission and also in addition to that a ‘santhosam’ for getting the estate cheap for him. Defendant promised to give $2\frac{1}{2}$ per cent. commission on the purchase value. Defendant did not say how much ‘santhosam’ he was going to give.”

In cross-examination Marimuttu stated :—

“I will get a share of the claim that is made by the plaintiff if he succeeds. On the day of the inspection of the estate, namely, the 22nd of December, 1942, defendant said that he was willing to buy the estate. Defendant verbally told us so and confirmed it by letter also. Defendant by letter P 2 confirmed that verbal statement. The confirmation was sent to me. When defendant took the particulars of the estate from me in December, 1942, he said that he would

pay us commission. That was prior to the inspection on the 22nd December, 1942. By a writing Messrs. Keell & Waldock agreed to pay the plaintiff a half share of their commission. No writing was taken from the defendant regarding his promise to pay commission to the plaintiff. Defendant said, when taking the particulars from the plaintiff, that he would pay the commission and that after inspection of the land, if he was satisfied he would give a writing confirming that agreement to give the commission. After the inspection defendant said that he would send a writing embodying the agreement to pay commission. He said he would send the writing to both of us. We were both going to share the commission. Defendant did not in fact send a writing agreeing to pay a commission. Then the plaintiff wrote a letter to the defendant asking for authority to negotiate the sale, and in that letter plaintiff mentioned about the commission. Plaintiff wanted a reply sent to him. Defendant sent a reply to me. In the letter sent by defendant to me, which was a reply to the letter sent by the plaintiff to defendant, he (defendant) did not say that he was willing to pay commission. After I received letter P 2 from the defendant we did not take any steps to get a writing from the defendant to pay us commission."

To sum up the evidence in regard to the promise to pay commission it would appear that both the plaintiff and Marimuttu are agreed that the only evidence in writing of such a promise is contained in the documents P 1 and P 2. They are agreed that a promise was given in Messrs. Keell and Waldock's office on January 6, 1943, after the purchase price had been agreed. In fact according to the plaintiff and Marimuttu, the defendant not only promised to pay the commission but also a *santosam*. In regard to any promise made prior to P 1 and P 2 the plaintiff first of all says that there was no prior promise and later in his evidence says that such a promise was made when the defendant was given particulars of the estate by the plaintiff. This information was alleged to have been given in Marimuttu's house about the second week in December. Marimuttu agrees with the second version given by the plaintiff as to when the first promise was made.

It is necessary to consider how the learned Judge when confronted with this variety of testimony has reached the conclusion that the plaintiff has discharged the burden of proving that the defendant agreed to pay him commission. He has apparently arrived at this conclusion after a consideration of P 1 and P 2. The defendant denies that he ever received P 1. Marimuttu in his evidence in cross-examination states that after the inspection the defendant said he would send a writing to both the plaintiff and himself embodying the agreement to pay commission. The inspection took place on December 22. It is very curious that in spite of the promise of the defendant that he would send a writing embodying the agreement the plaintiff should have thought fit to have written on December 23—the very next day—a letter to the defendant informing him that he must pay commission. Moreover no mention is made in P 1 of the promise made after the inspection on the previous day. There are other curious features in plaintiff's and Marimuttu's evidence in

regard to P 1. At an abortive trial before Mr. Nagalingam the plaintiff stated that P 1 was in a book in which he keeps copies of all his letters. The book was not produced but the plaintiff said he detached P 1 in order to produce it in Court. At the second trial, however, he said that he detached P 1 from the book in December, 1942, when he had no idea he would have to file it in a Court of law. Marimuttu in regard to P 1, in his evidence before Mr. Nagalingam, says that the plaintiff showed him the letter before it was posted. At the second trial Marimuttu said that P 1 was shown to him by the plaintiff on December 24, after it had been posted and the plaintiff asked him to keep it. It has been argued on behalf of the plaintiff that P 2 is an answer to P 1 and must be taken to be a promise to pay commission. It is difficult to understand this argument. P 2 is not addressed to the writer of P 1. No reference is made in P 2 to P 1 nor is there any mention of the payment of commission. In spite of this the learned Judge in his judgment says that the letter P 2 clearly implies that the defendant has accepted the terms contained in letter P 1. The learned Judge in coming to this conclusion has ignored the inconsistencies with which this piece of evidence is surrounded. It is on these two documents alone that he has decided in the plaintiff's favour. He does not find that the defendant on any other occasion gave any promise to pay commission. Moreover, he has come to the conclusion that the defendant after he had heard that the plaintiff was being paid commission by Messrs. Keell & Waldock changed his mind in regard to this promise to pay. At page 93 of the record the following passage occurs in the judgment:—

“Plaintiff says that somehow or other defendant had learnt on January 6, 1943, when they went to the office of Messrs. Keell and Waldock, that the plaintiff was hoping to get a share of the commission from Messrs. Keell & Waldock. To my mind that is what made the defendant change his mind and refuse to make any payment to the plaintiff by way of commission later.”

This amounts to a finding by the learned Judge that at the time when P 2 was written the plaintiff without the knowledge of the defendant had acquired a profit not contemplated by the defendant. The question of an agent receiving secret profits is dealt with in *Vol. I., Halsbury's Laws of England (Hailsham ed.)* pp. 251-254 in the following passages:—

“An agent must not, without the knowledge of his principal, acquire any profit or benefit from his agency other than that contemplated by the principal at the time of making the contract of agency.”

“A bribe or secret commission is a profit or benefit received by the agent from the third person with whom the agent is dealing on his principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the creation of the agency.”

“On discovering the receipt of a bribe the principal may instantly dismiss the agent, and, if he has already been dismissed may justify the dismissal on that ground, even though the bribery was not discovered

till after the dismissal. The agent forfeits any commission in respect of the transaction and becomes liable to his principal for the amount of the bribe, if in money, or for the value of the property so received by him, such value being measured by the highest value which the property might have fetched whilst in his possession."

In *Andrews v. Ramsay & Co.*¹, it was held that an agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal but is not entitled to any commission from his principal. At p. 638 Lord Alverstone L.C.J., stated as follows :—

"I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle ;"

Having regard to the principles of law governing the relationship of principal and agent, I am of opinion that the plaintiff having acquired an interest in Messrs. Keel & Waldock's commission could not insist on the defendant fulfilling any promise to pay commission based on the documents P 1 and P 2.

Apart from any question arising from the law governing the relationship of principal and agent I have come to the conclusion that the evidence did not justify the learned Judge in coming to the conclusion that the defendant ever agreed to pay commission to the plaintiff. In coming to this conclusion I have not been unmindful of the fact that the burden lies on the appellant to show that the judgment appealed from is wrong. That if all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side of the other being right he cannot be said to have succeeded, *vide Naba Kishore Mandal v. Upendra Kishore Nandal*². In the present case I am of opinion that the calculations were not nicely balanced making possible a verdict one way or the other. The learned Judge has formed an erroneous view of the documents P 1 and P 2. The verdict in favour of the plaintiff cannot be allowed to stand. It must be set aside and judgment entered for the defendant on the plaintiff's claim together with costs in this Court and the Court below.

WIJEYWARDENE J.—I agree.

Appeal allowed.

¹(1903) 2 K. B. 635.

²A.I.R. (1922) Privy Council 39.