Privy Council Appeal No. 44 *of* 1943

Shankarlal Narayandas Mundade - - - - *Appellant*

v.

The New Mofussil Co. Ltd. (in Liquidation) and Others - - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MARCH, 1946

Present at the Hearing:

LORD MACMILLAN
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* LORD DU PARCQ]

In the suit which has given rise to this appeal, the plaintiff (now the appellant) claimed against the defendant company specific performance of an oral agreement made by the company through its Liquidator, Sir Shapurji Bomanji Billimoria, for the sale to the plaintiff of a Pressing and Ginning Factory at Dhulia. He claimed the like relief against the remaining defendants, in accordance with section 27 of the Specific Relief Act, as persons claiming under the defendant company by a title arising subsequently to the contract.

It may be said at once that if the plaintiff is entitled to the relief which he claims against the defendant company, no question arises as to the liability of the other defendants. It is common ground that a contract for the sale to them of the factory was entered into after the date of the contract alleged by the plaintiff, and they made no attempt at the trial to prove that they had paid the purchase money in good faith and without notice of the original contract. Their Lordships have found it unnecessary to examine the evidence which was called on behalf of the plaintiff to show that these defendants in fact had notice of the earlier contract, since a decision of this Board is clear authority for the proposition that the burden of proving good faith and lack of notice lay upon the defendants. (*Bhup Narain Singh* v. *Gokhul Chand Mahton* (1933) L.R. 61 I.A. 115.)

The suit was tried before the First-Class Subordinate Judge of Dhulia. An objection was taken to the jurisdiction of the Court. Both the Trial Judge and the Judges of the High Court over-ruled it, and the respondents have not persisted in it. Apart from that objection and from questions as to the relief to which the plaintiff was entitled which are not now the subject of dispute, the case as it was presented to the learned judge was a simple one. It appeared that the plaintiff had authorized one Nandurdikar, a broker, to buy the factory on his behalf, and, if necessary, to

pay as much as Rs.65,000 for it. The Liquidators of the defendant company were Sir Shapurji Bomanji Billimoria and a Mr. A. M. Kajiji, since deceased, and it was with the former, who undoubtedly had authority to act for the company, that the negotiations were carried on. After some preliminary discussion the negotiations came to a head in a conversation between Sir Shapurji and Nandurdikar at Bombay on the 7th July, 1936. There was little difference between the accounts given by Sir Shapurji and Nandurdikar of what took place on that day. The trial judge summarizes Sir Shapurji's account of the interview as follows:— He (Nandurdikar) " offered Rs.62,000 as price of the suit factory. Sir Shapurji declined. Nandurdikar came to his office again on 7th July, 1936, at 4 p.m.; he offered Rs.63,000 and Sir Shapurji accepted the offer. Sir Shapurji told Nandurdikar that the earnest money was to be Rs.10,000, that half the costs were to be borne by each party, that the completion period was to be one month and that there were to be other usual terms which are incorporated in agreements by Solicitors. He accepted Nandurdikar's suggestion to pay brokerage at 2½ per cent. Nandurdikar accepted the terms and went to fetch the earnest money. Sir Shapurji called Antia who is a clerk of the Defendant No. 1 Company and told him the terms agreed upon between him and Nandurdikar. He told Antia to take Nandurdikar to Mr. Manekshaw to have the usual agreement drawn up. He told Nandurdikar when he came back to go with Antia. Sir Shapurji left his office at 5.30 p.m. or thereabout. He got a telephone call at his bungalow from Mr. Manekshaw to the effect that the party was offering Rs.7,000 by way of deposit though he had agreed to pay Rs.10,000 as earnest. Sir Shapurji agreed to accept Rs.7,000 on the suggestion of Mr. Manekshaw."

Sir Shapurji's reference to the " usual " agreement is explained by the fact which is stated in his evidence that fifteen, or more, Pressing and Ginning factories, owned by the company, had already been sold. The representative of Messrs. Wadia Ghandy & Company who dealt with the company's affairs was a Mr. Manekshaw, a solicitor of long experience, and on receiving instructions from Sir Shapurji this gentleman, in the words of the defendant company's written statement, " got a draft agreement for sale of the said factory prepared on the same lines on which the other factories belonging to these defendants had been sold to other purchasers ".

According to Nandurdikar, whose evidence was accepted by the Judge, he agreed to all the terms which Manekshaw inserted in the draft agreement. He said, indeed, that both he and Manekshaw initialled one copy of the draft, but this allegation was denied and the learned Judge was left in doubt about it. It is certain, however, that an engrossment was made ready for signature, and that a document prepared by the solicitors and dated the 7th July was handed to Nandurdikar, which acknowledged the receipt of " Rs.7,000 as earnest and on account of Rs.63,000 being the price for the sale of the Pressing and Ginning Factory of the New Mofussil Company Limited at Dhulia with the land building machinery and stores in the factory on the terms of the draft agreement prepared this day ". Mr. Manekshaw's attempts to explain away the receipt and the engrossment met with no success before the trial Judge. The chief matter of dispute before him was an allegation by the defendant company that Nandurdikar had refused to accept the terms put before him by Manekshaw, and had re-opened the negotiations. It was said that, by reason of his attitude, either the business had never proceeded beyond the stage of negotiation, or that, alternatively, after a contract had been concluded it " was re-opened and the parties entered into negotiations afresh, which negotiations did not result in a concluded agreement."

Sir Shapurji himself seems to have had no doubt that there was a concluded agreement. " When " he said " Mr. Manekshaw informed me that the party was haggling about the agreed terms I felt that the party was resiling from the agreement ". The plaintiff had alleged an agreement " in terms of the said draft agreement and the engrossment thereof ". The trial Judge found that this agreement had been proved, and that

" the agreement was not re-opened ". In their Lordships' opinion these findings of fact were amply supported by the evidence, and counsel for the respondents abandoned the contention that the agreement (if made) had been re-opened. Sir Shapurji's own evidence was to the effect that he offered to sell the factory on terms which, as to the more important of them, were stated by himself and, as to minor details, were left to be settled by Mr. Manekshaw. The whole of these terms were orally accepted by Nandurdikar who had full authority from his principal to accept them, and it is manifest from the documents which have already been mentioned that both parties were intending to make a contract.

By the law of India, such an oral contract is valid and enforceable. It was, however, natural enough that the parties should wish to have their agreement put in writing and drawn up in proper form. An offer by Nandurdikar himself to sign the engrossment which the solicitors had prepared was rejected on the ground that he had acted as broker in the transaction. Eventually, on the 10th July, Manekshaw, apparently after consultation with Sir Shapurji, said that the plaintiff himself must sign. On the 11th July, Nandurdikar called on Manekshaw to inform him that the plaintiff would arrive in Bombay on the 13th, but Manekshaw then said that the negotiations were at an end. Nandurdikar protested against this and when, on the 13th, the plaintiff arrived in Bombay he accompanied Nandurdikar to the solicitor's office and offered to sign. Manekshaw refused to allow him to do so, said that the agreement was broken, and offered to return the earnest money. Sir Shapurji's eagerness to be rid of what at first may have seemed to be a good bargain is perhaps explained by the fact that on the same day, as is now admitted, he had received Rs.30,000 as earnest money from the company's co-defendants, who had agreed to pay a purchase price of Rs.125,000 for the Dhulia factory and another Pressing and Ginning factory.

It might well be supposed that on these facts, about which there was no serious difference of opinion between the trial Judge and the High Court, no question of law could arise. By their Memorandum of Appeal, however, the defendants for the first time raised a point which, in the result, found favour with the learned Judges of the High Court. " The learned Judge " it was submitted, " omitted to notice that it was contemplated by the parties that the agreement was not to be considered as complete and binding until it was signed by the parties. He ought to have held that there was no complete agreement as no such agreement was signed by the parties ". In the High Court, the long series of cases which deal with transactions in which the parties have contemplated the execution of a formal contract was reviewed at length. In such cases, as was said by Parker J. (as he then was)," it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through " (*Von Hatzfeldt-Wildenburg* v. *Alexander*: [1912] 1 Ch. 284, at page 289). The learned Judges of the High Court (Broomfield and Divatia JJ.), though they were in substantial agreement with the findings of fact of the trial Judge, came to the conclusion, in the words of Broomfield J., that " Sir Shapurji accepted Nandurdikar's offer subject to the execution of a written agreement and that Nandurdikar acquiesced ". " Every item in the Plaintiff's case might be conceded ", said the learned Judge, " and he would still not be entitled to specific performance ". The question to be decided was, in his opinion, " whether, a draft agreement and engrossment being evidently contemplated by the parties, the contract can be said to be complete without the formal agreement being signed and executed ". Divatia J., in a concurring judgment, held that " the further contract was a term of the bargain and not merely an expression of desire ".

The conclusion come to by the High Court may be expressed in one or other of two ways. It may be said either that there was never a contract between the parties because they did not intend to be bound until an agreement had been drawn up in writing and executed, or alter-

natively, that there was a contract one term of which was that the parties should join in executing a written instrument embodying its terms and that until such an instrument had been executed the contract should not be enforceable. Both these alternative submissions were made to their Lordships in the very able argument of the Respondents' counsel. In whichever way the point is put, their Lordships regard it as open to the objection that it could not fairly be raised for the first time before an appellate tribunal. The submission was not made to the trial Judge in either of its forms. There is no trace of it in the Written Statements of the defendants. It was not the subject of an issue. The Judge does not refer to it in his judgment. No evidence was led with regard to it. If it is to be regarded as founded on the omission of the plaintiff to execute the written agreement, it is not surprising that it was not relied on at the trial by a defendant who had refused to allow the plaintiff to sign although he was ready and willing to do so.

But apart from the objection that the point was taken too late, their Lordships, with all due respect for the Judges of the High Court, are satisfied that it is without substance. In their Lordships' opinion, the facts do not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, their Lordships consider that there was ample evidence to prove that both parties intended to make, and believed that they had made, a binding oral agreement. Their desire and intention to put that agreement into formal shape does not affect its validity.

It was contended by counsel for the respondent that the agreement was necessarily incomplete because it had been left to the solicitors to settle some of its terms and because (as counsel rightly submitted) a solicitor has no implied authority to make a contract on his client's behalf. Their Lordships are of opinion, however, that no question as to a solicitor's implied authority arises in this case. In their Lordships' view, it is a fair inference from the evidence that Sir Shapurji authorized Mr. Manekshaw to put before the plaintiff for his acceptance the " usual " terms. In the circumstances which have already been explained, this seems to their Lordships to have been a very natural and businesslike course for Sir Shapurji to take, and necessarily resulted, when the appellant accepted the terms, in the formation of a binding contract.

For these reasons, their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The defendants must pay the plaintiff's costs of the appeal and in the High Court.

(48611) Wt. 8013—5 170 4/46 D.L. G. 338

In the Privy Council

SHANKARLAL NARAYANDAS MUNDADE

v.

THE NEW MOFUSSIL CO. LTD.
(IN LIQUIDATION) AND OTHERS

DELIVERED BY LORD DU PARCQ

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