APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884 *April* 22

KOYLASH CHUNDER DOSS AND OTHERS (PLAINTIFFS) *v.* TARINEY CHURN SINGHEE AND ANOTHER (DEFENDANTS.)

Specific Performance—Contract—Letters—Earnest money.

The defendant in the name of his wife wrote to the plaintiffs a letter, the material portions of which was as follows :—

"The value of your house, No. 10, Rutton Mistry's Lane, has been fixed through the broker at Rs. 13,125; agreeing to that value I write this letter. Please come over to the house of my attorney between 3 and 4 this day with the title deeds of the house, and receive the earnest. There shall be no doing otherwise."

The plaintiffs through their manager wrote in answer to the defendant's wife :—

"You having agreed to purchase our house for Rs. 13,125 have sent a letter through the broker, and we are agreeable to it, and we will be present between 3 and 4 this day at your attorney's, and receive the earnest."

The plaintiffs and defendants met at the attorney's office in the absence of the attorney, and no inspection of title deeds or payment of the earnest money therefore took place.

Held, in a suit for specific performance of the above contract, that the first letter contained no absolute proposal or undertaking to purchase, but merely fixed the price to be given for the house, leaving the inspection of title deeds and the payment of earnest money to be settled at the meeting asked for.

That both parties having treated the payment of earnest money as an element in the contract, the contract could not be completed till the amount of earnest money had been ascertained.

THIS was an appeal from a judgment of Mr. Justice Pigot, dated the 29th June 1883.

The plaintiffs alleged that on the 3rd of September 1883 they agreed to sell to one Tariney Churn Singhee, in the name of his wife, Runginee Dossee, a certain house in Rutton Mistry's Lane in Calcutta for the sum of Rs. 13,125; these terms being settled by a broker named Hurro Chunder Ghose, who brought about an interchange of letters between the plaintiffs and the defendants, which letters ran as follows :—

To Baboo KOYLASH CHUNDER DOSS and Baboo GIRENDRO NATH DOSS, Mohassoys.

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The value of your house, No. 10, Rutton Mistry's Lane, in Puttuldanga, has been fixed through Sreejoot Hurro Chunder Ghose, broker, at Rs. 13,125; agreeing to this value I write this letter. Please come over to the house of the attorney, Baboo Mooraly Dhur Sen, this day between 3 and 4 o'clock in the afternoon with the title deeds of the house and receive the earnest. There shall be no doing otherwise. Finis. 1289, 19th Bhadro,

(Sd.) RUNGINEE DOSSEE.

To SREEMUTTY RUNGINEE DOSSEE, Mohassoy.

You having agreed to purchase our house, No 10, Rutton Mistry's Lane, in Arcooly, for Rs 13,125, have sent a letter this day through Sreejoot Hurro Chunder Ghose, broker, and we are agreeable to it, and between 3 and 4 o'clock in the afternoon this day we will be present at the house of your attorney, Sreejoot Baboo Mooraly Dhur Sen, Mohassoy, and receive the earnest. Finis. 1289, 19th Bhadro.

(Sd.) KOYLASH CHUNDER DOSS.
GIRENDRO NATH DOSS.

The plantiffs called at the defendants' attorney's office, and met the defendants in the absence of their attorney, and alleged that Tariney Churn Singhee on that occasion agreed to abide by his wife's letter, and promised to let them know the next day when the agreement should be carried out.

On the 5th September 1882 the plaintiffs wrote to the defendants calling on them to perform their contract, or in default threatened to bring a suit against them in two days' time.

On the 7th the defendants' attorney wrote to the plaintiffs denying having entered into any contract. The plaintiffs then brought this suit for specific performance of the contract.

The defendants contended that the broker had misstated the number of rooms in the house, and that the letters interchanged were merely preliminary to the signing of the necessary agreement of sale, and did not amount to an agreement or contract to purchase, and that if they did amount to a contract, such contract was obtained by fraud and misrepresentation of the plaintiffs' agent.

At the hearing the broker stated that with regard to the writing of the letters he had said to the defendants: "If you have made up your mind to take this house give me a *pucca* contract that I may take it away," and that he considered the second letter to be the *pucca* contract.

No evidence was given by the defendants.

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Mr. *Allen* (with him Mr. *Trevelyan*) for the plaintiffs.

Mr. *Bonnerjee* (with him Mr. *M. P. Gasper*) for the defendants, contended that no condition as to possession being mentioned in the letters, and there being a tenant in the house, there was no contract that could be specifically performed, the matter only being in the region of negociation, no details of the contract having been given; and cited *Williams* v. *Briscoe* (1); *Rummens* v. *Robins* (2); *The South Wales Railway Co.* v. *Wythes* (3); *Huddleston* v. *Briscoe* (4).

Mr. *Trevelyan* in reply.

PIGOT, J., found that the letters contemplated a further writing being drawn up at the attorney's, and held that on the documents and facts it had not been proved that the defendants entered into the contract sued on, and therefore dismissed the suit.

The plaintiffs appealed.

The Advocate-General (Mr. *Paul*), Mr. *Allen* and Mr. *Doss* for the appellants.

The *Advocate-General*.—Section 4 of the Contract Act (cl. *a*) shows us that all that is required to make a contract is a proposal and an acceptance.

Section 12 (cl. *c*) of the Specific Relief Act gives an example of a contract which may be specifically performed. Now we find exactly those conditions in our contract, *viz.*, in the letters.

[GARTH, C.J.—I fail to see any finality of the agreement, the letter asks you to accept the earnest money, and there can therefore be no contract till the earnest money is accepted.]

I say the earnest money is immaterial to the contract, the case has not been decided on that ground; but because the letters are said only to amount to a preliminary agreement to a contract.

The case of *Rossiter* v. *Miller* (5) lays down that such a correspondence amounts to a contract, and that the only essential requirements to form a contract are the parties, the subject-matter and the price; all of which we have in our letters.

(1) L. R., 22 Ch D., 441.
(2) 3 de G. J. and S. 88.
(3) 5 de G. M. and G., 880.
(4) 11 Vesey, 583.
(5) L. R., 3 Ap. Cas., 1124 (1143).

[GARTH, C.J.—For three reasons the letters were never intended to be a contract, *viz*:—

(1) Earnest-money was intended to pass.

(2) The title deeds were to be produced.

(3) The parties were to meet at an attorney's;—doubtless to draw up some sort of an agreement.]

Ridgway v. *Wharton* (1) shows that an attorney in drawing up a deed cannot alter the terms of the contract, the letters therefore form the contract.

Bonnewell v. *Jenkins* (2) was a case where a plaintiff wrote saying: "I offer such and such a share for your leasehold property, this offer being made subject to the conditions of the lease being modified to my solicitor's satisfaction." Modifications were made, and the Court of Appeal held that notwithstanding the reference to a future contract, the letters constituted a complete contract.

As regards the question of earnest money; in England earnest money is a good legal symbol in cases where there is no written contract, but where there is a contract in writing, it is valueless, it has no legal significance. The Statute of Frauds does not apply to natives.

But even supposing that it has a legal significance, the new *Beerbhoom Coal Co* v. *Bularam Mahata* (3) shows that uncertainty is no sufficient ground for a party being refused specific performance of a contract, so the fact that the amount of earnest money was not settled, is no ground for refusing us relief.

As regards our taking the title deeds the next day, we could not get specific performance till we had given a good title, but we were not bound to make out a good title the next day to the one on which the letters were sent, even if we were bound to take the title deeds the next day and did not do so, that would only entitle the other side to at most to damages, but would not put an end to the contract. I rely on the letters and the evidence of the broker who alleged that the letters were to make the contract *pucca*—how can it be said that production of the title deeds formed part of the contract—it is one of the matters

(1) 6 H. of L. Cas., 238. (2) L. R., 8 Ch. D., 70.

(3) I. L. R., 5 Calc., 932.

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that arise after the contract has been made, the stage of contract is then passed.

Mr. *Allen* on the same side. As to what is necessary to complete a contract, see Fry on Specific Performance, p. 145, para. 324. This is a parol contract evidenced by the letters. *Fowle* v. *Freeman* (1) shows that specific performance has even been given of letters which were not intended at the time to be a complete final agreement.

Kennedy v. *Lee* (2) shows that all that is required to make a contract is, that the amount and nature of the consideration to be paid and received should be ascertained, together with a reasonable description of the subject-matter of the contract. In fact that the parties should be at one—and when once at one, nothing can vary or alter such a contract.

Thomas v. *Dering* (3) establishes that, although there may be no intention at the time of making a contract, of making a complete contract, yet the Courts will enforce it.

The Proprietors of the English and Foreign Credit Co. v. *Arduin* (4) is an authority to show that the defendants are precluded from saying the letters are not a proper contract, we having understood their letter to be an unconditional acceptance.

Hussey v. *Horne-Payne* (5); *Roddy* v. *Fitzgerald* (6); *Sanderson* v. *The Cockermouth and Workington Railway Co.* (7) were also cited.

Mr. *Bonnerjee* for the respondents cited *Williams* v. *Briscoe* (8) and *Rummens* v. *Robins* (9).

Judgments of the Court were delivered by GARTH, C.J., and CUNNINGHAM, J.

GARTH, C.J.—This suit is brought to enforce the specific performance of a contract for the purchase of a house.

The lower Court held that the alleged contract was not proved, and dismissed the suit.

(1) 9 Ves., 351.
(2) 3 Mer., 441.
(3) 1 Keen, 729.
(4) L. R., 5 Eng. and Ir. Ap., 80.
(5) L. R., 4 Ap. Cas., 311.
(6) 6 H. of L. Cas., 823 (876).
(7) 11 Beav., 497.
(8) L. R., 22 Ch. D., 441.
(9) 3 De. G. J. and S., 88.

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The plaintiff has appealed to this Court, and he has relied in support of his case upon two letters, which passed on the 3rd of September 1882, as well as upon the conduct of the parties, and a conversation which occurred on the afternoon of the same day after the letters were exchanged.

The *negociation*, it seems, was brought about by a house broker named Hurro Chunder Ghose, who knew that the defendant was on the look-out for a house in the particular locality, and proposed to him to buy this one. After looking over a portion of the house, and hearing Hurro Chunder's description of it, the defendant at Hurro Chunder's suggestion wrote the following letter to the plaintiffs in his wife's name :—

To Sreejot Baboo KOYLASH CHUNDER DOSS, and Sreejot Baboo GIRINDRA NATH DOSS, Mohassoy.

The value of your house, No. 10, Rutton Mistry's Lane, in Putuldangah, has been fixed through Sreejoot Hurro Chunder Ghose, broker, at Rs. 13,125, agreeing to that value I write this letter. Please come over to the house of the attorney, Baboo Moornly Dhur Sen, Mohassoy, this day between 3 and 4 o'clock in the afternoon with the title deeds of the house, and receive the earnest.

There shall be no doing otherwise. Finis. 1289, 19th Bhadro.

Sree RUNGINEE DOSSEE, now residing
in the house No. 49, Jhamapukur.
By the pen of Sree KISORY MOHUN GHOSE.

Upon receiving this letter from Hurro Chundor, the plaintiffs through their manager wrote the following letter to the defendant's wife :—

To Sreematty RUNGINEE DOSSEE, Mohassoy.

You having agreed to purchase our house, No. 10, Rutton Mistry's Lane, in Arcooly, for Rs. 13,125, have sent a letter this day through Sreejoot Hurro Chunder Ghose, broker, and we are agreeable to it, and between 3 and 4 o'clock in the afternoon this day we will be present at the house of your attorney, Baboo Mooraly Dhur Sen Mohassoy, and receive the earnest. Finis. 1289, 19th Bhadro.

Sree KOYLASH CHUNDER DOSS,
and
Sree GIRINDRO NATH DOSS,
By the pen of Sree MOHINDRO NATH MOOKERJI.

The plaintiffs contend that these letters constituted, and were intended to constitute, a *pucca* or binding agreement. The defendant on the other hand contends that they were only intended as commencing the negociation, which was to have been

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completed by the payment of the earnest money, and the execution of a regular *byna* contract.

At the trial, however, no evidence was given on behalf of the defendants. The learned Judge decided against the plaintiffs on their own showing; and I think that he was right.

It seems to me that the real question is, whether the two letters, which were exchanged on the 3rd of September, do, in fact, constitute a complete and binding agreement.

For the purpose of determining this question, we must gather the intention of the parties from the letters themselves, and not from what was said or intended before the letters were exchanged.

In consequence of some doubt being suggested during the argument, as to whether the letters had been correctly translated, we sent for one of the Court interpreters, and asked him to translate them in open Court. His translation agreed substantially with that which had been previously furnished, and by the aid of it the construction which I put upon the defendant's letter is this:

"As the value of your house has been fixed by Hurro Chunder, the broker, at Rs. 13,125, and as I agree to that value, I write this letter to request that you will come to the house of my attorney, Mooraly Dhur Sen, between 3 and 4 o'clock to-day, bringing with you the title deeds of your house, and receive the earnest money. If you will not fail me in this, I will not fail you."

The letter in answer appears to mean this.

"As you have agreed to purchase my house for Rs. 13,125, and have sent me your letter to that effect, we agree to your proposal, and will be at the house of your attorney to-day between 3 and 4 o'clock, and receive the earnest money."

Mr. *Allen* has contended that the first portion of the defendant's letter is an absolute proposal by him to buy the house for the sum named, independently of all other considerations; and that the remainder of the letter forms no part of the proposal, but merely suggests the time, place and manner in which the proposal is to be carried out.

If this were really so, I should quite agree with Mr. *Allen* that

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the case would come within the principle of *Rossiter* v. *Miller* (1), and the other authorities to which he has very properly called our attention. But I cannot take that view of the letter. It contains, as it seems to me, no absolute proposal or undertaking to purchase the house; what had been done at that time, with the aid of the broker, was merely to ascertain the proper price; and all that the defendant meant to say was "so far as price is concerned, I am quite content with that which my broker has fixed;—and if you are also content, I beg you will come to my attorney's office with your title deeds when we arrange matters, you shall receive the earnest money."

His intention, as it seems to me, was that the matter should be finally settled at the attorney's office; and two very important matters were left for that occasion;—namely, the inspection of the title deeds, and the amount and payment of the earnest money. It was very proper that the defendant should not commit himself to any binding contract, till he knew something at any rate of the nature of the plaintiff's title, and as regards the earnest money, it must be observed that both parties treat that as an element in the bargain. How then could the contract be said to be *complete and binding*, until the amount of the earnest money had been ascertained.

In point of fact no meeting took place at the attorney's office, because the attorney was not there, and the defendant refused to consult any other attorney; but suppose the meeting had taken place, and the parties had been unable to agree as to the amount of the earnest-money, how could it possibly have been said that they had arrived at any binding agreement.

Mr. *Allen* tried hard to escape from this difficulty in one of three ways:—

1*st*.—By the argument, which I have already mentioned, hat the payment of the earnest money did not affect the contract itself, but only the way in which it was to be carried out.

But it seems to me that both parties treated it as an element in the contract; and if so, the contract could not be complete until the amount of the earnest money was ascertained.

(1) L. R., 3 Ap. Cas., 1124.

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2*ndly*.—He argued that the Court could ascertain the amount of the earnest money, as it has ascertained in several cases the price of the property sold.

But the amount to be paid for earnest money must from its very nature be a matter of agreement between the parties; it cannot be ascertained by the Court, for the best of reasons, because it is paid not on the *completion* but on the *making* of the contract; or at any rate at some time before the completion.

3*rdly*.—Then lastly, Mr. *Allen* argued, that assuming the earnest money to have been an element in the contract, his clients were content to waive it. But no notice of any waiver appears to have been given; and even if it had been, the defendant had by that time repudiated the contract. If the contract was incomplete and not binding on the 3rd of September, nothing that was afterwards done by the plaintiffs could have made their position any better.

I am satisfied, on the whole, that looking to the letter itself, the defendant never made or intended to make any absolute proposal to purchase the property. I think he never intended to bind himselfs to any thing, till his attorney knew something of the plaintiff's title, and the amount of the earnest money had been ascertained.

As soon as these additional matters had been adjusted, the earnest money would have been paid and a *byna* contract prepared. That is undoubtedly the usual course in native transactions of this kind; and it seems to me that what was said by the plaintiffs' manager in giving his evidence strongly confirms that view.

Then lastly, Mr. *Allen* contended that what was said by the defendant when the parties met afterwards at Baboo Mooraly Dhur Sen's office was sufficient to constitute a binding contract according to the plaintiff's manager's evidence, the defendant said: "By the letter you have given me, you have bound yourself to sell the property to me, and by the letter I have given you, I have bound myself to take the property."

Even assuming this to be true, I think it makes the plaintiffs' case no better. It was no new promise, but only a reference to

the letters which had passed; and I don't think it would justify us in putting a different construction upon the letters, than that which they bear upon the face of them. Besides which, as the amount of earnest money was not then fixed, the words said to have been used by the defendant would not relieve the plaintiffs from that difficulty.

But even if I were disposed to take a different view of the evidence of the plaintiffs' manager, I think we should clearly be bound, before deciding in the plaintiffs' favor, to give the defendant an opportunity of contradicting this statement, and going generally into his case.

The learned Judge, as we understand, dismissed the suit upon the plaintiffs' own evidence, and without calling upon the defendant to go into his case. As it is, I agree with the Court below and think the appeal should be dismissed with costs on scale 2.

CUNNINGHAM, J.—I also think that the original Court was right. The main argument in the appeal was that as the parties to the contract, the subject-matter and the price were all ascertained, there was a binding agreement from which neither party was at liberty to recede. This rule, however, cannot be applied without qualification to the present case. The cases to which reference has been made—*Ridgway* v. *Wharton* (1); *Rossiter* v. *Miller* (2); *Bonnewell* v. *Jenkins* (3); *Crossley* v. *Maycock* (4); *Chinnock* v. *Marchioness of Ely* (5)—in my opinion, establish the rule that, if the material ingredients of the agreement are ascertained, and if there be a distinct offer on one side, and a distinct acceptance on the other, a contract arises, notwithstanding that the parties may have recorded their intention that it shall be put into a more formal shape by a solicitor. But on the other hand, if on the true construction of the correspondence and evidence, it appears to have been the intention of the parties that they are not to be bound till the agreement has been put into a formal shape and approved by them, then the parties ought not to be bound till that formal document has been executed. In the present instance I think that the proper con-

(1) 6. H. L. 238.
(2) L. R., 3 Ap. Cas., 1124.
(3) L. R., 8 Ch. D., 70.
(4) L. R., 18 Eq., 180.
(5) 4 de G. J. & S., 638.

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struction to be put on the letters is, that the defendant did intimate his intention, not to be bound till the deeds had been produced at his attorney's, and with his attorney's approval the *byna-putro* executed, and the *byna* or earnest money paid.

I concur on the ground on which the original Court held this to be the right construction, and especially on the fact that neither of the letters was written by the contracting parties, and that the request in the defendant's letter to the plaintiffs to come over to the house of Mooraly Dhur with the title deeds was not agreed to in the plaintiffs' letter, nor was in fact complied with. I concur accordingly in thinking that the original Court was right in dismissing the appeal.

Appeal dismissed.

Attorney for plaintiffs: *G. C. Dhur.*

Attorney for defendants: *Mooraly Dhur Sen.*