

Present: Wood Renton A.C.J. and De Sampayo A.J.

1913.

DE VOS v. BETT.

99—D. C. Negombo, 8,428.

Agent—Right to get commission from his principal—Secret arrangement to get a profit out of the transaction—Defamation—Intention to injure—Person utilizing information given by another regarding sale of an estate—Liability to pay the informant.

An agent who has arranged to make a secret profit out of the transaction can recover nothing in the nature of commission from his employer.

THE facts appear from the judgment.

Allen Driberg (with him F. J. de Saram, Jr.), for the defendant, appellant.

A. St. V. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

July 14, 1913. WOOD RENTON A.C.J.—

The plaintiff, Mr. R. V. de Vos, sued the defendant, Mr. James Bett, in this action for the recovery of a sum of Rs. 10,000 alleged to be due on the following causes of action, namely, Rs. 7,500 as profit, of which he had been wrongfully deprived by the conduct of the defendant in connection with the purchase by him of Waljapola estate from Mr. Graeme Sinclair, and Rs. 2,500 as damages for defamation. The plaintiff puts his case in this way. Acting as Mr. Graeme Sinclair's agent or broker, he negotiated the sale of Waljapola estate to the defendant for a sum of Rs. 120,000. The defendant "fraudulently and dishonestly utilized" information and knowledge which he had acquired through the plaintiff to purchase Waljapola estate for Rs. 112,500, and thereby deprived the plaintiff of a sum of Rs. 7,500, which under his agreement with Mr. Sinclair would have been due to him as commission if the sale had been carried through at the stipulated price. In the alternative the plaintiff says that owing to the defendant's conduct Mr. Sinclair refused to allow him to negotiate any further for the sale of the property, and claims his commission as damages. That is his first cause of action. As a second cause of action, he alleges that the defendant "falsely and maliciously" denied that he had ever agreed to purchase the property for Rs. 120,000, and thereby injured his reputation. He estimates his damages under this head at Rs. 2,500. The learned District Judge holds in effect that the plaintiff was acting in the matter of the purchase of Waljapola estate as the agent of the defendant; that the defendant instructed him to get an offer of the

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estate at the proprietor's lowest price; that the plaintiff was informed by Mr. Graeme Sinclair that he was prepared to sell the property for Rs. 112,500, but that if a higher price was obtained he might retain the difference as commission; that the plaintiff fraudulently represented to the defendant that the proprietor's lowest price was Rs. 125,000, an amount ultimately reduced through his efforts to Rs. 120,000; and that he concealed from the defendant the fact of the commission which was to be paid to him by Mr. Sinclair if a higher price than Rs. 112,500 should be obtained. These findings are conclusively supported by the evidence, and it is obvious (see *Salomons v. Pender*¹ and *Andrews v. Ramsay & Co.*²) that they are fatal, as the learned District Judge has held, to any claim on the part of the plaintiff to commission or to damages in the nature of commission. The statement of objections by the plaintiff to those parts of the judgment under appeal which are adverse to him fails.

The learned District Judge has held, however, that the defendant stated untruly, although not fraudulently, to Mr. Tonks, Mr. Graeme Sinclair's proctor, that he had never agreed to buy the property for Rs. 120,000, and that as the defendant had ultimately succeeded in buying the property at what really was the proprietor's lowest price through Mr. Tonks, to whom the plaintiff introduced him, it was fair that he should pay to the plaintiff the ordinary broker's commission of 2½ per cent. on the purchase money. He therefore gave judgment in favour of the plaintiff for Rs. 2,812.50, but in view of his other findings in the case, he directed that he should pay to the defendant three-fourths of the costs of the action.

In my opinion the decision of the learned District Judge on this part of the case cannot be supported. The cases of *Salomons v. Pender*¹ and *Andrews v. Ramsay & Co.*² show that an agent who, as was the case with the plaintiff, has arranged to make a secret profit out of the transaction can recover nothing in the nature of commission from his employer. Moreover, I do not think that the plaintiff can be allowed to retain the sum awarded by the District Judge, or any sum, as damages for defamation. Even if the defendant's statement to Mr. Tonks were untrue in fact, there is nothing to show that it was made with any intention to injure the plaintiff, or otherwise than with a desire to protect himself against legal liability. But I am very far from being satisfied on the evidence that what the defendant said to Mr. Tonks was untrue.

His Lordship discussed the evidence, and continued:—

It only remains to say a word as to the cause of action alleged in the plaint to arise out of the utilization by the defendant of information obtained by him through the plaintiff, with the result that he was enabled to buy Waljapola estate at a price most advantageous to himself and destructive of the plaintiff's anticipated profit.

¹ (1865) 3 H. & C. 639.

² (1903) 2 K. B. 635.

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To this ground of claim there are several answers. If the plaintiff, as he alleges, was not the defendant's agent in the transaction with which we are here concerned, there was no reason why the defendant should not turn to his own advantage any information that reached him directly or indirectly through the plaintiff, even if he caused some loss to the plaintiff in doing so. On the assumption that the plaintiff was the defendant's agent, his claim under this head would be equally untenable. His gross misconduct would preclude him, as I have already shown, from recovering anything from the defendant on the ground of loss of anticipated commission, and no such facts exist in the present case as can bring it within the *ratio decidendi* of such authorities as *Edley v. Koelman*.¹ The plaintiff brought the defendant and Mr. Tonks together in order that he might earn his secret and dishonest commission as speedily and as securely as possible. Nothing was further from his thoughts or desires than that the meeting should enable the defendant to ascertain the true state of the facts. I know of no authority which obliges us to hold—and in the absence of authority I decline to hold—that an introduction of this description comes within the category of those efforts to bring about the relation of buyer and seller which lay a foundation for a claim in the nature of commission.

The decree under appeal must be set aside, and judgment must be entered dismissing the plaintiff's action, with the cost of the action and of the appeal.

DE SAMPAYO A.J.—I entirely agree.

Set aside.

¹ (1896) 2 N. L. R. 207.