

SUPREME COURT OF INDIA

Col. D. I. Mac Pherson

Vs.

M.N.Appanna

Or.S.No.1 of 1945

(Saiyid Fazal Ali,J., B.K. Mukherjea and N.Chandrashekar Aiyar,JJ.,)

09.02.1951

JUDGMENT

Saiyid Fazl Ali J.,

1. This is an appeal from a judgment of the Judicial Commissioner of Coorg in a suit filed by the first respondent (hereinafter referred to as the plaintiff) against the appellant (hereinafter referred to as the first defendant) and the second respondent (hereinafter referred to as the second defendant), for the specific performance of a contract. The first defendant owned a bungalow in Mercara known as "Morvern Lodge". The suit which has given rise to this appeal was instituted by the plaintiff for the specific performance of an alleged contract of sale in respect of this bungalow.

2. It appears that the first defendant owned certain estates in Mercara, and one Mr. White was an alternative director in one of the estates, and Youngman was the manager of another estate also belonging to the first defendant and was looking after "Morvern Lodge" during his absence. It seems that about the middle of 1944, the plaintiff asked White if he would cable to the first defendant his offer of Rs. 4,000 for the bungalow, and, on the 1st June, 1944, White sent a cable to the first defendant to the following effect :-

"Have enquiries Mercara bungalow if for sale, wire lowest figure."

3. On the 24th July, 1944, the plaintiff wrote to the first defendant that he was prepared to purchase the bungalow for Rs. 5,000 and if the offer was acceptable to him, he (the first defendant) should inform the plaintiff to which bank he should issue a cheque in payment of the price. This letter was followed up by a cable from Youngman to the first defendant to the following effect :-

"Have had offer Morvern Lodge rupees six thousand for immediate possession."

4. On the 8th August, 1944, Youngman received a cable from the first defendant saying : "Won't accept less than rupees ten thousand". On the 7th August, 1944, the plaintiff wrote to

Youngman asking him whether his offer had been accepted, and saying that he was prepared to accept any higher price if found reasonable. Meanwhile, on the 8th August, the first defendant sent an airgraph to Youngman, which states inter alia :-

"I got a cable from you a few days ago saying you had had an offer of Rs. 6,000 for Morvern Lodge. At the same time I got one from White saying value of Bungalow was Rs. 10,000. So wired you - 'Won't accept less than Rs. 10,000'." On the 9th August, 1944, Youngman wrote to the plaintiff as follows :-

"In reply to your letter, dated 7th August, I received yesterday a cable from Col. MacPherson regarding your offer of Rs. 6,000, which reads as follows :- 'Won't accept less than rupees ten thousand' MacPherson."

5. The plaintiff has stated in his plaint that this letter of Youngman was received by him on the 14th August, 1944, and he immediately accepted the "counter-offer made by the first defendant", and confirmed it in writing in a letter addressed to Youngman. In his evidence, however, the plaintiff has stated that he met Youngman on the 11th August after receiving his letter and told him personally that he would pay Rs. 10,000 for the bungalow and will require immediate delivery. There was also some talk about the conveyance charges, and ultimately the plaintiff agreed to bear those charges. Afterwards, he wrote to Youngman a letter on the 14th August in which after referring to the conversation he had with the latter he stated as follows :-

"I hereby confirm my oral offer of ten thousand for the bungalow. I shall be grateful if you will kindly hurry up with consultation with your lawyers at Madras and make arrangements to receive the money and hand over the bungalow as early as practicable."

6. It appears that three days later, i.e., on the 17th August, one Subbayya wrote to Youngman stating that "he confirmed his offer of Rs. 10,500 made to him (Youngman) the previous day for the purchase of the bungalow", and he expected that the latter had cabled to the first defendant communicating the offer as promised. It seems that Youngman did not communicate Subbayya's offer to the first defendant, but sent a cable to him on the 26th August to the following effect :-

"Offered ten thousand Morvern Lodge immediate possession. May I sell." On the same day, White cabled to the first defendant in the following terms :-

"Hold offer for Morvern Bungalow rupees eleven thousand cash subject immediately acceptance and occupation. Strongly recommended acceptance."

7. On the 29th August, Youngman sent an airgraph to the first defendant in which he wrote as follows :-

"Thank you for your airgraph letters of 8th August which reached me on 24th instant. I cabled you on Saturday an offer of Rs. 10,000 for Morvern Lodge from the would

be purchaser who previously had offered Rs. 6,000, but I had a call from White a day or two ago and he tells me that he cabled an offer on the same day of Rs. 11,000. I expect you will have answered these and will have accepted White's offer. If you have decided will you please arrange for a Power-of-Attorney to be prepared as soon as possible."

8. In the meantime, the first defendant sent a cable to White to the following effect :-

"Accept rupees eleven thousand Morvern Lodge occupation permitted when full amount deposited my account Mercantile Bank Madras inform Youngman."

9. Thereafter, the second defendant paid the amount of Rs. 11,000 and occupied the bungalow.

10. The question to be decided in this case is whether in view of the correspondence which has been reproduced, it could be held that there was a concluded contract for the sale of "Morvern Lodge" in favour of the plaintiff on the 14th August, as stated by him in the plaint. The Judicial Commissioner of Coorg who tried the suit held that there was a concluded contract, but, instead of giving to the plaintiff a decree for specific performance, awarded a sum of Rs. 3,000 as compensation to him. Against this decree, the first defendant alone has appealed, after obtaining a certificate under Section 109(c) of the Civil Procedure Code from the Judicial Commissioner. The plaintiff has not preferred any appeal.

11. The plaintiff's case is that the cable sent by the first defendant on the 5th August, and received by Youngman on the 8th, to the effect that he would not accept less than Rs. 10,000, was a counter-offer made by him through Youngman to the plaintiff, and the contract was complete as soon as he accepted it. We however find it difficult to hold on the entire facts of the case that there was any concluded contract on the 14th August, 1944, and we are supported in this view by the well-known case of *Harvey v. Facey* [[1893] A.C. 552], in which the facts were somewhat similar to those of the present case. In that case, the appellants had telegraphed to the respondents "Will you sell us B.H.P. ? Telegraph lowest cash price", and the respondents had telegraphed in reply, "Lowest price for B.H.P. Pound 900," and then the appellants telegraphed, "We agree to buy B.H.P. for Pound 900 asked by you. Please send us your title-deed in order that we may get early possession," but received no reply. On these facts, the Privy Council held that there was no contract, and Lord Norris, who delivered the judgment of the Board, observed as follows :-

"The third telegram from the appellants treats the answer of L. M. Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L.M. Facey as binding him in any respect, except to the extent it does by its terms, viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell them; it is an offer that required to be accepted by L. M. Facey. The contract could only be completed if L. M. Facey had accepted the appellant's last telegram. It has been contended for the appellants that L. M. Facey's telegram should

be read as saying 'yes' to the first question put in the appellant's telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question, viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."

12. The conclusion at which we have arrived is strengthened by certain facts which emerge from the correspondence between the parties. The real question is whether the first defendant had made a counter-offer in his cable of the 5th August or he was merely inviting offers. The plaintiff in his letter of the 14th August addressed to Youngman, stated that he confirmed his oral offer of ten thousand for the bungalow and he did not say in so many words that he accepts the 'counter-offer' of the first defendant. Similarly, in the cable which Youngman sent to the first defendant on the 28th August, he did not state that the latter's offer had been accepted, but stated that he had been offered Rs. 10,000 for the bungalow and concluded with the words "May I sell ?" Neither party thus treated the first defendant's cable as containing a counter-offer. On the other hand, they proceeded on the footing that the plaintiff had made an offer of Rs. 10,000 which was subject to acceptance by the first defendant. Apparently, the first defendant was in communication not only with Youngman but also White, and both of them rightly thought that no transaction could be concluded without obtaining the first defendant's express assent to it.

13. Mr. Jindra Lal, counsel for the plaintiff, who pressed his points with force and ability, contended that by the 26th August, 1944, Youngman had come under the influence of the rival bidder or at least that of White who was supporting him, and the cable to the first defendant was deliberately framed by Youngman in such a way as to prejudice the plaintiff. There is however nothing in the evidence to support such an extreme conclusion. On the other hand, Youngman has frankly stated in his evidence that he felt it improper to entertain Subbayya's higher offer and did not communicate it to the first defendant. This statement is supported by the cable of the 26th August and, if Youngman can be said to have had any learning at all, it was certainly in favour of the plaintiff. In these circumstances, it would be difficult to hold that Youngman had deliberately misdescribed the plaintiff's acceptance of the counter-offer as his offer in the cable which he sent on the 26th August to the first defendant.

14. It seems to us that the view taken by the Judicial Commissioner is not correct, and, as there was no concluded contract, the decree passed by him awarding compensation to the plaintiff for breach of contract cannot be sustained. We therefore allow the appeal, set aside the judgment and decree of the Judicial Commissioner and dismiss the plaintiff's suit. Having regard to the circumstances of the case, we make no order as to costs.

15. Appeal allowed.