

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Eshanchunder Sing v. Schamachurn Bhutto, from the High Court of Judicature at Fort William in Bengal; delivered 3rd November, 1866.*

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Present :

LORD WESTBURY.

SIR JAMES W. COLVILE.

SIR EDWARD VAUGHAN WILLIAMS.

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SIR LAWRENCE PEEL.

THIS is an Appeal from the decision given by the High Court of Calcutta, reversing a Judgment of the Court of the Principal Sudder Ameen of Santipore. The case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. Unfortunately, in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the Plaintiff, and devoid not only of allegation but also of evidence in support of it.

The case made by the Plaintiff alleges a distinct agreement between the Plaintiff and two brothers (whose names have been pronounced in a short manner—the one Koilas and the other Eshen), that the three should be joint purchasers and joint owners—owners in common at all events—of a certain lease which was put up by a zemindar to be taken by public tender at a particular time. The Plaintiff proceeds upon the allegation that that lease was taken by Koilas on his own behalf and on behalf of Eshen and on behalf of the Plaintiff, and that, in conformity with the

agreement between the three, Koilas subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations therefore of the Plaintiff are inconsistent with the hypothesis of Koilas having no interest and acting in the transaction as agent only of Eshen. The Plaintiff also proceeds upon a clear and well-defined ground of relief, viz. contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between Koilas and Eshen of principal and agent, and from the alleged fact of Koilas, in the execution of his authority, having given certain rights and interests to the Plaintiff without which his principal (Eshen) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of First Instance, that of the Principal Sudder Ameen, found the facts of the case to be in direct contradiction to the allegations contained in the Plaintiff. It was found that Koilas had no interest at all; that the money paid to the lessor was not money in which Koilas had any interest or right; that Koilas acted from the beginning under the authority and as the agent only of Eshen; that the contract was completed with the money of Eshen; and that there is nothing at all to show that Eshen in any manner was made aware of or was party or privy to the alleged transactions between Koilas and the Plaintiff. These facts being established by the Judgment, and being therefore binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the Plaintiff, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original Judgment. That original Judgment was the subject of an intermediate appeal, which however does not vary the matter, because the Judge of the First Court of Appeal thought it right to dismiss that application and to affirm the original Judgment.

We now come to consider the assumed state of facts, which is the basis of the decision of

the High Court. The High Court takes it that Koilas was nothing more than the agent of Eshen; but the High Court appears to have in some manner or other arrived at this conclusion which does not appear to their Lordships to be warranted either by allegation or evidence, viz., that at the auction, or previous to the auction, there was an agreement between the Plaintiff and Koilas that the Plaintiff should abstain from bidding, and that in consequence of that abstinence on the part of the Plaintiff, Koilas succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give, and that the Defendant Eshen took possession of the property with the knowledge of that transaction on the part of Koilas. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the Plaintiff to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the Defendant has to meet, but which are in reality contradictory of the case made by the Plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of Appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true, and to be the competent subject of judicial inquiry, the legal conclusion which is attempted to be derived from those facts is not consistent with the settled principles of law or equity. Supposing it to be the case that a man sends an agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auc-

tion, and, in the execution of that authority, he does bid, and the estate is knocked down to him; but collaterally and in a bye manner he enters into a distinct and separate contract with an individual, that in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum; it is quite plain that, upon every consideration of justice, the principal cannot be bound by this bye transaction on the part of the agent. If the agent makes a contract on the part of the principal, having a definite authority, and he exceeds that authority by inserting a term in the contract itself, it would not be competent to the principal to say, "I will repudiate the inserted term in the contract, as being *ultra vires* and unauthorized, but I will obtain performance of the rest of the contract." In such a case, although the agent had no authority for the additional term, yet, as it is an integral part of the contract itself and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But in the other case, the act of the agent, if effect were given to it, would subject the principal, not only to the contract which he authorized and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated.

Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the Plaintiff, shall not be departed from; and they could not concur in the conclusion of law which has been drawn by the Court below, even if they were at liberty to take into consideration the state of facts which that Court assumed.

Their Lordships, therefore, will advise Her Majesty to reverse the decree that has been appealed from; thereby confirming the original decree, and the decree of the Zillah Court, and to give the Appellant the costs of this Appeal, the application to the High Court being directed to be refused with costs.