

Present : Lascelles C.J. and Pereira J.

1914.

CARIMBHOY *v.* MOHAMAD TAMBY.

22—D. C. Colombo, 36,070.

Negotiation for purchase of land—Commission to be repaid if sale not going through—Default of would-be purchaser.

The defendant ascertained from the owners of a land that they were prepared to sell the estate to him for Rs. 105,000. He then received Rs. 7,500 from the plaintiff and gave him the benefit of the negotiations with the owners, but undertook to return the Rs. 7,500 "in the event of the sale not going through for any reason whatsoever other than the default of the said J. (plaintiff)." The plaintiff subsequently found that many of the tenements on the land were built by the occupants, who were liable to pay only ground rent. He offered a smaller sum, which was refused, and the sale went off. In an action by plaintiff claiming a refund of the sum of Rs. 7,500,—

Held, that plaintiff was entitled to recover the sum.

1914.

THE facts are fully set out in the judgment.

Carimbhoy
v. Mohamad
Tamby

Bawa, K.C., for defendant, appellant.

A. Driberg, for plaintiffs, respondents.

Cur. adv. vult.

May 14, 1914. LASCELLES C.J.—

On the findings of the Court below, which are not controverted, the right of the plaintiffs to recover the Rs. 7,500 depends on the construction of the document P 7, which sets out the conditions on which this sum was paid by the plaintiffs to the defendant. This document is as follows :—

“ Received from Messrs. Davoodbhoy Jafferjee the sum of Rs. 7,500, being my fees for services rendered to them in arranging the sale of Bridge End estate from the present proprietors. In the event of the sale not going through for any reason whatsoever other than the default of the said Messrs. Davoodbhoy Jafferjee, I agree to return to them the said sum of Rs. 7,500 on demand.”

The position of the parties when this document was signed by the defendant was as follows. The defendant had ascertained from the owners of Bridge End estate that they were prepared to sell the estate to him for Rs. 105,000. It is not shown, and I do not think it very likely, that the defendant ever intended to buy the estate himself. But, however that may be, he had received nothing in the shape of a firm offer ; no agreement which was enforceable at law had been executed. Then, after some negotiation, he agreed, for a consideration of Rs. 7,500, to give the plaintiffs the benefit of his negotiations with the proprietors of the estate. The Rs. 7,500 were paid, and the document P 7 was signed by the defendant as a record of the consideration and the terms on which the Rs. 7,500 was paid to him. The sale which was contemplated by P 7 did not go through. The Bridge End estate consisted principally of small tenements in the town of Nawalapitiya, and the plaintiffs, when negotiating for the purchase, counted upon being able to raise the rent of these holdings. On inquiry it was found that many of the holdings had been built by the occupants, and were liable to pay only ground rent. It is not clear whether the tenants had acquired definite rights as *superficiarii*, or whether by putting up buildings, with the consent of the owner, they had acquired rights to compensation, which practically secured them in the position of ground tenants. But there is no question that these ground tenants were in such a position that a purchaser could not raise their rent. For this reason the plaintiffs refused to complete the sale. They offered a less sum, which was refused, and the sale went off. Under the

document P 7 the defendant was obliged to return the Rs. 7,500, " in the event of the sale not going through for any reason whatsoever other than the default of the said Messrs. Davoodbhoy Jafferjee."

1914.

LASCHELLES
C.J.Carimbhoy
v. Mohamad
Tamby

For a definition of what must be understood by the term " default " in a contract of sale we were referred to *In re Young and Harston's Contract*,¹ and no better authority could be cited. In that case Lord Justice Bowen said: "' Default ' is a purely relative term, just like ' negligence. ' It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

Applying this definition, can it be said that the plaintiffs' action in refusing to buy the property was unreasonable in the circumstances ; that it was improper, having regard to their relations with the defendant ?

Putting aside for a moment the plaintiffs' relation with the defendant, there was plainly nothing unreasonable in their refusal to accept the property. The existence of these ground tenants was a serious blot on the title, and one which might well have deterred any prudent investor from buying the property except at a reduced price. The relations between the plaintiffs and the defendant did not in any way alter the situation. There is nothing in these relations from which it can be implied that the plaintiffs were obliged to accept a title which would not have been acceptable to a prudent man of business. It is not as if the defendant had entered into any contract with the vendors and had assigned that contract to the plaintiffs. In that case we should have had to consider the effect of an agreement to sell under the Roman-Dutch law (*vide Jamis v. Suppa Umma et al.*²).

It is only by a figure of speech that the defendant can be said to have assigned " an option " to the plaintiffs. He had no right which was capable of being assigned, and his position, as is shown by the terms of P 7, as well as by the transaction itself, was simply that of a commission agent, who claims remuneration for negotiating a sale. It is, I think, quite clear that the sale did not fall through by reason of any default on the part of the plaintiffs, and I would dismiss the appeal with costs.

PEREIRA J.—I agree.

Appeal dismissed.

¹ 31 Chan. Division 169.

² (1913) 17 N. L. R. 33.