APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice May Oung.

FOUCAR & CO.

v.

M. C. T. MUDALIAR.*

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Dec. 14.

Principal and broker—Brokerage on sale of land—Inability of the purchaser introduced by the broker to complete—New arrangements between the principal and the purchaser after the period fixed for the completion of the first contract—The position of the broker on this second arrangement being rescinded by the principal.

Where a broker was commissioned to obtain a purchaser for a piece of land and a purchaser was found by him, who, however, having failed to complete the sale within a fixed period owing to his inability to pay ready money, and the principal entered into a new arrangement direct with the purchaser, and such new arrangement was subsequently rescinded by the principal, *held*, that the broker was not entitled to claim his commission.

Held, that the brokerage was payable only for an actual sale, it being the broker's duty to introduce a person willing *and able* to complete the purchase.

Held, further, that the second arrangement between the principal and the purchaser having been entered into by them only after period fixed for the completion of the sale for which the broker was commissioned, the principal was not liable to pay brokerage on account of the new transaction.

Passingham v. *King* (1898), 14 Times L.R., 392—*distinguished.*

McDonnell—for the Appellants.

Cowasjee—for the Respondent.

MAY OUNG, J.—The admitted facts in this case were as follows :—

On the 20th September, 1921, the defendant firm commissioned the plaintiff as a broker to obtain a purchaser for a piece of land, agreeing to pay him "a brokerage of 2½ per cent. on the price on completion" (Exhibit A). On the following day, a would-be purchaser was obtained and an agreement in writing (Exhibit B) was entered into between the firm and the

* Civil First Appeal No. 42 of 1923 against the decree of this Court on the Original Side in Civil Regular No. 246 of 1922.

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purchaser, whereby (1) the price of land measuring about 3½ to 4 acres (but in any event not less than 3 acres) was fixed at Rs. 1,75,000 per acre ; (2) a sum of Rs. 25,000 was to be paid as earnest money (3) the balance was promised to be paid on or before the 21st January 1922, earnest money to be forefeited in default ; (4) a transfer was to be executed on payment of the purchase price in full; and (5) the firm guaranteed a good title on completion of purchase. These terms were set out in the receipt (Exhibit B). The earnest-money was paid, but the transaction was never completed. The main, if not the only, reason for the falling through of the sale was, in my view, the purchaser's inability to pay the price agreed upon, a sum well over five lakhs. The plaintiff said:—

"At Mulla's (the purchaser's) request, I suggested part payment to Nuding (the firm's manager). I know Mulla well. As the amount was large, Mulla would have been pleased to pay by instalments."

"I asked Mulla why he did not complete his contract. He said there was time before him to do so. I asked him about 3 or 4 times. His last reply was that he was making arrangements direct with Nuding. This was about the end of December. Mulla told me later that he was arranging for part payments, to which Nuding had consented. Mulla could not pay the full amount and said he would make part-payments."

There was also, apparently, some dispute between the parties concerning the exact area of the land, which had been left indefinite in Exhibit B. Plaintiff's witness, Ady, was sent by Mulla to try and bring about a settlement. Ady saw Nuding and obtained from the latter two slips of paper (Exhibits G and H), both dated the 24th January, 1922, whereon are noted certain terms as to the land and as to payments, which were to be deferred; the transfer was to be

made at once, but the land was to remain as collateral security.

Considering that Mulla had, as early as December, told the plaintiff that he was arranging for part-payments it is, in my view, only reasonable to suppose that the matter of the payment of the purchase price was what really caused the hitch and that the so-called dispute as to the area of the land was a subsidiary matter which, in any case, had to be decided because of the indefiniteness in this respect of Exhibit B.

The terms contained in Nuding's notes were, after some haggling as to the rate of interest on the sums deferred, agreed to, but no formal agreement was executed.

Ady deposed :—

"Mulla agreed to the conditions on the slip I gave to him, except the rate of interest. He said he would agree to 8 per cent. I telephoned this to Nuding and he authorised me to alter the 9 per cent. to 8 per cent. and to initial it which I did. This arrangement was concluded some time in the forenoon of the day the slips were made. On the same day Nuding 'phoned to say that he could not carry out this arrangement. This was about 3 or 4 hours after the arrangements had been concluded. Nuding told me that he could not accept the mortgage and that his lawyers had instructed him that collateral security was a mortgage. This was his reason for backing out."

Both Exhibits G and H (supported by Ady's evidence) show that promissory notes and an "agreement" were to have been executed, but, owing, apparently, to Nuding's inability to obtain his director's consent to the new transaction, nothing was actually done and the negotiations fell through.

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The real point in the case, however, seems to be that on the 21st January, 1922, the date originally fixed for completion, Mulla was unable to pay, and, as appears from what followed, had no prospect of being able to pay within a reasonable time; Exhibit H shows that he wanted six months to pay half the price and one year to pay the remaining half.

Herein the defendant firm was in no way at fault. If Mulla had been in a position to pay as agreed upon they would have been under an obligation to convey the land. Mulla was not only unable to pay on the due date, but, three days later, sent Ady to Nuding with what was tantamount to a request for postponement of payment for one year.

So far as the plaintiff was concerned, he had obtained for the firm a purchaser who could not pay and had no expectation of being able to pay within a reasonable time. The subsequent negotiations through Ady clearly showed that the purchase price would not be forthcoming for many months and the plaintiff has not adduced any evidence to show that Mulla could have fulfilled his obligation. His failure to cite Mulla as his witness on this point must, I think, be weighed against him.

Ordinarily, a broker is entitled to a percentage on the money which he succeeds in realising for principal but, where the transaction cannot be completed because the money is not forthcoming and consequently the principal realises nothing, it is difficult to see how the broker has earned his brokerage. If, in the present case, the defendant firm had, *before the 21st January 1922* extended the time for completion and thus taken the negotiations out of the broker's hands, and those subsequently fell through, it might be held on the authority of *Passingham* v. *King* (1), that the full

(1) (1898) 14 Times L.R., 392.

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ge is nevertheless payable. But the point t arise, since there is nothing to show that the nt firm did anything in the matter until Ady see Nuding on the 24th January. The plain- ests vaguely that Nuding began to make arrange- with Ady "about a month or 10 or 15 days' the 21st January, but a careful perusal of evidence shows that the entire negotiations d only one day, the 24th January.

s argued that, as time was not the essence of ntract for sale, the defendant firm was bound t for a reasonable time and to serve notice on calling upon him to complete within a stated and, as the firm did not do so but instead l into fresh negotiations with him, that the f is not to blame and that he had done every- he had contracted to do. But all that the f had done was to obtain a purchaser who not pay on the agreed date and who, thereafter, his own broker to plead for concessions. Had concessions been refused, the plaintiff would have in exactly the same position ; in my judgment, fact that the firm was willing at first to grant the essions, but a few hours later recanted, because Nuding had no power to accept a mortgage, makes no difference so far as the work done for the firm by the plaintiff is concerned. The non-completion of the sale was not the result of the firm's act in formulating new terms and then withdrawing them but was directly due to Mulla's inability to pay. It is true that if defendants had followed up the new arrangement, they might have, by holding the land as security, ultimately realised the sale price. If Mulla had on his part fulfilled his obligation, half the balance would have been recovered in July, 1922, and the remaining half in January, 1923, with interest ; if, on the other hand,

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Mulla did not pay, the firm could have sued mortgage decree and realised their money by the land in execution. But such recovery or r tion would not have been the outcome of pla services to the firm. He had been asked to purchaser who would pay ready money; the a ment for which he was responsible was th purchaser should pay on or before certain dat there was to be neither delay nor trouble to th He now asks that, although he failed to g purchaser to pay on the date fixed, he shou given the benefit of a new transaction whereb firm would certainly have had to wait for a lon to realise their money and would possibly hav to go to the trouble of suing the purchase my judgment, he has no claim on this score, am fortified in my view by Lord Justice Va Williams' remark in the case above cited t effect that it is the duty of a broker to intr a person willing *and able* to complete the pur

It is further argued that the defendant firm s have taken steps against Mulla to obtain sp performance of the contract. The answer to th that there is no law which compels a vendo insist on specific performance. There usually is there was in the present case, an alternative remedy, *viz.*, forfeiture of the earnest-money. The question whether the firm could or could not legally claim a forfeiture does not now arise, but it is clear that the defendants purported to exercise the right given in Exhibit B.

In the result, I would hold that the plaintiff was not entitled to the brokerage claimed by him. I have considered the question whether we can, in these proceedings, award the appellant a decree for the sum which respondents were willing to pay, namely,

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2½ per cent on the amount of the earnest-money; but there being yet no decision of the question whether or not that earnest-money was rightly forfeited, I would hold that we cannot and should not do so.

I would reverse the decree passed on the Original Side and order that the suit be dismissed with costs. The respondent will also pay the appellant's costs in this appeal.

HEALD, J.—There can be no doubt that in this case the prospective purchaser, Mulla, whom respondent introduced to appellants, was neither willing nor able to purchase the property on terms which were substantially those which appellants employed respondent to obtain for them. If appellants had actually accepted the terms offered by Mulla and a sale had resulted, respondent would probably have been entitled to receive brokerage although the terms of the actual sale might be different from which he was employed to obtain. But appellants were not bound to accept any terms other than those which they offered through respondent, and if they refused to accept the less favourable terms offered by Mulla, so that no sale resulted, I do not see how respondent could be entitled to the brokerage which was payable only for an actual sale. The case would of course have been different if Mulla had been willing to buy on appellants' terms and appellants had been unable to carry out the sale, or if, after employing respondent, appellants had taken the negotiations out of his hands before the agreement which was actually made between them and Mulla had been broken. I do not think that respondent can as yet claim brokerage in respect of the Rs. 25,000 which appellants received and claim to retain as earnest-money forfeited under the agreement which, as they

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allege, Mulla broke. Mulla is said to have filed a suit against them for the recovery of that amount and if that suit should succeed respondents' agency will have been entirely infructuous. If, however, appellants should be held entitled to retain the earnest-money, they may possibly be regarded as having made a profit Rs. 25,000 on the transaction which resulted from respondent's agency, and the question may then arise whether respondent is not entitled to a *quantum meruit* from appellants in respect of that profit. That question does not however in my opinion arise at present and we do not consider it. So far as the present case is concerned it seems clear that respondent failed to bring about the sale which he was employed to effect and that no sale in respect of which he can claim brokerage was effected, and I agree with my learned brother May Oung that his suit must be dismissed with costs for appellants throughout.