

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

Mahaletchumi Periyasamy

Substituted PLAINTIFF-APPELLANT

C.A. Case No. 1137/1998 (F)

D.C. Kandy Case No. 17360/MR

-Vs-

1. E.Herath

2. Chandrika Herath

DEFENDANT-RESPONDENTS

BEFORE :

A.H.M.D. Nawaz, J.

COUNSEL :

Plaintiff-Appellant absent and unrepresented

Rohan Sahabandu, PC with Kushani Atukorale for
the Defendant-Respondents

Decided on :

29.06.2018

A.H.M.D. Nawaz, J.

The original Plaintiff-the husband of the substituted Plaintiff-Appellant (hereinafter sometimes referred to as the Plaintiff) instituted this action claiming a sum of Rs. 103,550/- with interest from the Defendants.

The position of the Plaintiff was that he was a 'land broker', and that in or about July 1984 the Defendant-Respondents (hereinafter sometimes referred to as the Defendants)

requested the Plaintiff to seek a buyer for the property of the 2nd Defendant No. 531, Siebel Place, Kandy.

It was the position of the Plaintiff that he found a buyer in one D. H.B. Jayasinghe, and that the Defendants promised the Plaintiff 2 ½ % commission as brokerage fees for the transaction. The Plaintiff further averred that, on or about 17.08.1984, Dr. Jayasinghe incorporated a company called "Suwasetha Hospital (Pvt) Ltd.," of which he was a Director, and that by a Deed bearing No. 11879 and dated 23.01.1985, the property in question was sold by the 2nd Defendant to the Company for Rs. 380,000/-. The position of the Plaintiff was that he was the person, who was responsible for the said sale. The further position of the Plaintiff was that the Defendants had refused to pay his brokerage fee and claimed the same with interest.

The Defendants in their answer whilst denying the position taken up by the Plaintiff sought the dismissal of the action.

The parties went to trial on 11 issues, 8 by the Plaintiff and 3 by the Defendants.

The cause of action was premised on the basis that he was the broker and the sale went through because of him, with DR. Jayasinghe being introduced by him to the Defendants and on that score claimed his brokerage fee.

In Issues No 9 and 10, the Defendants had raised an important question of law-Issue No.9 namely "whether the plaintiff is a registered licensed land broker". If not (Issue No.10) whether he could maintain the action.

The plaintiff giving evidence on 23.11.1990 testified that he knew the two Defendants well and he was aware that the 2nd Defendant-wife of the 1st defendant was the owner of the premises in question, and that the 1st defendant requested him to sell his wife's land and that he promised the 2 ½% commission. Then he went on to state how he met Dr. Jayasinghe (the prospective buyer) and initiated the process.

The original Plaintiff in his evidence mentioned the names of Drs. Jayasinghe and Senanayake but they were not called. Dr. Jayasinghe was an important witness as he was the 'link' but was not called.

Whilst giving evidence the Plaintiff produced marked P1-P11, letters allegedly written by the Plaintiff to the Defendants.

The Plaintiff's position was that the transaction more particularly the sale had taken place without notice to him. It is also pertinent to mention that the Plaintiff in his evidence specifically stated that he personally had discussions with Dr. Jayasinghe and the other doctors and the Defendants separately. He never spoke of a discussion he had with both the buyer and seller together. He concluded his evidence in chief on 23.11.190 but before he could be cross-examined, the Plaintiff met with an accident and passed away.

There was an argument before the District Court whether the cause of action survived but the widow of the Plaintiff was since substituted as the Additional District Judge in his order dated 25.11.1992 refers to the fact that evidence had been led upon issues and the widow was thus entitled to carry on with the case. The implication of the order was that the case had proceeded beyond *litis contestatio* when the original Plaintiff crossed the great Divide.

When the trial resumed on 26.06.1996, both parties agreed to a trial *de novo* but subject to the same issues and the admissions that had been raised at the abortive trial.

In other words no application was made to adopt the evidence of the original Plaintiff but in the written submissions that has been filed on behalf of the substituted Plaintiff- an argument is made that the testimony of the original Plaintiff given at the previous trial could be adopted by virtue of section 33 of the Evidence Ordinance. No doubt section 33 is one of the exceptions to rule against hearsay and it permits the reception of evidence of a witness who has since passed away. But that section stipulates conditions for admission of a deceased witness's testimony. According to section 33 of the Evidence Ordinance in the case of a witness who is dead,

“..... Evidence given by the said witness, in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same proceeding the truth of the facts which it states provided-

- (a) that the proceeding was between the same parties or their representatives in interest;
- (b) that the adverse party in the first proceeding had the right and opportunity to cross examine;
- (c) that the questions in issue were substantially the same in the first, as in the second proceeding.

Unfortunately no application was made on behalf of the substituted Plaintiff to adopt the evidence of the deceased Plaintiff. Instead the amended caption was tendered and when the trial *de novo* commenced on 26.06.1996 it was expressly recorded that evidence would be led afresh on behalf of the Plaintiff, because the parties had agreed to conduct a trial *de novo*. Only the issues and the admissions recorded at the first proceeding were adopted. Therefore a consideration of the applicability of Section 33 does not arise before this Court. One has to assume that the previous evidence of the original witness is non-existent.

At the trial *de novo*, the son of the Plaintiff gave evidence. His position was that his father was a professional land broker and that he was aware of the transaction in question.

Incidentally the witness was born in 1959 and the alleged brokering transaction took place in 1984 when the witness was about 25 years of age.

The witness stated at page 98 that he assisted his father in writing letters to the defendants.

The witness sought to produce the same documents P1-P11 that his father had produced at the previous proceedings. They were objected to by the Defendants on the basis that they were not original documents and they had not received the documents. The Defendants objected to the documents because he was not the author of those documents. As to the question why the Defendants did not object to the documents at the point of their first production namely when the original Plaintiff gave evidence, it was notified to Court by the Counsel for the Defendants, they had entertained the hope

that the Plaintiff could be cross-examined but that opportunity was lost when the original Plaintiff passed away. The defendant *though* objected to the documents written by the original Plaintiff being received in evidence but an argument has been made before this Court that the business letters written by the original Plaintiff could be admitted under Section 32(2) of the Evidence Ordinance-another exception to the rule against hearsay. This provision refers to statements made in the course of business. They become relevant and admissible under section 32 in the following situations.

- (i) The statement must have been made by a person is dead.
- (ii) a course of business must be proved. "Course of business" means any current routine of business usually followed by the person whose statement is sought to be proved
- (iii) the statement must have been made in the ordinary course of business.

The section refers to the following particulars statements:

- (a) an entry on memorandum made by the person in books kept in the ordinary course of business, or in the discharge of professional duty-See Illustrations (b), (c), (d), (j) to Section 32.
- (b) Any acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind.
- (c) A document used in commerce, written or signed by him (see Illustration (h) to Section 32.
- (d) The date of a letter or other document usually dated, written or signed by him- see S.32 (2)-see Illustration (g) to Section 32.

The witness stated in the course of cross examination that P1-P11 were in the handwriting of his father. He also stated that his father was a professional broker and his brokering fee was about 2 ½% commission. He accepted that all that he had stated in evidence is what his father had told him. In fact some of these documents P1, P2, P3, P4, P5 and P6 indicate that the original Plaintiff had been writing to the Defendants that he had been acting for them as a broker to find a buyer for them and in fact in P6, he set out

the basis on which he was entitled to the commission. In P6 a letter written to the 2nd Defendant dated 05.11.1984, the original Plaintiff sets out a chronology of events and demands that he be paid his brokerage. I hold the view that these are letters written in the course of business of the deceased Plaintiff and they could be properly admitted as evidence against the Defendants under Section 32 (2) of the Evidence Ordinance-this provision being one of those exceptions to the rule against evidence that admit an out of court statement of a deceased person or absent witness provided the ingredients for admissibility are satisfied. There are postal receipt articles that connote the dispatch of these letters to the Defendants and once these letters are shown to have been posted, Section 114 of the Evidence Ordinance permits the inference to be drawn that they were received by the Defendants- vide illustration (e) to Section 114.

But there is an insuperable impediment that stands in the way of the Plaintiff succeeding in the case.

At page 109 of the appeal brief this Courts finds the pertinent question. The witness was asked whether the original Plaintiff was a registered licensed broker. The answer was in the negative. That answer also provides answers to Issues No.9 and 10 of the defendant but at the same page the witness took another stance, his father had been a registered broker but no proof thereof was tendered to Court.

This Court bears in mind Section 2 of the Auctioneers and Brokers Ordinance which states the following:

- (1) No person shall carry on the trade or business of an auctioneer or broker in any area within the administrative limits of any local authority except under the authority of a licence issued by the Chairman under this Ordinance.
- (2) Every licence issued under subsection (1) shall be in the form specified in the Schedule.

Could the Plaintiff maintain this action in view of his failure to obtain a licence as required under Section 2 of the Auctioneers and Brokers Ordinance? An identical

provision of Ordinance No. 15 of 1889, section 13 was alluded to by Poyser S.P.J in *Gunatileke v Liptons Ltd* 40 N.L.R 130. This provision required that any person who carries on the trade or business of an auctioneer or broker within the limits of any town in which a Municipal Council is or shall be established or shall be brought under the operation of various Ordinances shall obtain a licence to practise as such.

It was argued on behalf of the defendant firm in *Gunatileke* (supra) that as the plaintiff did not obtain such a licence, he was not entitled to maintain the action. In support of this argument the English case of *Cope v. Rowlands* (1836) 2 M & W 157 was cited before Poyser S.P.J and Koch J. In *Cope v. Rowlands* (supra) Baron Parke had held that a broker could not maintain an action for work and labour and commission for buying and selling stock; unless duly licensed by the mayor and alderman of the City of London. This case was considered in many later cases many of which are set out by Koch A. J in *Sockalingam Chettiar v Ramanayake* reported in 35 N. L. R. at p. 33. and the deductions which may be made from these cases are that if a contract or transaction is expressly prohibited by law, whether such prohibition was for the protection of the revenue or otherwise, or if such contract was forbidden by implication, for example, by the infliction of a penalty, the contract is void and cannot be enforced.

In fact the ratio is that where the contract which the plaintiff seeks to enforce is prohibited expressly or by implication by the common or statute law, no court will lend its assistance and give it effect to. This view has been acted upon in *Sockalingam Chettiar v Ramanayake* (supra) and in my view it is contrary to public policy to allow the contracting out of a statutory provision if it has been enacted for the public good and in the interest of society. The upshot of the reasoning is that if a broker does not have the imprimatur of a licence or is not registered, he will be debarred from instituting an action to claim his commissions if any. What the original plaintiff engaged in was not an isolated transaction and there is sufficient material on record to show that the original plaintiff had been engaging in the trade or business of a broker within the meaning of a trade or business as enunciated in Section 2 of the Auctioneers and Brokers Ordinance

and this provision outlaws the engagement of a broker unless the de facto broker is sanctioned by a license from a local authority and there was no proof of such a licence before the Additional District Court of *Kandy*.

In the circumstances I am constrained to affirm the judgment of the Additional District Court of *Kandy* dated 07.05.1998 and dismiss the appeal of the substituted Plaintiff-Appellant.

I would however state that though the original Plaintiff suffered from a limitation in instituting this case because of the want of a license, equity demanded that the Defendants compensated him for his efforts in finding a buyer and it would appear that once he found a buyer, he was dropped unconscionably from any further participation in the transaction that finally came to fruition. Though I have found for the original Plaintiff as regards his engagement in the whole transaction having regard to his correspondence to the Defendants, he fails in his action because of the rigor of Section 2 of the Auctioneers and Brokers Ordinance. This reminds me of the eternal verity that a just and honorable man shall not claim or exercise many of the rights and liberties that the law confers because of the necessary imperfections of its methods. One will also do well to remember that all that is lawful is not honorable though law confers on one so many rights and liberties because of its inherent imperfections.

JUDGE OF THE COURT OF APPEAL

Appeal dismissed