1950

March 14.

ABDULLA AHMED

v.

ANIMENDRA KISSEN MITTER.

[SHRI HARILAL KANIA C. J., SAIYID FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN and S. R. DAS JJ.]

Contract—Agency—Estate broker—Authority to 'negotiate a sale' and 'secure purchaser'—Whether empowers broker to conclude contract—Construction of contract—Broker finding out purchaser ready and willing to buy for price fixed by principal—Principal concluding contract with same purchaser for lower price—Broker's right to commission—Powers of estate agents.

The appellant, an estate broker, was employed by the respondent by a letter dated 5th May, 1943, to negotiate a sale of a certain property on the terms mentioned in a commission note which ran as follows: "I.....do hereby authorise you to negotiate the sale of my property 27, Amratolla Street, free from all encumbrances at a price not less than Rs. 1,00,000. I shall make out a good title to the property. If you succeed in securing a buyer for Rs. 1,00,000, I shall pay you Rs. 1,000 as your remuneration. If the price exceeds Rs. 1,05,000 and does not exceed Rs. 1,10,000, I shall pay you the whole of the excess over Rs. 1,05,000 in addition to your remuneration of Rs. 1,000 as stated above. In case you can secure a buyer at a price exceeding Rs. 1,10,000 I shall pay you twenty-five per cent. of the excess amount over Rs. 1,10,000 in addition to Rs. 6,000 as stated above. This authority will remain in force for one month from date." In pursuance of this contract the appellant found two persons ready and willing to purchase the property for Rs. 1,10,000 on the 2nd June and by letters exchanged with them he purported to conclude the contract for the sale of the property, and on the 3rd June communicated the same to the respondent. The respondent, however, cancelled the authority of the appellant on the 9th June and on the same date entered into an agreement with a nominee of the said persons for a sale of the property for Rs. 1,05,000 and eventually executed a conveyance in their favour for Rs. 1,05,000. The appellant instituted a suit against the respondent for Rs. 6,000.

Held, per KANIA C.J., FAZL ALI, PATANJALI SASTRI and DAS JJ.—(i) that a house or estate agent is in a different position from a broker at the Stock Exchange owing to the peculiarities of the property with which he has to deal, and an owner employing an estate agent should not, in the absence of clear words to that effect, be taken to have authorised him to conclude a contract of sale; but the lack of such authority is not inconsistent with an understanding that the agent is not to be entitled to his commission unless the owner and the purchaser introduced by the agent

carried the transaction to completion; (ii) that even if the commission note in the present case were to be construed as making payment of commission conditional on the completion of the transaction, the appellant having "negotiated the sale" and "secured buyers" who made a firm offer to buy for Rs. 1,10,000, acquired the right to the payment of commission on the basis of that price subject only to the condition that the buyers should complete the transaction of purchase and sale; and as this condition was fulfilled when the buyers eventually purchased the property in question, the appellant's right to commission on that basis became absolute, and could not be affected by the circumstance that the respondent for some reason of his own sold the property at a lower price.

MAHAJAN J.—Under the terms of the commission note in the present case the appellant had authority to enter into a binding contract on behalf of the defendant, and, as he had entered into such a contract he was entitled to the commission of Rs. 6,000 according to the terms of the commission note. Even conceding that he had no such authority, under the terms of the commission note the agent was entitled to his remuneration as soon as he introduced a buyer ready and willing to purchase for the price fixed by the owner, whether the owner completed the transaction or not.

Luxor (Eastbourne) Ltd. v. Cooper ([1941] A.C. 108) distinguished.

Chadburn v. *Moore* (67 L.T. 257), *Rosenbaum* v. *Belson* ([1900] 2 Ch. 267), *Durga Charan Mitra* v. *Rajendra Narain Sinha* (36 C.L.J. 467), *Wragg* v. *Lovett* ([1948] 2 All E.R. 969) referred to.

APPEAL from the High Court of Judicature at Calcutta: Civil Appeal No. XLIV of 1949.

This was an appeal by special leave from a judgment and decree of the High Court of Judicature at Calcutta (Harries C.J. and Mukherjea J.) dated 5th January 1948 which varied a judgment passed by a single Judge sitting on the Original Side of the same High Court (Gentle J.) dated 11th June, 1945. The facts of the case and the arguments of the Counsel appear fully in the judgment.

M. C. Setalvad (*A. K. Sen* with him), for the appellant.

B. Sen, for the respondent.

1950. March 14. The judgment of Kania C. J., and Fazl Ali, Patanjali Sastri and Das JJ., was delivered by Patanjali Sastri J.: Mahajan J. delivered a separate judgment.

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PATANJALI SASTRI J. This is an appeal by special leave from a judgment and decree of the High Court of Judicature at Fort William in West Bengal dated 5th January, 1948, which varied a judgment and decree passed by a single Judge on 11th June, 1945, on the Original Side of the same Court.

The appellant who is carrying on business as an estate broker in Calcutta was employed by the respondent on the terms mentioned in a commission letter dated the 5th May, 1943, to "negotiate the sale" of premises No. 27, Amratolla Street, Calcutta, belonging to him. In pursuance of this contract the appellant found two persons who were ready and willing to purchase the property for Rs. 1,10,000, and by letters exchanged with them on 2nd June, 1943, he purported to conclude a contract for the sale of the property and communicated the same to the respondent by a letter of even date. The respondent, however, entered into an agreement on 9th June, 1943, with a nominee of the said persons for the sale of the property for Rs. 1,05,000 and eventually executed a conveyance in their favour on 8th December, 1943.

Thereupon the appellant brought the suit alleging that the contract concluded by him with the purchasers for Rs. 1,10,000 on the 2nd June, 1943, was binding on the respondent and claimed that he was entitled to the payment of Rs. 6,000 as remuneration in accordance with the terms of his employment as he had done all that he was required to do on behalf of the respondent. In the alternative he claimed the same sum as damages for breach of contract. In defence to the suit the respondent pleaded, *inter alia*, that the appellant had no authority to conclude a binding contract for sale with any one, that the purchasers refused to complete the transaction alleging that they had been induced by the fraudulent misrepresentation of the appellant to agree to a price of Rs. 1,10,000, that the subsequent sale was effected independently of the appellant, and that the appellant was not therefore entitled to any remuneration or damages.

Gentle J. who tried the suit found that the terms of the appellant's employment did not authorise him to conclude a contract of sale and that the letters of 2nd June, 1943, did not effect a contract of sale binding on the respondent. The learned Judge, however, rejected the respondent's case that the purchasers refused to purchase on the ground of any fraudulent misrepresentation by the appellant and that the negotiations were later resumed afresh directly between the respondent and the purchasers, and came to the conclusion that the agreement to sell of the 9th June, 1943, and the subsequent conveyance of 8th December, 1943, were due solely to the efforts of the appellant in bringing the parties together as potential buyers and seller. The learned Judge refused to accept the suggestion that the sale was in fact effected for Rs. 1,10,000 as not being supported by any evidence but found that the reduction of the price by Rs. 5,000 from Rs. 1,10,000 for which the purchasers were ready and willing to buy the property, was made only for the purpose of depriving the appellant of his legitimate remuneration of Rs. 6,000. He accordingly held that the appellant, who had performed his part of the contract by finding two persons who were ready, able and willing to buy at Rs. 1,10,000 was entitled to the commission claimed.

The Division Bench (Harries C.J. and Mukherjea J.) which heard the appeal of the respondent, agreed with the trial Judge that the appellant's authority did not extend to the concluding of a binding contract for sale of the property, but differed from his view that all that the appellant was required to do was to introduce a purchaser who was ready and willing to buy for Rs. 1,10,000 and that he was entitled to his commission whether or not the property was sold at that price or at all. They held, following certain observations of Lord Russell of Killowen and Lord Romer in the case next mentioned, that the appellant, having undertaken to "negotiate the sale" and to "secure a buyer", could not be said to have either secured a buyer or negotiated the sale "unless the sale actually took place or at least a contract had been entered into". As,

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however, a sale did take place between the persons introduced by the plaintiff and the defendant, and as that sale, in the view also of the learned Judges, was the "direct result of the plaintiff's negotiations", they held that the appellant was entitled to commission but only on the price mentioned in the sale deed, namely, Rs. 1,05,000 which, they found was the price actually received by the respondent. As to why the respondent accepted a reduced price, Harries C.J., who delivered the judgment of the Court, observed: "All that is known is that persons who undoubtedly made a firm offer of Rs. 1,10,000 for this property eventually bought it for Rs. 5,000 less. I strongly suspect that the price was reduced at the defendant's instance but I cannot find it as a fact". In support of their view that the appellant was not entitled to any commission above that payable on a purchase price of Rs. 1,05,000 the learned Judges relied on the decision of the House of Lords in *Luxor (Eastbourne) Ltd.* v. *Cooper* (1), where it was held that, in a contract to pay commission upon the completion of the transaction which the agent was asked to bring about, there was no room for implying a term that the principal shall not without just cause prevent the agent from earning his commission, and that it was open to the principal to break off negotiations and refuse to sell even after the agent had produced a customer who was ready and willing to purchase on the principal's terms. Applying what they conceived to be the principle of that decision, the Appellate Bench varied the decree of the trial Judge by reducing the amount payable to the appellant to a sum of Rs. 1,000.

The commission letter runs as follows:

"I, Animendra Kissen Mitter of No. 20-B, Nilmoni Mitter Street, Calcutta, do hereby authorise you to negotiate the sale of my property, 27, Amratolla Street, free from all encumbrances at a price not less than Rs. 1,00,000. I shall make out a good title to the property. If you succeed in securing a buyer for Rs. 1,00,000 I shall pay you Rs. 1,000 as your remuneration. If the price exceeds Rs. 1,05,000 and does not

(1) [1941] A.C. 108.

exceed Rs. 1,10,000 I shall pay you the whole of the excess over Rs. 1,05,000 in addition to your remuneration of Rs. 1,000 as stated above. In case you can secure a buyer at a price exceeding Rs. 1,10,000 I shall pay you twenty-five per cent. of the excess amount over Rs. 1,10,000 in addition to Rs. 6,000 as stated above. This authority will remain in force for one month from date".

In the absence of clear words expressing the intention of the parties it is possible to construe these terms in three different ways corresponding to the three patterns into which commission contracts with real estate brokers may broadly be said to fall. In the first place, the letter may be read as authorising the appellant not only to find a purchaser ready and willing to purchase the property at the price required but also to conclude a binding contract with him for the purchase and sale of the property on behalf of the respondent. Secondly, the contract may be construed as promising to reward the appellant for merely introducing a potential buyer who is ready, able and willing to buy at or above the price named, whether or not the deal goes through. And lastly, the commission note may be understood as requiring the appellant to find such a purchaser without authorising him to conclude a binding contract of sale but making commission contingent upon the consummation of the transaction. As stated already, the first of these interpretations was rejected by the learned trial Judge as well as by the Appellate Bench, but it was pressed upon us by Mr. Setalvad on behalf of the appellant. We are unable to accept that view. The contract specifies only the price required by the respondent but does not furnish the broker with other terms such as those relating to the payment of the price, the investigation and approval of title, the execution of the conveyance, the parties who are to join in such conveyance, the costs incidental thereto and so on. In fact, the agreement of sale dated the 9th June, 1943, entered into by the respondent with the purchasers contains detailed stipulations on all these and other matters. Mr. Setalvad laid stress on the statement in the commission note that the sale was to

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be free from encumbrances and that a "good title" would be made out, but this is no more than a general indication of the nature of the bargain proposed and is perfectly consistent with an understanding that further details will be subject to negotiation between the respondent and the purchaser when found.

As pointed out by Kekewich J. in *Chadburn* v. *Moore*(1) a house or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal which does not pass by a short instrument as stocks and shares do but has to be transferred after investigation of title as to which various special stipulations, which might be of particular concern to the owner, may have to be inserted in a concluded contract relating to such property. The parties therefore do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. That is why it has been held, both in England and here, that authority given to a broker to negotiate a sale and find a purchaser, without furnishing him with all the terms, means "to find a man willing to become a purchaser and not to find him and make him a purchaser": see *Rosenbaum* v. *Belson* (2) and *Durga Charan Mitra* v. *Rajendra Narayan Sinha*(3).

Mr. Setalvad next suggested, in the alternative, that the second interpretation referred to above, which was favoured by the trial Judge, should be adopted, and that, inasmuch as, in that view also, the appellant had done all that he was required to do when he introduced to the respondent two prospective buyers who were ready and willing to buy the premises for Rs. 1,10,000, he was entitled to commission on that basis. Learned counsel criticised the view of the Appellate Bench, who adopted the third construction, as illogical and inconsistent, and argued that, if authority to secure a buyer were to be taken to mean authority to find one who is not only ready and willing to buy but also becomes eventually a buyer in order to entitle the agent to his commission, then such authority must of *necessity*

(1) 67 L.T. 257. (2) [1900] 2 Ch. 267. (3) 36 C.L.J. 467.

extend to the concluding of a contract of sale, as otherwise the agent could not possibly accomplish the task assigned to him. We do not see much force in this criticism. As already indicated there are cogent reasons why an owner employing an estate agent to secure a purchaser should not, in the absence of clear words to that effect, be taken to have authorised him to conclude a contract of sale, and we cannot see how the lack of such authority is inconsistent with an understanding that the agent is not to be entitled to his commission unless the owner and the purchaser introduced by the agent carried the transaction to completion.

In the present case, however, it is not necessary to decide whether or not the commission note imports such an understanding, for a sale was in fact concluded with the purchasers introduced by the appellant who has thus, in any view, earned his commission, both the trial Judge and the Appellate Bench having found that the appellant's efforts were the effective cause of that sale. The only question is whether the commission is payable on the basis of Rs. 1,10,000 for which the appellant brought a firm offer from the purchasers, or on the basis of Rs. 1,05,000 which is the price mentioned in the conveyance.

As already stated, the Appellate Bench based their decision on the ruling in the *Luxor* case. The learned Judges reasoned thus: "In that case the principal had refused to sell in circumstances which afforded no reasonable excuse. Nevertheless, the House of Lords, reversing the Court of Appeal, held that no commission was payable. It appears to me that the principle is applicable to this case. Though the agent introduced a purchaser ready and willing to buy for Rs. 1,10,000 the sale for some reason took place at a lower figure. Even if the defendant unreasonably or without just cause refused to conclude the sale at the higher figure, nevertheless the plaintiff has no right to commission based on that higher figure." We are unable to agree with this reasoning and conclusion. The ground of decision in the *Luxor* case was that, where commission was made payable on the completion of the transaction, the agent's right to commission was "a purely

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contingent right" and arose only when the purchase materialised. As Lord Simon put it "The agent is promised a reward in return for an event and the event has not happened". But the position is different where the principal, availing himself of the efforts of the agent, concludes the sale with the purchaser introduced by him, as the respondent did in the present case. As observed by Lord Russell of Killowen in the same case, "where a contract is concluded with the purchaser, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of his vested right". Applying that principle, (even if the commission note in the present case were to be construed as making payment of commission conditional on the completion of the transaction, as it was in the English case) the appellant, having "negotiated the sale" and "secured buyers" who made a firm offer to buy for Rs. 1,10,000 had done everything he was required by the respondent to do and acquired a right to the payment of commission on the basis of that price which he had successfully negotiated, subject only to the condition that the buyers should complete the transaction of purchase and sale. The condition was fulfilled when those buyers eventually purchased the property in question, and the appellant's right to commission on that basis became absolute and could not be affected by the circumstance that the respondent "for some reason" of his own sold the property at a lower price. We accordingly hold that the appellant is entitled to the full commission of Rs. 6,000.

The appeal is allowed, the decree passed on appeal in the Court below is set aside and that of the trial Judge restored. The appellant will have the costs of this appeal including the costs incurred in the lower court as well as his costs of the appeal in that court.

Mahajan J.

MAHAJAN J.—This is an appeal by special leave from a judgment and decree of the High Court at Calcutta, dated 5th January 1948. By that judgment the High

Court varied the judgment and decree of Gentle J. dated 11th June 1945 made in exercise of his original jurisdiction, decreeing the plaintiff's suit for recovery of a sum of Rs. 6,000.

The appellant is a broker by profession residing at No. 81/1 Phear Lane, Calcutta, and carries on the business of a house agent. The respondent, Animendra Kissen Mitter, resides in No. 20B, Nilmony Mitter Street, Calcutta.

The appellant was employed by the respondent to negotiate the sale of the respondent's premises, No. 27, Amratolla Street, Calcutta, on certain terms and conditions on commission and the question raised by this appeal is whether the appellant is entitled to his commission under the circumstances hereinafter mentioned.

The facts are substantially admitted. By a letter dated 5th May, 1943, the appellant was employed by the respondent for arranging a sale of the premises above mentioned. This letter is in the following terms:—

"I, Animendra Kissen Mitter of No. 20B, Nilmoni Mitter Street, Calcutta, do hereby authorize you to negotiate the sale of my above property free from all encumbrances at a price not less than Rs. 1,00,000. I shall make out a good title to the property. If you succeed in securing a buyer for Rs. 1,00,000 I shall pay you Rs. 1,000 as your remuneration. If the price exceeds Rs. 1,05,000 and does not exceed Rs. 1,10,000 I shall pay you the whole of the excess over Rs. 1,05,000 in addition to your remuneration of Rs. 1,000 as stated above. In case you can secure a buyer at a price exceeding Rs. 1,10,000 I shall pay you twenty-five per cent. of the excess amount over Rs. 1,10,000 in addition to Rs. 6,000 as stated above. This authority will remain in force for one month from date."

As recited in the letter, the authority given to the appellant was to remain in force for one month from 5th May 1943. Three days before the termination of the appellant's authority, on 2nd June 1943 the plaintiff-appellant obtained an offer from two persons, namely,

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Kishorilal Mahawar and Ramkumar Mahor, for the purchase of the premises regarding which the plaintiff had been authorized to arrange a sale. This letter is in these terms:—

"We are willing to purchase the above house, land and premises at and for the price of Rs. 1,10,000 only free from all encumbrances.

We hereby authorize you to accept the offer for sale of the above permises from Mr. A. K. Mitter for Rs. 1,10,000 on our behalf and send the confirmation to the vendor Mr. A. K. Mitter on our behalf."

On the same date the plaintiff gave a reply which runs thus:—

"I am in receipt of your letter of date and *under authority from the owner* Mr. A. K. Mitter, I hereby confirm your offer for the purchase of the above permises at and for the price of Rs. 1,10,000 free from all encumbrances."

Simultaneously with the issue of this letter he gave intimation of this contract to the respondent in the following terms:—

"*Under the authority given to me by you* I made an offer for the sale of the above premises to Messrs. Kishorilal Mahawar and Ram Kumar Mahor of No.27, Amratolla Street, Calcutta, for rupees on lakh and ten thousand only and they have accepted the offer and they have authorized me to send a confirmation to you of the said offer. I accordingly confirm the offer made by you for the sale of the above premises for rupees one lakh and ten thousand only. The draft agreement for sale will be sent to you in the usual course.

A copy of the letter of Messrs. Kishori Lal Mahawar and Ram Kumar Mahor accepting your offer is enclosed herewith."

The letter was received by Mitter on 3rd June 1943, two days before the termination of the plaintiff's authority. The respondent made no reply and kept silent. He did not question the agent's authority in effecting a binding contract of sale with the purchasers. He did not repudiate the transaction nor did he

expressly ratify it. It was the plaintiff's case that he had accepted the purchasers' offer after getting express instructions from the respondent. That case, however, was not accepted in the two courts below.

On 3rd June, 1943, the solicitor for the purchasers wrote to the solicitor for the agent that as the offer of his client for the purchase of 27, Amratolla Street had already been accepted and acceptance communicated to him, the title deeds should be sent so that a conveyance may be prepared. At his request inspection of the letter of authority was offered by the plaintiff and a copy of the letter was sent to him by post. On receipt of this copy the purchasers' solicitor assumed a curious attitude. He said that the copy of the letter sent contained different terms as to commission than those contained in the letter of authority originally shown to his client. The plaintiff was charged with making a secret illegal gain. In spite of these allegations it was asserted that the contract was a concluded one and that being so, the plaintiff was bound to refund to the purchasers whatever moneys he would receive from the vendor. It appears that the purchasers' attorney did not like the idea of the plaintiff pocketing a sum of Rs. 6,000 out of the purchase price, and this dislike on the part of the purchasers for the broker's commission has led to further complications resulting in this litigation.

On 9th June, 1943, the purchasers' solicitor wrote to the plaintiff's solicitor that his client had cancelled the agreement of purchase. Immediately on receipt of this communication the plaintiff's solicitor replied expressing surprise at this attitude and accused the other party of a change of front with an ulterior motive. It was said that further instructions would be given after getting instructions from Mitter to whom these letters were forwarded. It seems that the plaintiff was in the dark while writing the letter of 9th June, 1943, of the negotiations that were going on behind the scene directly between the purchasers and the vendor who had kept absolutely silent all this time. On 9th June the date of the alleged

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cancellation of the bargain already made, an agreement was executed between Animendra Kissen Mitter, the vendor, and Makkanlal, a benamidar of Kishorilal Mahawar and Ramkumar Mahor (the purchasers) for sale of the premises for a sum of Rs. 1,05,000. The sale deed in pursuance of this agreement was actually executed on 8th December, 1943, in favour of the original purchasers and not in favour of the benamidar. As pointed out by the learned Chief Justice who delivered the judgment of the appellate Bench, possibly some arrangement was made whereby both the defendant and the purchasers benefited by the insertion of a lower price in the contract of sale and the transfer deed. It seems obvious enough that the defendant having received a firm offer of Rs. 1,10,000 for this property could not have parted with it for Rs. 5,000 less except on the basis of some arrangement between himself and the purchasers under which both of them shared the commission instead of paying it to the broker. It was to the advantage of both of them.

On 14th August, 1943, the appellant filed the suit out of which this appeal arises for recovery of Rs. 6,000, brokerage payable under the commission note. He also claimed relief by way of damages in the alternative. The defendant resisted the suit and denied the appellant's claim. Gentle J. who heard the suit, gave judgment for the plaintiff and passed a decree for a sum of Rs. 6,000, with interest and costs in his favour. He held that on a true construction of the commission note the appellant's authority was to find a purchaser, namely, a man ready, able and willing to buy at a price acceptable to the respondent and that the appellant had accomplished this when he introduced to the respondent the purchasers and that he had done all that was required of him. It was held that the appellant had no authority to conclude a contract of sale and no binding contract of sale was made on 2nd and 3rd June, 1943, that the transaction effected nominally in the name of Makkanlal and completed on 8th December, 1943, in favour of Kishorilal Mahawar and Ramkumar Mahor, was effected solely through the intervention of the appellant who brought

the parties together in the capacity at least of a potential buyer and seller, that the reduction of the price by Rs. 5,000 from Rs. 1,10,000 was more than peculiar and that this reduction was made for one purpose and that was to deprive the plaintiff of his remuneration.

The respondent preferred an appeal against this decree. This was partially allowed by the learned Chief Justice and Mukherjea J. on the following findings: that the appellant procured two persons, *viz.*, Kishorilal Mahawar and Ramkumar Mahor, on 2nd June, 1943, who were willing to buy the property for Rs. 1,10,000, that on a true construction of the contract of agency no commission was payable until at least a binding contract had been entered into between the appellant and the respondent, that the agent could only be said to have negotiated the sale if he introduced a person willing to buy who eventually bought, that the sale took place between the persons introduced by the appellant and the respondent and it was the direct result of the appellant's agency, that the commission note gave no authority to the appellant to conclude a contract of sale, that Makkanlal with whom the sale agreement dated 9th June was entered into was a benamidar of Kishorilal Mahawar and Ramkumar Mahor, that the appellant had no right to commission on a higher price than for which the sale was actually made and as the sale was actually made for Rs. 1,05,000, his remuneration could not exceed a sum larger than Rs. 1,000. On the basis of these findings the appeal was allowed and the decree granted by Gentle J. was modified and the plaintiff's suit was decreed in the sum of Rs. 1,000. No order for costs was made in the appeal.

In this appeal Mr. Setalvad for the plaintiff raised three contentions: (1) That the finding of the court below that on a true construction of the commission note the plaintiff had no authority to make a binding contract regarding the sale of this property with the purchasers was erroneous; (2) That even if that finding was correct, the plaintiff was entitled to a decree

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for the sum of Rs. 6,000, because he had done all that he had promised to do for the respondent, *viz.*, he had secured a purchaser for Rs. 1,10,000, who was ready, able and willing to buy the property and that if by reason of his own caprice or in collusion with the purchasers, the respondent did not sell the property for Rs. 1,10,000 but chose to receive instead Rs. 1,05,000, the plaintiff could not be made to suffer. (3) That on the evidence it should have been held that the sale was made for a price of Rs. 1,10,000 and that the amount entered in the sale deed was fictitious.

The first thing to see is what the parties have expressed in the commission note and what is the true effect of the language employed in it, read in the light of the material facts. As pointed out by Viscount Simon, Lord Chancellor, in *Luxor (Eastbourne), Ltd.* v. *Cooper*(1), contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion. I have very carefully considered the terms of this contract in the light of the material circumstances and with great respect to the Judges who decided this case in the High Court, I am of the opinion that the authority given by the principal to the agent authorized him to enter into a binding contract of sale on his behalf. It was not a mere authority authorizing him to find a purchaser willing, able and ready to buy the premises for a price mentioned in the document. The note, to begin with, confers authority on the plaintiff to negotiate a sale free from all encumbrances at a price not less than Rs. 1,00,000. Then it proceeds to say that the principal undertakes to make out a good title to the property. It further provides that if the agent succeeds in securing a buyer for Rs. 1,00,000, he will be paid a sum of Rs. 1,000 as remuneration. In the concluding part of the note a scale of commission proportionate to the price has been promised in case a price higher than Rs. 1,00,000 was secured. In express words it is said that if the price exceeds Rs. 1,05,000 and does not exceed Rs. 1,10,000,

(1) [1941] A.C. 108.

"I shall pay you the whole of the *excess* over Rs. 1,05,000 in addition to your remuneration of Rs. 1,000", that if a buyer is secured at a price exceeding Rs. 1,10,000, he will be paid 25 per cent. of the excess amount over Rs. 1,10,000 in addition to Rs. 6,000. The authority of the agent was to remain in force for one month. In my opinion, the terms of the note as regards the property being free from encumbrances and in respect of the guarantee about title indicate that the agent was given authority to make a binding contract. In a bare authority conferring power on a broker for introducing a customer, these stipulations would ordinarily find no place. The words "to negotiate a sale" standing by themselves may not authorize an agent to make a contract of sale. But here they do not stand by themselves. They are followed by two important conditions adverted to above. The agreement further lays down that if the broker *succeeds in securing a buyer*, he will get a certain remuneration. Gentle J. observed that the word "securing" here had the meaning of "obtaining a buyer". I have consulted the same dictionary as the learned Judge did and I find that the true meaning of the expression "securing a buyer" is "to obtain a buyer firmly". It is not possible in business sense to secure a buyer firmly unless he is bound by an offer and an acceptance. Otherwise, he is entitled to withdraw the offer at any time before acceptance and it cannot in this situation be said that a buyer has been secured firmly. The word "secure" has not the same meaning as the word "find" or "procure". It gives an idea of safety and certainty. If a buyer is ensured he, is said to be secured and no buyer can be said to be ensured till he is bound by his offer and that cannot happen unless it stands accepted. The agent could only secure a buyer in the strict sense of the term if he had authority to enter into a binding contract. The word "buyer" when used in a strict sense also means "a person who has actually made the purchase". The authority given to an agent to secure a buyer therefore gives him authority to enter into a binding contract of sale with him. Without such an authority it

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was not possible to secure a buyer. I am further supported in this view by the language employed in the document in respect of the payment of the commission. When the price secured was Rs. 1,10,000, the broker was entitled to 25 per cent. of the excess. It is difficult to think of an *excess* in relation to price in a stipulation for commission unless the agent has been given an authority to make a contract of sale. If the scope of the authority is only to introduce a customer ready, able and willing to buy the property with an option to the principal to accept or to refuse the offer, then it would have been drawn up in a different language.

The subsequent conduct of both the parties to the agreement very strongly supports this view The evidence of such conduct is relevant in this case because, as pointed out by Viscount Simon, L. C., in the case already referred to, the phrase "finding a purchaser" is itself not without ambiguity. Here the phrase is "securing a purchaser". This phrase similarly is not without ambiguity. The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument. (Vide para 343 of Hailsham Edn. of Halsbury, Vol. 10, p. 274).

So far as the conduct of the agent is concerned, he accepted the offer and under his own signature sent the letter of acceptance to the purchasers. In the letter written by him to his principal he specifically refers to his authority. The correspondence above mentioned clearly shows that both the purchasers and the agent thought that a concluded contract had been made. Information of this was given to the vendor and though he did not speak, his silence in the circumstances of the case seems as eloquent as speech would have

been. He never repudiated the contract made by the agent but behind his back entered into a fresh contract with the same persons who had been secured by the agent in a surreptitious manner. In the witness box he assumed a dishonest and untruthful attitude. The learned trial Judge pronounced him a liar and rightly too. He asserted complete ignorance about the subsequent contract of sale and fixed all blame on to his son. When asked about the sale price on the contract of 9th June, 1943, his answer was that he knew nothing about this and said that because his son asked him to sign the deed he did sign it and that was all that he knew. When faced with the sale deed, he said that he did not know what his son had told him as to what was written in the deed. He added that he did not know what consideration was paid to him for the sale. He further professed not to know whether the sale price went into his banking account or was even entered in the account books. After a great deal of prevarication he was made to accept the document of 5th May, 1943, and its terms. He admitted that on 3rd June he had a conversation with the purchasers and was informed by them that they had entered into a bargain with the broker and that the broker had deceived them about the commission and therefore they would not buy the house. He admitted that he got the letter sent by the plaintiff, but gave no explanation as to why he sent no reply to that letter. With great difficulty he was made to accept his signature on the postal acknowledgment about the receipt of the letter sent by the broker to him informing him of the concluded bargain made with the purchasers, and he had to admit that he got that letter from the broker. He also admitted that he took no objection to the letter written by the broker before Kishoribabu had told him the story about the commission of two per cent. In further cross-examination he admitted that what was stated by the broker in the letter of the 2nd June was correct. The whole evidence given by the defendant consists of evasive statements and his ultimate resort was in lapses of memory. It is quite clear from his deposition that the respondent accepted the contract made by the agent and was clearly under the

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belief that the agent had not exceeded his authority in entering into a binding contract with the purchasers. I am therefore of the opinion that the authority given to the agent in this case was an authority to enter into a binding contract of sale and this he did and he was therefore entitled to his commission of Rs. 6,000.

The learned single Judge and the learned Judges of the Court of Appeal found otherwise on this part of the case in view of certain decisions of English Courts and a decision of a Division Bench of the Calcutta High Court. In my opinion, none of those cases touch the present case. Unless the language of two documents is identical, an interpretation placed on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted.

In *Hamer* v. *Sharp*(1) Sir Charles Hall, V. C., considered the case of an authority of an agent for sale appointed by the owner of an estate. The document in that case was in these terms :—

"I request you to procure a purchaser for the following freehold property, and to insert particulars of the same in your Monthly Estate Circular till further notice, *viz.*, my beer house and shop No. 4 and No. 6, Manchester Road, Tenant No. 4, William Galloway, gilder, and No. 6, Albert Vaults, Henry Holmes, beer retailer, and work rooms above. Present net rent, £150, price £2800, when I will pay you a commission and expenses of fifty pounds. About six years' lease unexpired."

The Vice-Chancellor observed as follows :—

"The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and *none as to the title of the property*, and mentioning none of those special stipulations which it might be proper to insert in conditions in reference to the title,

(1) L. R. 19 Eq. 108.

that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions, *without making any provision whatsoever as to title.* In considering whether the instructions of October, 1872, were a sufficient authority to the agent for that purpose, I cannot help expressing an opinion that such an authority to an agent on the part of a vendor would be highly imprudent, as the purchaser would then be entitled to require, on completion, attested copies of all documents of title, and the expense of them would swallow up, to a great extent, the purchase money. This estate agent must have known that if this property had been offered for sale by public auction there would have been conditions to guard the vendor against being subject to certain expenses, and to prevent the contract becoming abortive by reason of a purchaser requiring a strictly marketable title. Could he suppose that he was invested with authority to sign a contract without considering what it should contain as regards title? As an intelligent and well informed person, he could not suppose that he was properly discharging his duty to his principal when he signed the contract which he signed; such a contract was not one within the scope of his authority to sign."

The case therefore stood decided on the construction of the document. It was remarked that in those circumstances it was not necessary to decide what words would confer such an authority. Having said so, the learned Vice-Chancellor proceeded to observe as follows:—

"but I nevertheless state my opinion to be, that when instructions are given to an agent to *find* a purchaser of landed property, he, not being instructed as to the *conditions to be inserted in the contract as* to title, is not authorized to sign a contract on the part of the vendor."

This case can hardly be said to be an authority for the construction of the agreement that we are called upon to construe in the present case. Considerable emphasis was laid in that case on the point that no instructions had been given as to the conditions that had to be

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inserted in the agreement as to title. In the present case the agent was told that the principal guaranteed marketable title. He was further told that the sale should be free of encumbrances. All the material conditions of sale were thus contained in the present agreement.

The next case on which considerable reliance was placed in the courts below is the case of *Chadburn* v. *Moore*(1). In this case an advertisement appeared in the Daily Telegraph in these words:—

"Forced sale by order of the mortgagees—thirty-four well built houses, situated at Grays, close to the station on the London, Tilbury, and Southend Railway, within easy reach of the docks, all let to respectable tenants at rents amounting to £ 620 per annum. Held for about ninety-five years at ground rents amounting to £ 146; price £ 3500, of which £ 3000 can remain on mortgage. For further particulars apply to Messrs. Pinder, Simpson and Newman, 33 and 34, Savilerow, London, W."

In response to this advertisement the plaintiff in that case, James Chadburn, called on Messrs. Pinder, Simpson and Newman, a firm of surveyors and estate agents, for further information. He then went to see the houses and came back and made an offer to purchase them, which was reduced to writing. It appeared from the evidence that the offer was to be submitted by Mr. Newman to his client the defendant, and the plaintiff was to return the next day for an answer. Newman saw the defendant, who gave him instructions to withdraw five of the houses, and fixed the price, but did not, according to the evidence given in court, give instructions to Newman to enter into a binding contract. Later on the plaintiff called on Messrs. Pinder, Simpson and Newman and two letters were exchanged between them, which were letters of offer and acceptance for the twenty-nine houses at Grays. The offer and acceptance were forwarded by the defendant to the estate agents. The defendant on receiving this offer wrote a letter saying *inter alia* :—

(1) 67 L.T. 257.

"I think you were, as you usually are, a little premature in actually entering into what might be a binding contract. It is always best to have an offer and acceptance subject to a formal contract being entered into....".

To this Newman replied:—

"The offer for the above was accepted under your definite instructions and is a very good get out for you."

Kekewich J., who decided this case, gave the following judgment:—

"Having heard Mr. Newman, who was called without the plaintiff knowing what he was going to say, and having read the correspondence, I have little doubt that I have the real transaction—which is a mere transaction between principal and agent—before me. It might be that a different colour would be put upon the matter by the cross-examination of Mr. Moore, but this was not done, and he is entitled to have judgment upon the point of law. Moore undoubtedly authorized Newman to *find* a purchaser for the houses. *It is true the expression does not come out on the correspondence.* On the second occasion Newman appears to have been instructed *to negotiate a sale.* Whatever else he did do, Moore did not in express terms authorize Newman to enter into a contract. *Newman was to find a purchaser, and to negotiate a sale.* Is that sufficient? No evidence was given as to custom; no evidence was brought to show that the position of a house or estate agent resembles that of a broker on the Stock Exchange or any other exchange. A house or estate agent is in a different position, owing to the peculiarity of the property with which he has to deal, which does not pass by a short instrument as stocks and shares do, but has to be transferred *after investigation of title and in accordance with strict laws.* An agent for sale of real estate must be more formally constituted than a seller of stocks and securities of a similar nature. There is no definite authority; in *Hamer* v. *Sharp*(1), Hall V.C., does not

(1) 19 Eq. 108.

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go so far as to say an estate agent cannot enter into any contract, and does not decide the question of authority, but only states his opinion. I must perforce refer to *Prior* v. *Moore*(1), where I indicated my own opinion distinctly, that instruction to a house agent *to procure* a purchaser and to negotiate a sale does not amount to authority to the agent to bind his principal by contract. Here the circumstance must not be forgotten that Moore on the second occasion told Newman what he was prepared to take for the twenty-nine houses. Newman then jumped at the conclusion that he had power at that price to enter into a contract. That is in my opinion not sufficient, and unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract, the principal reserves his final right to accept or refuse."

In this case there was no written document between the principal and the agent. From the correspondence it was inferred that the principal had asked the agent to find a purchaser or to negotiate a sale and it was held that within these words an authority to sell could not be spelt out. Not only is the language of the document with which we are concerned different, but the evidence in the case particularly about the conduct of the parties is materially different. The observations made by the learned Judge must be taken to be limited to the facts found by him. The expressions "find a purchaser", "procure a purchaser", "negotiate a sale" standing by themselves may not be sufficient to confer authority on the agent to enter into a binding contract on behalf of the principal; but as I have indicated above, the words in the present case are such as by necessary implication conferred authority on the agent for making a binding contract.

The next case is *Durga Charan Mitra* v. *Rajendra Narain Sinha*(2), a Bench decision of the Calcutta High Court. The document considered in that case bears considerable resemblance with the document in the present case.

(1) 3 T.L.R. 624. (2) 36 C.L.J. 467.

It was in these terms:—

"I hereby authorize you to negotiate the sale of the lands at Tolligunge I have recently purchased from Messrs. Martin and Co. *If you can* secure a purchaser to purchase the same at the gross value of Rs. 16,000, I shall pay you Rs. 200 as your remuneration. If you *be able to raise* the price to any amount above Rs. 16,000, you will be entitled to the excess amount fully and I shall be bound to mention the whole amount in the conveyance.

Please note that this letter of authority will remain in force for a fortnight only to complete the transaction; after that this letter will stand cancelled."

The agent acting on this authority sold the property. On receipt of this letter the vendor informed the agent that he would not sell the land. On the acceptance of the agent a suit was brought for specific performance. Sir Asutosh Mookerjee who delivered the judgment of the Bench referred to the cases of *Hamer* v. *Sharp* (1), *Prior* v. *Moore* (2), *Chadburn* v. *Moore* (3), and also *Rosenbaum* v. *Belson* (4), and observed that it was well settled that an estate or house-agent, authorized to procure a purchaser, has no implied authority to enter into an open contract of sale, because the transaction mentioned is as specified in the letter, *viz.*, to negotiate a sale after securing a purchaser. There is similarity in the language employed in the letter dealt with in this case and the letter of authority with which we are concerned; but read as a whole, the two documents are drafted with different intents and the true effect of both is not the same. There was no mention of the title being guaranteed by the vendor or of the sale being made free of encumbrances in that case. There was no evidence of surrounding circumstances or of the conduct of the parties. On the other hand, the plaintiff who was himself a solicitor realized the difficulties of the situation and endeavoured to alter the foundation of his claim. He conceded that as a broker he had no authority to sell the property and that he

(1) 19 Eq. 108.
(2) 3 T.L.R. 624.
(3) 67 L.T. 257.
(4) (1900) 2 Ch. 267.

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could not have taken a conveyance of sale of the plot. In the present case the attitude adopted by the parties, as already pointed out, was entirely different. Sir Asutosh Mookerjee also cited the case of *Rosenbaum* v. *Belson* (1). In this case the learned Judge made the following observations:—

"To my mind there is a substantial difference between those expressions. Authorizing a man to sell means an authority to conclude a sale; authorizing him to find a purchaser means less than that—it means to find a man willing to become a purchaser, not to find him and also make him a purchaser."

In *Saunders* v. *Dence* (2), Field J. distinguished *Hamer* v. *Sharp* (3), saying that 'all that Hall, V.C., in that case decided, as I understand it, was that if you go to an estate agent, and tell him you have a property to sell, and that you want a purchaser, and you tell him what you have made up your mind shall be the price, and to a certain extent what shall be the conditions, and you instruct him to try and find a purchaser, that is not sufficient, under those circumstances, to authorize the agent to make a contract without any conditions whatever with regard *to the title*'.

I have been unable to find any case in which it has been held that instructions given by A.B. to sell for him his house, and an agreement to pay so much on the purchase price accepted, are not an authority to make a binding contract, including an authority to sign an agreement.

In my opinion, on the terms of the instrument in this case and in view of the relevant evidence the correct conclusion to draw is that the agent had authority to enter into a binding contract with the purchaser and that he did and is therefore entitled to succeed in the case. Reference in this connection may be made to *Wragg* v. *Lovett* (4), where Lord Greene, M.R., put the proposition in these words:—

"Whether or not the agents were authorized (or, what in law is the same thing, reasonably understood

(1) (1900) 2 Ch. 267.
(2) 52 L.T. 644.
(3) 19 Eq. 108.
(4) [1948] 2 A.E.R. 969.

themselves to be authorized) to make this particular contract",

and it was held that the proper inference from all the facts of the case was that the defendant was satisfied to allow his agents to make whatever contract they thought best and relied on them to protect his interests provided, and provided only, that they obtained the desired statement from the plaintiff as to his intention to remain in the house. The answer to the question depends on the facts of each individual case and though authority to make a binding contract has not to be lightly inferred from vague or ambiguous language but from substantial grounds, that however does not mean that in express words it should be stated that the agent is authorized to sell the property.

The learned Chief Justice in the judgment under appeal observed that " the agent had undertaken to negotiate a sale and secure a buyer. He could not be said to have either secured a buyer or negotiated a sale unless a sale actually took place or at least a contract of sale had been entered into". If that is the correct construction of the note, then in my judgment, the true implication of the note is that the agent was authorized to enter into a binding contract, because othewise he could not have secured a buyer. Later on, the learned Chief Justice while referring to the case of *Rosenbaum* v. *Belson*(1), took the view that authorizing a man to sell meant an authority to conclude a sale and authorizing a man to find a puchaser meant less than that. It meant finding a man willing to become a purchaser, not to find him and also make him a purchaser. If that was the duty entrusted to the agent, then he had clearly performed his duty and was entitled to his commission.

For the reasons given above I am of the opinion that the plaintiff had authority to enter into a binding contract on behalf of the defendant and he entered into such a contract and thereby earned the commission which he has claimed in the suit and he is entitled to a

(1) [1900] 2 Ch. 267.

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decree in the sum of Rs. 6,000 which the trial Judge had given to him, with all costs throughout.

Conceding for the sake of argument that the construction that I have placed on the agreement entered into between the principal and the agent is not the correct one, the question arises whether in that event the decision under appeal can be maintained. I am inclined to the opinion that even on the construction placed by the trial Judge on the commission note the view taken by him was the correct one and the court of appeal arrived at a wrong conclusion by giving too much importance to certain obiter observations of Lord Russell of Killowen and Lord Romer in *Luxor (Eastbourne) Ltd.* v. *Cooper*(1). In this very case it was pointed out by Viscount Simon L. C. that there were at least three different classes of cases in which the question of a right to commission could arise. He states the first of them in these terms:—

"There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether this principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result."

In my opinion, the present case falls within this class of case and commission became payable on the introduction of a willing buyer by the agent to the principal.

In *Burchell* v. *Cowrie & Blockhouse Collieries Ltd.*(2) it was observed by their Lordships of the Privy Council that if an agent brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms

(1) [1941] A.C. 108. (2) [1910] A.C. 614.

which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale and that there can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent.

In *Inchbald* v. *Western Neilgherry Coffee etc. Co.*(1) Willes J. thus lays down the rule of law applicable to such cases :—

"I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it."

The rule has been stated by Story on Agency at page 404 in the following terms:—

"The general rule of law, as to commissions, undoubtedly is, that the whole service or duty must be performed, before the right to any commissions attaches, either ordinary or extraordinary ; for an agent must complete the thing required of him, before he is entitled to charge for it. In the case of brokers employed to sell real estate, it is well settled that they are entitled to their commission when they have found a purchaser, even though the negotiations are conducted and concluded by the principal himself; and also where there is a failure to complete the sale in consequence of a defect in title and no fault on the part of the brokers."

In my judgment therefore, Gentle J. was right when he held on the interpretation placed by him on the document that the plaintiff had earned his commission in full inasmuch as he had secured a buyer who was ready, able and willing to buy the property for Rs. 1,10,000.

As I have indicated above, if the word "buyer" is to be construed in a strict sense, then it must be held that the broker had authority to secure a buyer of that type and he could only do so by making a binding

(1) 17 C.B. (N.S.) 733.

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contract with him. On the other hand, if the word is taken to mean a potential buyer, such a buyer having been secured, the agent was entitled to the commission that had been promised to him.

It is now convenient to consider the case of *Luxor (Eastbourne) Ltd.* v. *Cooper*(1) in some detail because certain observations made by Lord Russell of Killowen and Lord Romer are the basis of the decision of the learned Chief Justice. In this case no commission note was addressed to the broker and the contract was not contained in any document. Evidence in support of the commission agreement was oral and its terms had to be deduced from that evidence. Viscount Simon L. C., out of the materials from which express contract had to be pieced together, reached the result that the bargain was this:

"If a party introduced by the respondent should buy the cinemas for at least £1,85,000, each of the two appellants would pay to the respondent £5,000 on *the completion of the sale.*"

No such sale took place, and in those circumstances it was held that there could be nothing due to the respondent on the terms of the express bargain. It was then argued that since the proposed purchasers introduced by the respondent were and remained willing and able to buy the properties for the minimum price, while the appellants did not close with the offer, the appellants were liable in damages to the respondent for breach of an implied term of the commission contract. In the statement of claim the implied term was said to be that the appellants would "do nothing to prevent the satisfactory completion of the transaction so as to deprive the respondent of the agreed commission." The breach pleaded was the failure to complete the contract of sale with the respondent's client and the disposal of the subject-matter in another quarter. The Lord Chancellor was of the opinion that the suggested implied term was not necessary in this contract and it was observed that in contracts made with commission agents there was no justification for introducing an implied term unless it was necessary to

(1) [1941] A.C..108.

do so for the purpose of giving to the contract the business effect which both parties to it intended it should have.

Lord Russell of Killowen in his opinion said that the only right of the plaintiff was to receive his commission out of the purchase moneys if and when received. His right was a purely contingent right. He stood to earn a very large sum at comparatively small pains, taking the risk of either side withdrawing from the negotiations before any binding contract of sale and purchase was concluded, or of the contract for any reason not being carried to completion. In this view of the case the action was bound to fail and no occasion arose for pronouncing on the correctness or otherwise of the view expressed by the Court of Appeal in *Trollope & Sons* v. *Martyn Brothers*(1). Then it was said that as the question of these commission contracts was discussed at great length, that furnished an excuse for stating briefly conclusions which his Lordship's mind, free as it was from the fetter of previous decisions, reached. In dealing with the subject the following observations were made:—

"I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can only be justified under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff his contract was made on September 23, 1935; his client's offer was made on October 2, 1935. A sum of £10,000 (the equivalent of the remuneration of a year's work by a Lord Chancellor) for work done within a period of eight or nine days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such a contract, even

(1) [1934] 2 K.B. 436.

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though the principal is free to refuse to sell to the agent's client.

The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case it can be said with truth that a 'purchaser' has been introduced by the agent; in other words, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right."

It is the observations last quoted which are the basis of the decision of the learned Chief Justice in the present case. It seems to me that these observations had reference to cases visualized by Lord Russell of Killowen in the earlier part of this quotation with specific reference to the facts found in that case and cannot apply to all cases where the word 'purchaser' or 'buyer' has been loosely used in a different context.

Lord Romer in his opinion made the following observations:—

"But supposing that a contract by one person to pay another a sum of money in the event of the latter performing an unsolicited service to the former is as much subject to an implied condition as if the latter had been employed to perform the service, the condition is in general one that merely imposes on the former a negative and not a positive obligation. If I employ a man for reward to build a house on my land I subject myself to an implied condition that I will do nothing to prevent him carrying out the work. But I am under no implied obligation to help him earn the reward whether by the supply of building materials or otherwise. But there are exceptional cases where in a contract of employment the employer is under a positive obligation. If, for instance, I employ an artist to paint my portrait I subject myself to the positive obligation of giving him the requisite sittings. The question, then, to be dermined upon the hypothesis that I mentioned just now is this: Where an owner of

property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal ? This qualification must plainly be added, for the respondent does not contend, and no one could successfully contend, that the obligation of the principal to enter into a contract is an unconditional one."

The learned Chief Justice relying on the last part of the above quotation reached the conclusion that in the present case as the duty of the agent was to secure a purchaser, it could not be held that the purchaser had been secured till the contract of sale was concluded by the vendor with him and that the actual sale having been concluded for a sum of Rs. 1,05,000, the plaintiff could only get his remuneration on the basis of the price for which the sale was made and not on the basis of the offer the plaintiff had secured. It seems to me that when Lord Romer was laying down that a purchaser in such contracts means at least a person who enters into a binding contract to purchase, he had in mind the contract with which he was dealing in that case. I am free to think that Lord Romer had not in mind commission notes wherein the word "buyer" or "purchaser" had been employed in a loose sense.

In Jones v. *Lowe*(1), wherein the instrument was in these terms—

"In the event of my introducing a purchaser, I shall look to you for the payment of the usual commission in accordance with the scale fixed by the Auctioneers and Estate Agents Institute",

Hilbery J. said that had he been free of authority, he should have thought that there were strong grounds for saying that what every owner of a house who desired to

(1) [1946] 1 K.B. 73.

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sell it expected a house agent to do, was to bring the property fairly to the notice of persons who resorted to him for houses and endeavour to persuade one of them to buy it. The learned Judge further observed as follows :—

"If the agent introduces someone who is perfectly willing to go through with the purchase at a price which will satisfy the vendor, it would seem that the agent has done everything that the parties contemplate that he should do, for they do not contemplate that the agent should have anything to do with the actual completion of the transaction. He is to find a person who will pay the price which is asked for the property, and the contract is entered into on the basis that the person so found will be the person to whom the owner of the property will sell.

It seems to me hard, if an agent has done to the full extent what the parties contemplated that he should do, that he should not be entitled to say 'I have done what I contracted to do because I have introduced someone willing to purchase although he never in fact became the actual purchaser'. I do not feel, however, that it is open to me to put that construction on the words of the contract in the present case because I think that the observations made in the House of Lords, and particularly those of Lord Russell of Killowen and Lord Romer in *Luxor (Eastbourne) Ltd.* v. *Cooper*(1), show that they were clearly of opinion that if an agent is employed to introduce a purchaser for a house and before the purchaser has entered into a binding and legal contract, the house is withdrawn from the market, the agent cannot say that he has earned his commission."

In a later case, *E. H. Bennett* v. *Millet*(2), the same learned Judge had to deal with a case where the contract was in these terms :—

"We confirm that in the event of our introducing a purchaser who is able and willing to complete the transaction, our commission will be in accordance with the recognized scale....".

The plaintiffs introduced a prospective purchaser, whom the court found to have been at all times able

(1) [1941] A.C. 108. (2) (1948) 2 All E.R. 929.

and willing to purchase, but the defendant refused to complete. It was argued by the defendant that the qualification of the word "purchaser" in the plaintiffs' letter was otiose and therefore should be struck out and the plaintiffs had not performed the contract until they had introduced a person who actually completed the purchase. It was held that the expression "a purchaser who is able and willing to complete the transaction" meant not a person who did, in fact, ultimately purchase the property, but one who was prepared to purchase it at the seller's price, and, as the estate agents had found such a person, they were entitled to their commission. The learned Judge further stated that in ordinary parlance we do not use the word "purchaser" as necessarily restricted to a person who actually completes a transaction of purchase and sale. In my judgment, therefore, on the alternative interpretation which has been placed by the two courts below on the commission note the word "purchaser" cannot be read in the strict sense in which it was read in *Luxor's* case (1), but should be read in the sense in which it is loosely used in common parlance, and that being so, the decision under appeal cannot be sustained.

Mr. Setalvad cited a number of Indian authorities where the words "buyer" and "purchaser" had not been given the strict meaning that had been given in *Luxor's* case (1). Similarly, the words "lender" and "borrower" had been given the meaning of "potential lender" and "potential borrower". It is, however, unnecessary to enter into a discussion of all those cases as it does not in any way advance the matter beyond what I have already said. It is unnecessary to go into the third contention of Mr. Setalvad in view of the above decision.

For the reasons given above I agree with the conclusion reached by my brother, Patanjali Sastri, in the judgment just delivered by him, that the appeal be allowed with costs throughout.

Appeal allowed.

Agent for the appellant: *S. P. Varma.*

Agent for the respondent: *Sukumar Ghose.*

(1) [1941] A.C. 108.