Present: Bertram C.J. and Ennis J.

DISSANAYAKE *v.* RAJAPAKSE.

198—D. C. Negombo, 12,105.

Broker — Agreement to pay commission on receipt of money — Defective title—Sale not carried out—Claim for commission.

The defendant engaged the plaintiff, a broker, to negotiate the sale of an estate. He wrote: "I will pay commission 1½ per cent. if you get me the Rawita money (money realized by the sale of the Rawita land)." The plaintiff found a purchaser, who instructed his lawyer to draw up the deed, but when the title was examined, it transpired that defendant had settled this land in trust for his children. The sale fell through. The defendant imagined that the trust was not binding, as it was not registered, and as it was subject to an arrangement with his father, which, in fact, had gone off.

Held, that the broker was entitled to his commission, though the defendant had not received the " Rawita money."

Where an agent is engaged to sell property on a commission, and a sale is arranged, but proves abortive through the act or default of the principal, the commission agent is entitled to remuneration for his exertions, and a reasonable measure of that remuneration is the commission which he might have earned but for the act or default of his principal.

This principle applies even where that act or default occurred before the agent had commenced to exert himself.

Bertram C.J.—The right of a commission agent to sue on a *quantum meruit* may be made dependent upon a special condition .... The principal may guard himself even against his own defaults, if he takes the proper measures to do so. As Blackburn J. said: "It might be prudent in cases of this kind to introduce into the contract a clause such as 'if this goes off without fraud on my part, you are not entitled to your commission,'" but this was not done in this case. The special words relied upon are not wide enough for this purpose.

THE facts are set out in the judgment.

A. St. V. Jayawardene (with him *J. S. Jayawardene*), for appellant.

Brito-Muttunayagam, for respondent.

Cur. adv. vult.

September 9, 1918. Bertram C.J.—

This case raises a very difficult question in connection with the law governing the rights of commission agents. Ordinarily a commission agent is only entitled to a commission for introducing

a purchaser if in fact the sale takes place, but it has been recognized by a series of decisions of long standing that in certain circumstances he may obtain his commission even if there is no sale. The question is whether this case belongs to that class of cases.

The material facts are that the defendant engaged the plaintiff to negotiate the sale of a particular property—Rawita estate. The terms of the engagement may be taken as comprised in the following extract from a letter or memorandum signed by the defendant: "I will pay commission 1½ per cent. if you get me the Rawita money (money realized by the sale of Rawita land)." As a matter of fact, the defendant had no title to sell. He had settled this very land in trust for his children. He imagined that the trust was not binding, because it was not registered, and because it was subject to an arrangement with his father, which, in fact, had gone off. But in this he was mistaken. The trust was binding upon the land (at any rate, to such an extent as to justify the purchaser in refusing to complete the sale). The vendor's title, therefore, was defective, and the purchaser introduced to him declined to complete the sale because of this defect. It should be noted, however, that this was not simply a case of a sale going off because of a defective title. The plaintiff's effort to effect a sale proved abortive, because of the voluntary act of his employer; in fact, the employer, before he had employed the agent, had by his own act disabled the agent from effecting the sale.

The question is, What are the rights of the plaintiff under these circumstances? It has been recognized, as I have said, by a series of cases that in certain circumstances a commission agent is entitled to his commission, even though no sale is effected. The principle on which those cases are supposed to rest has been thought to be embodied in a formula to the effect that if a commission agent has done all that it was necessary to do on his side he is entitled to his commission, even though no sale has been effected. (See for examples of this principle in our own books, the cases of *Simpson v. Soyza* [1] and *Perera v. Soysa.* [2]) The plaintiff claimed commission on the authority of these cases. For the defendant, on the other hand, without disputing these, or the English authorities on which they are based, it was argued that they have no application in the present case, because in this case the defendant made a special contract, expressly stipulating that the commission should only be paid if the purchase price was realized. To this the plaintiff replies that the principle that a commission agent is entitled to his commission, whether the sale is effected or not, when he has done all that has to be done on his side by introducing a purchaser willing and able to purchase, equally applies to cases where it is provided that no commission is to be payable unless the purchase money is realized; at any rate, where the vendor is to blame for the sale

[1] *(1900) 4 N. L. R. 90.*

[2] *(1910) 13 N. L. R. 85.*

going off. He argues that if this were not the case, the vendor under such a contract could himself disentitle the agent from remuneration by his own wilful act in refusing to complete, and that such an interpretation of the contract could not possibly be intended.

It is important to understand the principle on which the Courts give rewards to commission agents for commissions on sales which do not in fact take place. On what principle is this done? It is not sufficient to say that the commission agent has done all that is reasonable on his side, and that; therefore, he should be remunerated. The Courts do not give remuneration simply on the ground that it is reasonable that a man should receive it. The right to remuneration must be founded upon a contract. Is the contractual right in this case due to an implied term in the contract of agency, or is it due to a substituted contract? It clearly cannot be due to an implied term in the contract of agency; there cannot be implied in a contract to pay money on a particular event, an obligation to pay the same money upon an entirely different event. The principle on which this remuneration is accorded is clearly explained in the case of *Prickett v. Badger*,[1] and is based upon an old principle of English law discussed in the notes of *Cutter v. Powell* in *2 Smith's Leading Cases 1*. In *Prickett v. Badger* [1] it was laid down by the Lord Chief Baron that " the defendant having declined, from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, although the plaintiff could not maintain an action upon the special contract, he was, nevertheless, entitled to recover upon the common count (*i.e.*, a *quantum meruit*) a reasonable remuneration for his work and labour." The principle is further explained as follows, quoting from *Smith's Leading Cases*, at page 16: " It is an invariably true proposition that; wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything which he had done under it previously to the rescission." Again, at page 31: " It being, therefore, established that, where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other party may, if he please, rescind; such act or such refusal being equivalent to a consent to the rescission; the remaining part of the proposition above stated is that, upon such a rescission, he has a right, if he have done anything under the contract, to sue immediately for compensation on a *quantum meruit*." It is thus clear that the right of remuneration is a right to compensation for

[1] *(1856) 1 C. B. (N. S.)296 ; 26 L. J. C. P. 33.*

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work and labour done, independently of the contract, and the agent can only sue for this remuneration if the carrying out of his contract has been rendered impossible by the act or default of his principal. It may be asked why the rescission of the special contract is insisted upon. This is because of the rule in the English law, explained in the notes in *Cutter v. Powell*,[1] that it was not competent for a plaintiff who has been engaged upon a special contract to sue upon a *quantum meruit* so long as the special contract " remained open." He can only sue upon a *quantum meruit* if he can get rid of the special contract; he can only get rid of the special contract by rescinding it; and he can only rescind the special contract either by agreement with his principal, or on the ground that the conduct of his principal justifies him in rescinding it without an agreement. It may also be noted that the amount recovered on the *quantum meruit* is not recovered *qua* commission; but the amount agreed upon as commission is taken as a convenient measure of the value of the agent's exertions. (*Par* Wiles J. in *Prickett v. Badger*.[2])

Now, if this is the principle, it is clear that it equally applies, whether the contract expressly makes the commission dependent on the realization of the purchase money or not. Thus it was applied in the case of *Fisher v. Drewett*,[3] where, by the terms of the agreement, commission was only payable " on any money received," and where the argument of the present appellant was most forcibly pressed upon the Court by Mr. Dickens, K.C., but expressly rejected by Bramwell L.J. in his judgment. In that case the act of the vendor which caused the sale to go off was his refusal, on the ground of expense, to furnish an abstract of title which the purchaser reasonably required.

The next question is this. In the present case the act of the principal which caused the contract to go off was one committed before the agent had exerted himself to bring about the sale—indeed, long before the sale was ever contemplated. Does the rule above explained include such a case? I confess that but for express authority I should have concluded from the above quotations that it did not. But it appears to me that the authorities preclude this view. In *Green v. Lucas*[4] the act of the principal which caused the contract to be abortive was a representation as to his title made before the proposed lender was approached, and on the basis of which he was prepared to offer the loan. Similarly, in our own Courts, in *Perera v. Soysa*[5] the sale went off because the agent of the vendor had, in employing the plaintiff for the sale of the German Club, assured him that the extent of the property was 3 acres, and the plaintiff had so told the purchaser, but on discovering that the property was less than 3 acres in extent,

[1] *Smith's Leading Cases 1.*

[2] *(1856) 1 C. B. (N. S.) 296; 26 L. J. C. P. 33.*

[3] *(1878) 39 L. T. (N.S.) 253.*

[4] *(1875) 33 L. T. 584.*

[5] *(1910) 13 N. L. R. 85.*

the purchaser raised difficulties, and the land was sold elsewhere. In both these cases, therefore, the act of the principal, by which the agent's claim was justified, was an act committed before the agent had taken any steps in the matter at all.

I quite appreciate that there is a difference between the facts of this case and those of *Green v. Lucas* [1] and *Perera v. Soysa.* [2] In those two cases the act of the principal which destroyed the possibility of an effective sale was an act which, though committed before the purchaser was approached, was committed in the transaction itself and for the purposes of the transaction. Whereas, in the present case, the act of the principal was committed long before the transaction, and before the commission agent was engaged for the purposes of the sale. But it seems to me that when once we admit that the act of a principal which entitles the agent to rescind and sue on a *quantum meruit* need not necessarily be an act subsequent to the exertions of the agent, but may be an act committed before any purchaser was actually approached, we are driven by logical necessity to extend the principle to acts which are altogether antecedent to the transaction itself. In *Green v. Lucas* [1] and *Perera v. Soysa* [2] the position was this. The commission agent could say: " By your own act in asserting, in the one case, that your title was free from extraordinary covenants, or, in the other case, that your land was 3 acres in extent, you sent me into the negotiations so handicapped that any trouble and expense I had incurred in the matter was bound to be wasted when the purchaser ascertained the true facts." So, here, in this case, he can say: " By encumbering your property with the trust you placed me in such a position that any arrangement made with a purchaser was bound to prove abortive when he discovered the true state of the title." There is no English or Ceylon case which goes to this length, but it seems to me that this follows inevitably from the cases I have cited.

There are certain expressions both in our own cases and in the English reports that seem to suggest that a commission agent has the right to sue for what in English law is called a *quantum meruit,* even in cases where the sale or loan goes off simply because the title to the property proves to be defective, whether the defect is due to the act of the principal or not. Thus, the principle as laid down by Wood Renton J. in *Perera v. Soysa* [2] was as follows: " Whenever the agent who is employed to negotiate such a bargain has introduced to his principal a person who is able and willing to enter into the contract, so that nothing further remains for the agent to do, he is entitled to his commission, although the negotiations afterwards fell through in consequence of circumstances over which the agent has no control." (See also the dicta of Bonser C.J. in *Simpson v. Soyza.* [3])

[1] *(1875) 33 L. T. 584.* [2] *(1910) 13 N. L. R. 85.* [3] *(1900) 4 N. L. R. 90.*

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It appears to me, as at present advised, that these statements of the law go beyond the recognized English authorities, which are based upon the principle laid down in *Smith's Leading Cases*, viz., that it is only where the principal has by his own act or default absolutely refused or rendered himself incapable of performing his part of the contract that the right to sue on a *quantum meruit* arises.

There is no doubt that the right of the commission agent to sue on a *quantum meruit* may be made dependent upon a special condition. This was so in the cases of *Beale v. Bond*,[1] *Bull v. Price*,[2] and *Chapman v. Wilson*,[3] but those were not cases in which the failure to complete the contract was due to the default of the principal. It is quite true also that the principal may guard himself even against his own defaults, if he takes the proper measures to do so. As Blackburn, J. said in *Green v. Lucas* [4]: " It might be prudent, in cases of this kind, to introduce into the contract a clause such as ' if this goes off without fraud on my part, you are not entitled to your commission,' " but this was not done in this case. The special words relied on are not wide enough for this purpose.

In my opinion, therefore, the plaintiff is entitled to succeed, and the appeal of the defendant must accordingly be dismissed, with costs.

ENNIS J.—

In this case the plaintiff, who is a broker, sued for Rs. 3,000, commission promised by the defendant for negotiating a sale of Rawita estate, or, in the alternative, for Rs. 2,250, being 2½ per cent. on the purchase price, the plaintiff's customary commission. During the hearing of the case a writing signed by the defendant (D 1) was put in. In it the defendant said: " I will pay commission 1½ per cent. if you get me the Rawita money."

The learned Judge found that the plaintiff did all that he could. He negotiated the sale of Rawita and found a purchaser, who instructed his lawyers to draw up a deed for execution. When the title was examined, it transpired that the defendant had already alienated Rawita by gift to his children, and the sale in consequence fell through. The learned Judge found against the plaintiff on the alleged promise to pay Rs. 3,000, and held on D 1 that the agreement was for a commission of 1½ per cent., for which amount he gave judgment for the plaintiff.

The defendant appeals, and it was urged by his counsel that no commission was payable, as defendant had not received any money from the sale of Rawita estate.

The principle upon which it has been held that a broker is entitled to commission was enunciated in *Perera v. Soysa*,[5] viz., " that where it is agreed that an agent shall be paid a certain commission

[1] *(1901) 84 L. T. 313.*
[2] *(1831) 7 Bing. 237.*
[3] *(1904) 91 L. T. 17.*
[4] *(1875) 33 L. T. 584.*
[5] *(1910) 13 N. L. R. 85.*

in the event of his finding a purchaser for the property, it is sufficient, as a general rule, if he procures a complete and binding contract which is accepted by the principal, although the transaction is never completed."

Where the terms of the agreement expressly provide that the commission is to be paid on the receipt of the money, as in this case, the same rule holds good, and if the sale has fallen through by the default of the principal, the commission is still payable. See *Fisher v. Drewett* [1] and *Bull v. Price.* [2]

On the finding of fact by the learned District Judge, the decree appealed from is, in my opinion, right, and I would dismiss the appeal, with costs.

Appeal dismissed.