

ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice B. Tyabji.

1895.
August
9, 10, 12.

THE MUNICIPAL CORPORATION OF BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* CUVERJI HIRJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

MOTLIBA'I (ORIGINAL DEFENDANT), APPELLANT, *v.* CUVERJI HIRJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Vendor and purchaser—Broker—Brokerage from vendor and vendee—Position and rights of broker—Claim of brokerage from both vendor and vendee.

A broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him.

A broker is entitled to his commission where he has induced in the vendor the contracting mind, the willingness to open negotiations upon a reasonable basis even though a change or modification of the terms of the contract is made by the buyer and seller without his intervention.

A broker sued the Municipality of Bombay for brokerage in respect of land purchased by them.

Held, that, if during the time that the broker was negotiating with the vendor, the latter was induced to consent to the sale, the broker was entitled to his brokerage. It was not material to enquire what operated upon the mind of the vendor, and whether it was the advice of friends, or the knowledge that his land could be acquired compulsorily, or the persuasions of the broker. It was sufficient to support the broker's claim if the vendor's acceptance of the terms was brought about during his intervention; and the fact that the Municipal Commissioner stepped in at the last moment, and himself actually struck the bargain, did not deprive the broker of his brokerage.

Primarily a broker is merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage it must be shown that he has been employed by such party to act for him, or that in the contract he has agreed to pay brokerage.

THESE two appeals were heard together. The respondents (plaintiffs) in both suits were a firm of brokers in Bombay, and in both suits they claimed to recover money alleged to be due to them as brokerage in certain transactions. They alleged that in 1891 they were instructed to purchase lands required by the Municipality for certain proposed new roads. The price was not to exceed Rs. 3 per square yard. They purchased a quantity of land at this rate, and were paid two per cent. on the purchase-money as brokerage by the Municipality. There remained three

* Suit No. 402 of 1893; Appeal No. 857.

† Suit No. 403 of 1893; Appeal No. 856.

plots of land still to be obtained : two of them belonged to Bái Motlibái and the third to one Muncherji Framji Cáma. With much difficulty they ultimately persuaded these owners to part with the land, and the two plots were accordingly purchased from Bái Motlibái for Rs. 7,47,489, the brokerage on which at two per cent. was Rs. 14,949, and the third plot was purchased from Muncherji for Rs. 1,72,124, the brokerage on which at the same rate was Rs. 3,462.

In their suit against the Municipality (No. 402 of 1893) as purchasers the plaintiffs claimed both these sums.

The Municipality alleged that their purchase of the lands in question had not been brought about by the plaintiffs, and they denied their liability.

The second suit (No. 403 of 1893) was brought by the plaintiffs against Bái Motlibái in respect of the first of above transactions. They claimed to recover from her, *as vendor*, another sum of Rs. 14,949, being brokerage on the purchase-money of the land sold by her to the Municipality charged at the same rate as the plaintiffs charged the purchaser, *viz.*, two per cent.

Bái Motlibái in her written statement denied her liability, alleging that she had not employed the plaintiffs as brokers nor accepted their services as such.

In both suits the lower Court passed a decree for the plaintiffs for the sums respectively claimed.

The defendants in both suits appealed, and the appeals were heard together.

Macpherson (Acting Advocate General), *Inverarity* and *Scott* for appellants in both appeals.

Lowndes and *Jardine* for the respondents.

The arguments of counsel were exclusively upon the facts appearing in the evidence taken by the lower Court.

FARRAN, C. J. :—The questions which we have to determine in these appeals are (1) whether the Division Court was right in awarding to the plaintiffs' firm of Cuverji Hirji and Company brokerage at the rate of two per cent. against the appellants the Municipal Corporation of Bombay in respect of the purchase by

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the latter of two plots of land at Agradáda, one from the appellant Motlibái and one from Mr. Muncherji Cáma, and (2) whether that Court was right in awarding to the same firm brokerage at the same rate against the appellant Motlibái in respect of the sale by her of the former plot to the Municipality. The sums awarded are large—Rs. 18,412-4-2 against the Municipality and Rs. 14,949-12-5 against the appellant Motlibái. In each case the appellants respectively contend that they are not liable to pay the plaintiffs any brokerage, and if they are liable for brokerage, they are not liable at the rate of two per cent. awarded.

Separate evidence was not recorded in the Court below in each of the two cases. Before us it was argued that the evidence presented in Appeal No. 857 (Suit No. 402) should be taken as the evidence upon which both appeals should be decided, with the exception of that of the witness M. H. Máju, whose evidence was only to be read in Appeal No. 856 (Suit No. 403).

(After dealing with preliminary matters not material to this report His Lordship continued :—) The question which we have to consider next, is upon what terms as to remuneration Hirji Hansráj was employed by the Municipality. This forms the basis of the case against that body. Hirji was really only a partner in the plaintiffs' firm; but, as the other partners were dormant, so far as the transactions in question in the suit are concerned, we shall speak of Hirji Hansráj as though he only were the broker.

The Municipality of Bombay in carrying out their operations for the well-being and improvement of the city have often to acquire lands in particular localities. Such lands are acquired sometimes by ordinary purchase and sometimes by inducing Government to put in force the provisions of the Land Acquisition Act on their behalf. In addition to the limited compulsory powers of purchase which their own Act (Bombay Act III of 1888) confers upon them, they can always apply to Government to put in force the provisions of the general Act. They differ, therefore, from private purchasers in that they can compel unwilling owners to part with their lands; but, if they are known to be the intending purchasers, they can be forced to pay

for the land, which they are under the necessity of acquiring, a little more than its actual market value. Their position in this respect must be borne in mind when we come to consider the claim of their brokers against Motlibái (His Lordship reviewed the evidence as to the terms in which the brokers were employed, and found that the agreement was that brokerage should be paid at the rate of one per cent. He then continued :—)

Mr. Scott for the appellants argued that the evidence afforded signs of a special agreement between the Municipality and Hirji that the latter should be paid brokerage only in cases where the bargain had been actually struck through him. The only written evidence which he can point to (oral there is none) in support of the argument is an ambiguous phrase in Exhibit No. 1. We do not consider that it affords any substantial basis for such a contention. And we think that whatever the general law may be which governs the relation between principal and brokers, such is the law to be applied between the Municipality and Hirji. Now we take that law to be as laid down by Erle, C. J., in *Green v. Bartlett*⁽¹⁾. His Lordship says : “ The question whether or not an agent is entitled to commission, has repeatedly been litigated, and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him.” In that case the purchaser had been introduced to the vendor by the agent. In the present case, there is no question of introduction. That is often the main office of a broker in cases where an article of commerce is sold. The bringing together of a willing vendor and a willing purchaser is virtually bringing about the bargain, and the same is often the consequence, though in a less degree, of bringing a vendor and buyer of land into communication. But, in a case like the present, the owner is usually well known to the intending purchaser ; the latter has no difficulty in ascertaining the person with whom he has to deal. The initial phase of the transaction is not the making of the parties known to each other, but the inducing in the owner the contracting mind — the willingness to open negotiations upon a reasonable basis. The American authorities cited in the notes to Story on Agency

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(1) 14 C. B. N. S., 681.

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(9th Ed.), p. 329, show that a broker is entitled to his commission who has negotiated the contract, even though a change or modification of its terms is made between the buyer and seller; and that view is, we think, borne out by the English cases. See *Green v. Bartlett* (*supra*) and *Wilkinson v. Martin*⁽¹⁾; *Mansill v. Clements*⁽²⁾; *Lara v. Hill*⁽³⁾.

We proceed to consider how far Hirji brought about the Motlibái purchase. We shall deal with the history of the transaction in some detail, as it is necessary to have it fully before us when considering the plaintiff's claim against Motlibái. (His Lordship discussed the evidence at length and continued:—)

Now the result of this evidence appears to us to be, so far as the Municipality is concerned, that although Hirji did not succeed in obtaining a definite account in writing from Motlibái of the terms upon which she would part with the land, yet during the time he was negotiating with her, her mind had been brought to the point of being willing to accept either Rs. 3 per square yard of her land or to grant it on Fazendári tenure at two annas per square yard per annum; and that when the purchase was effected upon the former terms, it had been substantially brought about while Hirji was conducting the negotiations on behalf of the Municipality. It is not, we think, material to enquire what operated upon the mind of Motlibái to bring about this condition of mind, whether it was the advice of her friend Mr. Bengáli or the knowledge that her land could be acquired compulsorily, or the persuasions of Hirji. It appears to us sufficient, to support Hirji's claim against the Municipality, if it was brought about during the intervention of Hirji, and we think that the Municipal Commissioner stepping in at the last moment, and himself actually striking the bargain, does not deprive Hirji of his claim to brokerage.

We turn to a consideration of the liability of Motlibái to pay brokerage to Hirji in respect of this contract. The evidence in the case shows that the rate of commission usually demanded by, and given to, land brokers in Bombay, where there is no special agreement, is two per cent. on the purchase-money, but that this

(1) 8 C. and P., 1.

(2) L. R., 9 C. P., 139.

(3) 15 C. B. N. S., 45.

rate, which is deemed exorbitant in the case of large purchases, is usually modified by special agreement in such cases. The question before us is not, however, so much as to the rate of brokerage. It is rather as to the liability of Motlibái to pay brokerage at all.

Hormusji Muncherji Cama makes the following statement:—
 “The practice as to brokerage on sale of land in Bombay is that, in the absence of special contract, the purchaser and the seller both pay two per cent.” Subject to the above observations as to the rate, this is doubtless true in cases where a broker is engaged on each side; but as Hormusji was speaking of a case in which there had been but one broker employed on both sides, his answer must, we think, as contended for by counsel for the respondent, have reference to that case also. There was no cross-examination upon this answer. Hirji says in his re-examination: “Besides the Rs. 31,800 received as brokerage, I have also received a large amount of brokerage from the parties on the other side. In all cases of private purchase, I always received brokerage from the other side, and in every case, except Cama’s, I was paid two per cent.”

No evidence was given for the defendant Motlibái to contradict or modify these statements. We must, therefore, assume that where a contract for the sale of land is completed through the intervention of a common broker, the practice, subject as above stated, is that he receives two per cent. from each of the contracting parties.

The common course appears, in such cases, to be to sign the contract subject to the usual or agreed rate of brokerage being paid. This appears from the plaintiff’s letters, and coincides with our experience. This affords the parties the opportunity of considering the question of their liability to brokerage and its rate before finally signing. The practice, as we have stated it, assumes the employment of a common broker. A broker is often spoken of as a middleman or negotiator between two parties (Story on Agency, p. 29; *Fairlie v. Fenton*⁽¹⁾). He frequently acts as the agent of each. “The engagement of a broker is, like

(1) L. R., 5 Ex., p. 169,

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that of a proxy, a factor or agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what every one of them entrusts him with" (Domat, Bk. I, tit. 17, cited in Story on Agency, p. 28, in *notis*). But primarily he is deemed merely the agent of the party by whom he is originally employed (Story, p. 31). To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for him, or that in the contract such party has agreed to pay the brokerage.

In the present case we think, therefore, that it lies on the plaintiffs to show that Motlibái employed Hirji as her agent to conduct the negotiation before they can recover brokerage from her. The case is peculiar. Hirji did not, as we have said, introduce the parties to each other, nor was the purchase actually completed through him. He was a special agent of the Municipality, who are a body, as we have pointed out, armed with peculiar power of purchasing land, to effect this and other purchases, and his position as such was known to Motlibái. His commission, too, was not agreed to at the time of the contract being entered to. Under those circumstances it appears to us that he cannot receive brokerage from Motlibái unless he can show that he was engaged by her to negotiate on her behalf. No special agreement between Hirji and Motlibái is alleged in the plaint, and there is no *prima facie* presumption, we think, of his having been engaged by her.

Motlibái has positively denied that she ever engaged Hirji as her broker; but this denial is not in itself entitled to much weight, as she has untruly asserted that he had no interviews with her save one. That circumstance cannot, however, we think, be pressed strongly against her. She is a very old lady, and in August, 1894, showed symptoms of senile *dementia*, with a failing memory (Exhibit 44). Her examination had been taken so late as December, 1893. The same excuse cannot be made for some of the witnesses who supported her assertions. Hirji's diary shows six interviews with Motlibái between the 14th April,

1892, and the 17th of October inclusive in that year. They are Exhibits 22b, 22f, 22p, 22R, 22h, 22q; of these 22f and 22p alone support the idea that Motlibái employed Hirji, or suggested that he should obtain favourable terms for her. The rest of the several interviews which he had with Bengáli and Nowroji point to him as urging upon her acceptance terms which, he thought, would be acceptable to the Municipal Corporation. The oral evidence of Hirji Hansráj does not advance the case any further upon this point. Nor we think does the fact of Motlibái not having answered Hirji's letters (Exhibits Z and A1). Notwithstanding the terms in which these letters are couched, Motlibái had all along taken up the position that she would not make an offer to the Municipality, but would consider offers made to her by that body. Hirji, we think, when ignoring this he pressed the lady to make an offer to the Municipal Corporation, cannot complain that his letter was not distinctly replied to, nor can it be inferred from Motlibái's not replying that she recognised his right to brokerage. Her not replying to his subsequent letters (Exhibits A 7 and A 12) is as consistent with her having considered them to be begging letters as with her having recognized the claim made upon her as just.

The plaintiff's whole case against Motlibái rests, we think, upon Exhibit 22p⁽¹⁾. Assuming the last two paragraphs of that entry

(1) This exhibit was an extract from the diary of Hirji (plaintiff No. 2) under date 28th August, 1892, which was as follows:—

“To-day being Sunday (I) had had an interrupted interview with Bái Motlibái Wádia. In course of conversation as usual about her land (she) said as follows:—

“My younger son does not agree with my view. He says that (the land) may either be sold (to the Municipality) at the rate of Rs. 5, or that (a portion of) the land sufficient for (the purpose of) the roads may be given free of charge. But I and (my) elder son are of opinion that (the land) should not be sold, but that the same should be given on perpetual lease, so that a permanent income may be secured. But do you’ (she) said ‘get (the Municipality) to pay something more than two annas (rate)’ and suggested certain alterations in the conditions. But ultimately (she) said in sweet words ‘do you arrange definitely with the Municipality and call (again) to-morrow (or) day after; I will give a clear answer.’

“To-day the aforesaid Bái asked (me) about the practice in respect of the brokerage. (I) told her the practice (was to charge the brokerage) at the rate of two per cent. on twenty years’ rent.

“On this occasion the Bái often consulted an aged Pársi who was sitting by her side.”

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to be genuine, and to represent correctly what took place (and for this we have to rely wholly upon the truthfulness and accuracy of Hirji,) we do not consider that they establish an agreement on the part of Motlibái to pay brokerage to the plaintiff. Taking the penultimate clause at the highest, it only shows that Motlibái contemplated the possibility of paying Hirji brokerage on a lease if she should grant one to the Municipality. Such a lease she never granted. We are of opinion that under these circumstances Hirji has not established his right to brokerage against Motlibái.

(As to the second claim of the plaintiffs against the Municipality in Suit No. 402 of 1893, viz., the claim for brokerage in respect of the purchase from Muncherji Framji Cama, His Lordship after discussing the evidence held that the plaintiffs were entitled to recover brokerage from the Municipality on the amount of the purchase-money at *one per cent.*, and continued:—)

The decree in Appeal No. 857 (Suit No. 402) will, therefore, be varied, reducing the amount awarded by one-half. In other respects it stands confirmed. Each party to have their own costs of that appeal. The Appeal No. 856 (Suit No. 403) will be allowed and the suit dismissed. As to costs, we think that we ought not to allow Motlibái any costs either of the suit or appeal. It was her denial of Hirji's interviews with her, and the resulting charge of fabrication of books by him, which caused the great length of the hearing in this case. Even in appeal the same charges, though in a modified form, were insisted on. Moreover, by not answering Hirji's letters, and allowing him to assume that she recognized his claim to brokerage, she in some measure was the cause of the litigation between Hirji and herself. The untruthful line of defence which she adopted is, however, the reason which compels us to refuse her her costs.

Decree varied.

Attorneys for the appellants:—Messrs. Crawford & Co. and Messrs. Craigie, Lynch and Owen.

Attorneys for the respondent (plaintiff):—Messrs. Payne, Gilbert and Sayani.