

Present : Bertram C.J. and De Sampayo J.

1920.

WEERASURIYA v. CROOS.

26—D. C. (Inty.) Negombo, 14,038.

Action for commission for sale of land—Application by defendant that all documents be disclosed by plaintiff.

The plaintiff sued defendant, *inter alia*, for remuneration for his services in connection with the sale of an estate. The defendant applied that plaintiff be required to declare by affidavit all the documents relating to the alleged promise.

Held, that in the circumstances of this case the defendant was not entitled to get an order of discovery.

The Court has a discretion to refuse discovery of documents where it can see that no good is reasonably to be expected from ordering it ; whether any good is to be expected can be ascertained by looking at the pleadings.

THE facts appear from the following order of the District Judge (W. S. de Saram, Esq.) :—

The defendant has asked for an order, under section 102 of the Civil Procedure Code, on the plaintiff to declare, by affidavit, all and every documents which are or have been in his possession or power relating to the promises alleged in paragraph 5 of the plaint filed. It seems clear that if there are any documentary evidence to any of the agreement or promise the defendant should be aware of them, and should be able to plead accordingly without discovery. In my opinion section 102 is not intended to afford a means of discovery of what documentary evidence the other party is in possession of to perhaps enable the applicant to shape his defence accordingly. Moreover, section 102 applies to documents, &c., relating to any matter in question in the action which would appear to refer to question in issue. My attention has been drawn to the case of *Contajina Franciscu* reported at 11 Q. B. D. 55, 63, but, unfortunately, those are not available here.

It would appear that the order made on February 5, 1920, regarding the filing of an affidavit was made in error, because the motion has endorsement by plaintiff's proctor of receipt of notice for 11th instant (*i.e.*, for to-day). I would, therefore, vacate the order of February 5, 1920, and I would refuse to order affidavit as applied for. Costs of this inquiry to be borne by applicant (defendant).

The relevant parts of the plaint were as follows :—

For a First Cause of Action.

3. The defendant was from about March, 1916, at all times material to this action a client of the plaintiff, and constantly sought plaintiff's advice and assistance in regard to the raising of loans on mortgage of his lands, the sale of lands and purchase of lands, the drawing up of deeds, the investigation of title, and other matters.

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4. In or about October, 1918, the defendant entrusted plaintiff with the sale of one of the defendant's coconut estates called St. John's in Kiniyama, in the Kurunegala District, and the plaintiff negotiated and arranged the sale of the said estate for the defendant, inspecting the property at defendant's request with a buyer, arranging with the mortgagees for a cancellation of a mortgage then existing granted by the defendant which the mortgagees had the right of holding for a longer term, procuring the title deeds from the mortgagees, &c., and procuring for the defendant a price above that offered by any other bidder at the time, to wit, Rs. 160,000.

5. The defendant agreed to pay the plaintiff, as remuneration for his services as set forth in the foregoing paragraph, a fee of 2 per cent. on the purchase money equivalent to Rs. 3,200.

6. The sale arranged by the plaintiff was effected in or about November 5, 1918.

For an Alternative Cause of Action.

7. The defendant has, by reason of the promises set forth in the 4th paragraph of the plaint, become liable to pay to plaintiff reasonable remuneration for plaintiff's services, and the plaintiff claims Rs. 3,200 as such reasonable remuneration.

For a Second Cause of Action.

8. The defendant in or about November, 1918, sought plaintiff's advice in regard to an action threatened by Messrs. E. John & Co., of Colombo, with regard to defendant's alleged failure to carry out an agreement to sell the said estate to them, and the plaintiff conferred with the defendant and his agents on several occasions, consulted counsel on several occasions, drafted letters for defendant to the said Messrs. E. John & Co. and their lawyers, Messrs. Julius & Creasy, and after much labour spent in this connection effected a compromise preventing an action, and saving the defendant from any claim by the said Messrs. E. John & Co. for compensation or damages.

9. In respect of the aforesaid transaction the plaintiff claims a sum of Rs. 522.50 for expenditure incurred and reasonable remuneration.

E. W. Jayawardene (with him *E. G. P. Jayatileke*), for the appellant.

J. S. Jayawardene, for the respondent.

July 23, 1920. BERTRAM C.J.—

This is an appeal from an order of the District Judge of Negombo refusing to order an affidavit of documents. The plaintiff sued the defendant on various causes of action, and in his plaint by paragraph 5 he alleged that the defendant had agreed to pay him as remuneration for his service in connection with the sale of an estate a fee of 2 per cent. of the purchase money. The defendant has now applied to the Court that the plaintiff be required to declare by affidavit all and every documents which are or have been in his possession or power relating to the promise alleged in paragraph 5 of the plaint in the case. No reason apparently was adduced for this application. It was not explained to the Court what would be the result of it. The plaintiff had not attached a list of documents to

his plaint. It is entirely within the discretion of the Court whether such an application should be acceded to. Lindley L.J. in *In re Wills' Trade Marks*¹ remarked that the tendency to extend the power of the Court to order discovery in cases of this nature ought to be very carefully checked, and certainly not encouraged. Nowadays, he added, a man cannot run over another in the street without there being an application for an affidavit of documents. In *Dowling v. Falmouth United Sewerage Board*² Cotton L.J. explained the principles in force in England. He said that the rule was intended to give the Court a discretion to refuse discovery of documents where it can see that no good is reasonably to be expected from ordering it, and he observed that whether any good is to be expected it can be ascertained by looking at the pleadings; that the Court ought not to require affidavits on the point, but that, if evidence has been previously taken, the Court may look at it to inform its mind as to whether there is any prospect of production of documents being useful.

I do not think from looking at the pleadings in this case that there is anything to indicate that an affidavit of documents would have any useful result. I, therefore, think that the District Judge has exercised his discretion very wisely, and I would dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

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BERTRAM
C.J.

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