Privy Council Appeal No. 114 *of* 1931.

Jehangir Shapoorji Taraporevala - - - - - - *Appellant*

v.

Reverend Savarkar, Secretary of the Bombay Tract and Book Society - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE, 1932.

Present at the Hearing:—

LORD WRIGHT.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WRIGHT.]

The appellant in the case is a photographer who in 1913 took a lease for ten years of certain premises owned by the Bombay Tract and Book Society, hereinafter called the Society, and later, in 1925, took a renewal of that lease for a further ten years from 1923. In 1927 the Society sold the property, subject to the appellant's leasehold interest, to one Kavarana. The appellant claims that this sale was in breach of an obligation undertaken to him by the Society in 1913 in consideration of his entering then into the lease, and he claims specific performance as under that obligation. The respondent is sued as secretary of the Society which is a charitable society in Bombay, formed according to its memorandum of association to circulate religious tracts, and managed by a committee, and with three trustees in whom its property was vested with powers of disposal. The secretary was named in the regulations as the proper person by whom the Society was to sue or be sued. The Society, who owned the house in question, retained certain portions for its own use, and leased

to the appellant under the lease of the 11th February, 1913, certain portions of the ground and first floor and the whole of the second and third floors: by the lease the lessors covenanted (*inter alia*) to do all heavy repairs. The appellant's claim as set out in paragraph 3 of the plaint, is as follows :—

> " The said Society thereupon promised to the plaintiff that before selling the said building to a third party it would offer to sell the said building to the plaintiff at the net price free from brokerage obtainable from such intending purchaser, thus giving to the plaintiff the right of first refusal and the plaintiff in return promised to take the major part of the said building on a long lease upon terms and conditions orally agreed upon between the parties."

In the proceedings a further or alternative claim was set up, expressed as follows in Issue No. 7 :—

> " Whether the assurance mentioned in the letter of 9th May, 1927, from Athavle to the plaintiff amounted to an agreement on the part of the Society to give the plaintiff a right of first refusal in regard to the purchase of the property."

There is an obvious difference on the face of it between these two allegations. A right of first refusal, which is a vague expression, imports prima facie no more than an obligation to give a reasonable opportunity of buying to the appellant if or when the Society should desire to sell, whereas the alleged oral agreement involves the Society informing the appellant of any concrete offer from any intending purchaser before the Society could close with that offer, and giving the appellant a chance of then purchasing on preferential terms free from brokerage. The peculiarity of this case is that there is nowhere to be found in the various documents passing between the two parties, or in the leases or in the Society's minutes, any record or indication of any such bargain as the appellant alleges to have been orally made until the appellant wrote on the 10th September, 1927, after he had been informed of the completion of the sale to Kavarana ; nor is there any written reference even to " a right of first refusal " until 1926. The appellant sought to prove his case by the oral evidence of himself, supported by that of Mr. Smith, who was the Society's secretary from 1912 until 1923, and also from inferences which he sought to draw from happenings between the parties between 1913 and 1927. The appellant deposed that he had spent Rs. 30,000 on taking possession under the lease and had only done so on the faith that he should have this additional right, so that the premises could not be sold away from him against his will. His evidence was that he had said to Mr. Smith that he would only take a lease and sink capital if he had the first refusal, and that Mr. Smith came back and assured him that the Society agreed that if and when they sold the premises they would give him the right of first refusal. Mr. Smith corroborated, and said he told him " the committee had agreed to give him the first refusal if they wanted to sell." Mr. Smith further said in cross-examination, " The first agreement [*sc.* in 1913] was simply that he [*sc.* the appellant] should have the first refusal. In 1918

or 1919 we discussed the matter, and it was agreed that as we were dealing direct with one another the price should be less brokerage. . . . I cannot say if I put this before the committee." The appellant, however, said, " There was no new agreement in 1919 to give me the first refusal." The minutes of the Society for 1912 and 1913 had been destroyed by white ants, but Mr. Smith cannot swear that any such agreement as is alleged was embodied in the minutes; there is nowhere any written note of it. As against the evidence of the appellant and Mr. Smith, Mr. Athavle, an advocate—now Coroner of Bombay—a member of committee of the Society in 1912 and 1920 and subsequently at all material times president, and Mr. Aston, now Judicial Commissioner in Sind and in 1912 a magistrate in Bombay, and a member of the committee at all material times till 1921, both deposed that they had never heard of any such condition being agreed, though if it had been they must have heard of it. Mr. Aston adds: " I think the secretary brought to the attention of the committee that appellant was a photographer and it would be hard if he had to turn out and lose his fittings. I think the committee agreed to give him notice of any sale to an intending purchaser that he might be able to bid. I do not recollect his being given any right to buy in preference to any other person." The Trial Judge was favourably impressed by this witness. What he states may well explain the genesis of the idea that the appellant was given any contractual right. This would well explain why there was no written record in the lease of any such right, because no right was understood. It is true that under Section 92 of the Indian Evidence Act evidence of such a collateral contract, if there were such, would not be excluded, though it would be strange to omit such a condition if it had been agreed. The Trial Judge acquits all the witnesses of any intention to give other than truthful evidence. But, taking all the evidence in the sense most beneficial to the appellant, their Lordships are of opinion that no such contract as the appellant alleges in paragraph 3 of his plaint is established. The obvious inference from the evidence appears to be that a friendly assurance was given to the appellant that in the event of the Society contemplating a sale of the property every consideration would be given to him as sitting tenant, so that he would have a fair opportunity of purchasing if so minded. Nor is the appellant's case strengthened by the subsequent happenings. In 1918 the Society had some idea of selling the property, and the appellant was informed of an offer the Society had received. The idea fell through: the appellant stated he was not then prepared to buy, the price being too high for him. A draft lease was prepared to meet the case, in the appellant's interests, of the property being then sold, but was not executed. In 1919 the Society again considered the question of selling the property, and the appellant was informed of an offer which the Society had received from a third party to purchase at Rs. 210,000,

and he offered to buy at Rs. 206,000. In his letter he stated that the difference was " the usual 2 per cent. to be paid to my friends who have brought about the sale. I mention this just in order to satisfy you that I am willing to pay you just the same amount of money as any outside purchaser would pay you to whom you would be selling the property." This last observation appears to be inconsistent with the appellant's present claim. The Society abandoned the project of selling because of the difficulty of obtaining for themselves other accommodation. The lease expired in 1923, and a new lease at an increased rent for ten years from 1923 was executed after considerable discussion on the 21st August, 1925; this lease is completely silent as to any such right as is alleged. The appellant states that no reference was made during these discussions to any right of first refusal, and Mr. Athavle says the same. The next material date is August, 1926, when, owing to the ravages of white ants, a joist fell, and it was obvious that the whole building needed very serious repairs. By that time the Society was in financial difficulties, and as they could not find money for the repairs it became urgent to sell, though the market had fallen very seriously since 1919. Mr. Athavle wrote to the then secretary on the 4th October, 1926, that he had told the appellant about the position and assured him that if he wished to buy the building they would give him preference over other would-be purchasers if his offer was reasonable. The appellant said in evidence that about this time Mr. Athavle referred to the appellant's right of first refusal, but this Mr. Athavle denied. A little later the sale was put into the hands of Gilbert Lodge and Company, house agents. In March, 1927, a certain amount of shoring up had been done, and the appellant was informed by letter that the Society hoped to be able to sell the building at once. On the 6th May, 1927, by letter, the appellant was informed of an offer of 1¼ lakhs, which appeared to have become abortive, and was invited to make a definite offer; he made no offer, but pressed for repairs. On the 9th May, 1927, Mr. Athavle used, in a letter of that date to the appellant, the words relied on as a separate promise in Issue No. 7 :—" In intimating to you the state of repairs [that is in 1926] I told you that our only alternative was to sell the building, and we asked Mr. Gilbert Lodge [the house agent] to find a purchaser. I also assured you that we would give you the first refusal, and I adhere to that assurance even now." On the 20th May, 1927, Mr. Athavle wrote again to the appellant making a definite offer to sell at 1 lakh, adding, " It is now for you to come to a decision." The appellant did nothing, but continued to press for urgent repairs, which the Society continued to execute to the extent of about Rs. 4,000 until the 17th August, 1927. The appellant has remained in possession under the lease.

Their Lordships have carefully considered the whole of the correspondence of which these letters form a part and cannot find

any such agreement as the appellant alleges. They cannot agree with the conclusion of the Acting Chief Justice, who holds not only that there was an agreement in the letter of the 9th May, 1927, but that there was consideration in that the appellant forebore in consideration of the Society's promise to insist on his right under the lease to have repairs executed. In fact, he insisted on repairs, and repairs were done, and there is no evidence that the assurance given by Mr. Athavle was given in return for any reciprocal promise from the appellant. It may be that the Society would have been bound by any promissory acts of Mr. Athavle, at least on the ground of his having ostensible authority. But the question does not in their Lordships' judgment arise.

On the 14th August, 1927, the appellant and Mr. Athavle had a discussion, in which the appellant stated that his engineer had advised him that the building was not worth more than Rs. 65,000. Mr. Athavle says, but the appellant denies, that the appellant then stated he would not give more; in any case Mr. Athavle next day accepted an offer from Kavarana of Rs. 75,000, and at that price the property was sold to Kavarana on the 5th September, 1927, after some difficulty due to the fact that Kavarana wanted vacant possession; but as the Society could not give it, Kavarana purchased subject to existing leases. It was not till the 10th September, 1927, that the appellant put forward in clear terms for the first time the claim he has maintained in this action.

Their Lordships have thought it better to set out the history in full, but their conclusion on the whole case is that the appellant has failed to make out the contractual obligation which he alleges, either as entered into in 1923 or at any date. As to the assurance contained in the letter from Mr. Athavle on the 9th May, 1927, even if the words were construed as being a contract to give a first refusal that would only mean a contract to give the appellant a reasonable chance of buying and that chance in their Lordships' opinion was duly given. But their Lordships do not for the reason given hold that there ever was any obligation.

On the main claim in the action—that is, the claim set out in paragraph 3 of the plaint—there are concurrent findings of fact adverse to the appellant. That in their Lordships' judgment would in itself be sufficient to defeat this appeal; their Lordships have examined the whole history in some detail, because in regard to Issue No. 7 the question is rather one of law, and in any case there are not on that issue concurrent findings of fact; accordingly the whole case had to be considered in order to deal with that issue. But their Lordships must not be taken to have in any way failed to give effect to the rule that on an issue of fact concurrent findings should be conclusive, unless indeed where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure. The importance of the rule is to discourage bringing before this Board issues of fact in which the appellant has failed in two courts. The present case as regards the issue to

which the rule applies, affords a complete illustration of the wisdom of the rule. Apart from their decision on the merits, their Lordships are for dismissing the appeal on that issue simply on the ground of the concurrent findings.

In the result, notwithstanding the able argument of Mr. Chappell, their Lordships' judgment is that the appellant has failed on all points, and that the appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

In the Privy Council.

JEHANGIR SHAPOORJI TARAPOREVALA

v.

REVEREND SAVARKAR.

DELIVERED BY LORD WRIGHT.

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