

Privy Council Appeal No. 75 of 1932.

Florrie Edridge and others - - - - - *Appellants*

v.

Rustomji Dhanjibhoy Sethna - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH OCTOBER, 1933.

Present at the Hearing :

LORD ATKIN.
LORD TOMLIN.
LORD WRIGHT.

[*Delivered by* LORD WRIGHT.]

This appeal arises out of a contract between the respondent and Richard Tilden Smith (since deceased, the present appellants added during the litigation as being representatives of his estate) : this contract is contained in a letter dated the 7th January, 1926 signed by Tilden Smith and addressed to an agent for the respondent and duly accepted on behalf of the respondent. The letter was in the following terms :—

Dear Dinshaw, “ Bombay House, Fort,
Bombay, 7th January, 1926.

Re. R. D. Sethna's Matter. If Sethna will pay costs in connection with the appointment of the Receiver and the Receiver's costs and give credit of any distribution he may receive in respect of Receiver's distribution and write letters to his solicitor and to the Receiver to the effect that he is satisfied that the affairs of the Company have been properly conducted, I will pay him the sum of £5,000/- invested by him in Ifold Herds Limited less such credit.

Yours sincerely,
(Sd.) R. TILDEN SMITH.”

The circumstances under which this contract was made were that the respondent had in 1921 invested £5,000 in debentures in Ifold Herds Ltd., a limited Company incorporated and registered in England. These debentures were part of an issue of £40,000 the residue being taken by two companies which were the nominees of Tilden Smith, who had also put a large sum of money into the company as a shareholder and whose evidence was that his total interest amounted to a very large sum. It was on his introduction that the respondent took the debentures which he did in the sum of £5,000. The venture having proved a failure, on the 28th March 1925 the respondent instituted a debenture holders' action against the Company in the Chancery Division of the High Court of Justice in London, claiming the usual relief including accounts and the appointment of a Receiver. By an order in the action dated the 30th April 1925 a Mr. Page was appointed Receiver and the usual directions were given. During these proceedings the respondent made various allegations adverse to Tilden Smith in regard to his participation in the affairs of the Company: it was also intimated by his solicitors that an investigation should or might be held into the management of the Company. There is now no suggestion that there was any ground for complaint against Tilden Smith, who was the principal sufferer by the failure of the Company. It was in this state of things and during the course of the debenture holders' action that the contract in question was made. Subsequently to the agreement various letters were exchanged between the parties and their solicitors: in particular Tilden Smith asserted that no concluded bargain had been made and claimed to withdraw what he called his offer. There were also disputes as to the exact sums which were referred to in the contract under the terms "cash in connection with the Receiver and the Receiver's Costs": in any case the respondent did not accept as a final repudiation Tilden Smith's assertion that there was no contract binding on him and on that ground claim to treat the contract as terminated save as founding a claim in damages as no doubt he might have done. The respondent did not however pay any costs to the Receiver nor did he write letters to his solicitor or to the Receiver to the effect that he was satisfied that the affairs of the Company had been properly conducted, or any such letters.

Meantime, in January, 1927, an order was made in the Receivership action discharging the Receiver, approving the final account and ordering the distribution of the net balance of the funds in Court among the debenture holders in their due proportions. These funds were far from sufficient to satisfy the debentures. Further correspondence between the respondent's solicitors and Tilden Smith took place until in December, 1927, the respondent issued his writ in the present action claiming £3,508 5s. 9d. as being money due under the contract; the sum was arrived at by deducting from £5,000 the sum of £710 5s. 2d as being the

respondent's taxed costs of the debenture holders' action, and £781 9s. 6d. as the amount receivable by the respondent as his share on apportionment in the above action. It is not now contended that these deductions represent correctly the sums described in the contract as "costs in connection with the appointment of the Receiver and the Receiver's costs," or that on account being taken in accordance with contract the sum to be credited by the respondent as his share of the distribution by the Receiver was as stated in the claim, but it is not necessary in this judgment to examine further these figures. The plaint did not include any claim for damages either primarily or in the alternative; it alleged that the respondent had substantially carried out his part of the agreement and had been throughout ready and willing to write the letters required of him by the terms of the agreement. It also set out the assertions of Tilden Smith that there was no agreement, but did not allege that such assertions had been accepted by the respondent on a final repudiation by Tilden Smith so as to terminate the contract; on the contrary it claimed in terms that Tilden Smith was bound under the agreement to pay the sum claimed.

Tilden Smith, by his written statement, while denying the agreement, alternatively alleged that the respondent had failed to perform his part thereof, in particular in regard to writing the letters to the solicitors and the Receiver, and paying the costs in connection with the appointment of the Receiver. The action was tried by Kemp J., who held that the agreement was not one in which reciprocal promises were to be simultaneously performed within the meaning of section 51 of the Indian Contract Act. He held that the respondent not having written the letters referred to in the agreement and not having performed a substantial and important part of it, could not say that anything in Tilden Smith's subsequent conduct excused him from performance and therefore could not recover in the action which the learned Judge accordingly dismissed.

On appeal Beaumont C.J. and Rangnekar J. reversed this judgment, taking the view that the respondent could not be expected to write letters to his solicitor and to the Receiver, withdrawing imputations, till he got the payment Tilden Smith was to make; they held that the letter to the Receiver could still be written notwithstanding that he had been discharged, in the sense that it could still be written to the Mr. Page who had been receiver. It was enough, they held, that the respondent had always been ready and willing to write the letters. As to payment of the costs, it was in their judgment merely a matter of account, to determine the proper deduction to be made from £5,000; they accordingly allowed the appeal and gave judgment for the respondent "subject to the respondent writing the letters" for the sum of £5,000 less the dividend which he would have received in the debenture holders' action on the footing that

he had paid his own costs and the cost of the appointment of the Receiver and the remuneration of the Receiver. What that amount should be the Court requested the parties to agree, as in fact they did, for purposes of the judgment. Rangnekar J. was of opinion that even if the payment of costs and writing of the letters were conditions precedent, Tilden Smith by repudiating the contract had prevented the respondent from carrying out his part, but the learned Judge does not point out that in such case the claim must have been not in debt, but for damages in accordance with section 53 of the Indian Contract Act.

From this judgment the appellants have appealed to His Majesty in Council

Their Lordships are of opinion that the primary question to be determined on the appeal is whether or not the terms of the agreement as to payment of costs and writing of the letters constitute what are often called conditions precedent, that is promises which must be performed by the respondent before he can claim payment of the money under the agreement. That question can only be determined by construing the actual language used, considered in connection with the facts of the case as in contemplation of the parties. The question is whether the case falls within section 52 of the Indian Contract Act, which is in the following terms "Where the order in which reciprocal promises are to be performed is expressly fixed by the contract they shall be performed in that order: and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires." The language of the agreement in the present case, merely as language, tends to the conclusion that Tilden Smith was not bound to pay the agreed sum unless and until the respondent had previously paid the costs and written the letters. But the precise language need not be stressed, because the same conclusion, in their Lordships opinion, follows more clearly from what "the nature of the transaction requires." At the time when the agreement was made the debenture holders' action was on foot: the respondent by his solicitors was threatening legal proceedings against Tilden Smith and the Receiver was being asked to consider the holding of an investigation into the management of the Company, in which Tilden Smith was personally involved. From the nature of things the letter which he stipulated should be written to the Receiver, must necessarily have been intended to be written before the debenture holders' action was completed: equally the importance to Tilden Smith of the letter to be written to the respondent's solicitors was to relieve him of the threat then being made of legal proceedings. So far as the question of the costs of the Receivership was concerned, these also must have been intended to be actually paid by the respondent in the course of the action, so as to relieve *pro tanto* the accounts of the Company of these charges: that payment

would, though perhaps not to a large extent, help to determine the amount coming to the respondent "in respect of the Receiver's distribution." Their Lordships cannot resist the conclusion that the respondent's right to claim the money was dependent on and postponed to his performing what he on his part had promised, with the consequence that when he launched his claim his course of action was not complete and his claim must on this ground fail, as Kemp J. held: in fact the respondent had paid nothing at all in regard to costs and had taken no steps to write the letters at any material time or at all. The agreement did not, as their Lordships construe it, merely involve a conventional calculation when the debenture holders' action was ended, but the credit to be allowed by the respondent for his share in the distribution was a credit which could only be ascertained on the basis of the stipulated payments being made by the respondent to the Receiver. Their Lordships are further of opinion that quite apart from their conclusion that the timeous writing of the letters was a condition precedent, the form of order adopted by the appellate judges making their judgment "subject to the respondent writing letters" is not one which is proper in an action for a purely money claim. In the result when the true nature of the transaction is considered, their Lordships cannot regard the reciprocal promises contained in the agreement as inherently capable of simultaneous performance within the terms of section 51 of the Indian Contract Act.

It was strongly urged that the subsequent conduct of Tilden Smith up to the termination of the debenture holders' action amounted to a waiver of his right to insist on the performance by the respondents as a condition precedent. The word "waiver" is at times used loosely and with varying signification, but in this context what is meant by waiver is that by words or conduct Tilden Smith created or accepted the position that he would be content to pay the money even though the letters were not written and the costs paid in the order of priority which the agreement required, so that he could no longer claim that he was not bound to pay unless and until the stipulated payments were made and the letters written by the respondent. In the first place however it may be noted that no waiver was pleaded by the respondent and no issue was directed on waiver; but waiver depends on evidence of fact and is not an issue which their Lordships could properly deal with, unless Tilden Smith had been afforded an opportunity of giving such evidence as he thought proper. But apart from that objection, their Lordships after considering all the evidence and documents in the case, cannot discover anything which would justify a finding that Tilden Smith had waived his rights under the agreement. No such effect can be given to his repudiation of the agreement, that is to say to his claim that there was no agreement binding him. The respondent might have accepted that as a final repudiation

and thus treated the contract as determined and brought a claim for damages under section 53. He did not do so. But a wrongful repudiation by one party cannot, except by the election of the other party so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called "*brutum fulmen*," that is the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent. In the present case, the respondent, when he sued on the contract, was still as much bound as ever to show that he had fulfilled all the conditions binding on him before he could exact performance from Tilden Smith.

Finally their Lordships observe that the subsequent conduct of Tilden Smith is irrelevant for the purpose of construing the agreement: the construction must depend on the intention of the parties when it was made, which is to be ascertained from its terms, read in the light of the facts known to both parties when it was concluded, that is from what is expressed or from what "the nature of the transaction requires," in the words of section 52.

In the result their Lordships hold that the appeal should be allowed and the judgment of the Appellate Court set aside and the judgment of Kemp J. restored: the respondent will pay the appellants their costs of this appeal and their costs in the Courts below.

They will humbly so advise His Majesty.

In the Privy Council.

FLORRIE EDRIDGE AND OTHERS

v.

RUSTOMJI DHANJIBHOY SETHNA.

DELIVERED BY LORD WRIGHT.

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