

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Moulvie Mahomed Ikramull Huq v. Wilkie
and others, from the High Court of Judica-
ture at Fort William in Bengal; delivered
the 3rd July 1907.*

Present at the Hearing :

LORD ASHBOURNE.

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an appeal from a decree of the Calcutta High Court in its appellate jurisdiction reversing a decree of Stephen J. and dismissing with costs a suit brought by the Appellant, Mahomed Ikramull Huq, an honorary magistrate and landowner in Calcutta, against the members of a firm of merchants, trading as Graham & Co. It was a suit for specific performance of a written contract to take a lease.

For some reason which is not explained, but apparently without objection on the part of the Plaintiff, Stephen J., in substitution for specific performance, directed an inquiry as to damages for breach of agreement.

The negotiations for the contract began with an interview between Huq and a Mr. Borger. These negotiations are detailed by Huq in his examination in chief. His statement in all its details was accepted without contradiction and without an attempt at cross-examination. Huq, it seems, knew Borger in the course of business as a person connected with the firm of Graham & Co. and in the habit of buying hides for

them. One day early in January 1901 Borger called at Huq's house. He said he came from Graham & Co., and enquired about a hide godown for them. Huq told him that all his godowns were occupied then, but that he had a piece of land at No. 4, Gobind Chund Dhur's Lane, and that a hide godown could be put up there. Borger went to see the land, and said he liked the place. It was covered with buildings and in the occupation of tenants. The suggestion was that Huq should get rid of the tenants, and erect a hide godown on the land. The rent and other matters were discussed, and when everything was apparently arranged the Plaintiff said to Borger, "You have come and you have also agreed, but I want to have something for my satisfaction. I want to see Graham & Co. on this point." So a day was fixed, and the Plaintiff went by appointment to Graham & Co.'s office. Mr. Wilkie, the head of the firm, was engaged at the time. Borger asked Huq to wait, but he said, "No, I will not wait, but if I get a letter from Graham & Co. putting all these terms, then I will be satisfied." That was on the 9th of January 1901.

On the next day Huq received the following letter from Graham & Co. :—

To Moulvie Ikramull Huq,
Honorary Magistrate.

DEAR SIR, 10th January 1901.

WE agree to rent from you the tenanted portion of the land situated at No. 4, Gobind Chund Dhur's Lane, at a monthly rent of Rupees 500 (five hundred), for the period of 5 (five) years.

The municipal taxes and the trades license fee will be paid by us, the buildings to be erected at our system.

The lease will be executed shortly.

Yours faithfully,
GRAHAM & CO.

On receipt of that letter Huq had a plan of the proposed building prepared and handed it to Borger.

On the 21st of January 1901 Graham & Co. returned the plan with the following letter :—

Mr. Mahomed Ikramull Huq,
Honorary Magistrate.

DEAR SIR, Dated January 21st, 1901.

IN reference to our conversation, we agree to the plan handed comprising erection of building in No. 4, Gobind Chund Dhur's Lane, and would thank you to advise us when you will commence with same, as well as how long you expect to take until same will be ready for occupation.

Yours truly,
GRAHAM & Co.
R. BORGER.

Huq told Borger, who brought the letter, that the building would take three or four months to put up after the ground was cleared. Soon afterwards Huq called his tenants together and gave them notice. They promised to quit but would not go, so he had to take proceedings in the Small Cause Court for the purpose of ejecting them. All this took time. However, by August 1901 the ground was clear, and on the 19th of that month Huq wrote the following letter to Graham & Co. :—

Messrs. Graham & Co.

DEAR SIRS, 19th August, 1901.

ACCORDING to the conversation and arrangements made by Mr. R. Borger, and confirmed by your letter dated 21st January, I gave notice to my tenants to quit and vacate the holding. But as they were very unwilling to leave the land and I had to file ejectment suit, and they applied for time and succeeded in getting it from the Court although I had produced your two aforesaid letters in support of my case.

Now they have broken their sheds and cleared away and the ground is ready and fit for construction, and so godown will be ready for occupation in the course of three or four months from the date I hear from you.

Are you to suggest any alterations in the already approved plan or it stands as it is?

Yours faithfully,
MD. IKRAMULL HUQ.

To this letter Huq received a reply from Borger in the following terms :—

Mahomed Ikramull Huq,

Calcutta.

DEAR SIR, 20th August, 1901.

MESSRS. Graham & Co. having handed me your letter of the 19th instant, and in reply beg to state as there has no attempt been made on your part to follow

up my suggestion, and as I told you in presence of Mr. Halpern, some three months ago, my arrangement by the fact of your having neglected to act in accordance with same has by virtue of your default become void, and neither I nor Messrs. Graham & Co. have any obligation towards you under any former arrangements that may have existed.

Yours truly,
R. BORGER.

Huq then put the matter in the hands of his solicitors, G. C. Chunder & Co., and the following correspondence passed between them and Messrs. Graham & Co. and their solicitors and Messrs. Orr, Robertson and Burton:—

[G. C. CHUNDER & Co. to GRAHAM & Co.]

Re 4, Gobind Chund Dhur's Lane.

Messrs. Graham & Co.

Calcutta,

DEAR SIRS,

26th August, 1901.

MOULVIE Mahomed Ikramull Huq has handed to us a letter written to him by Mr. Borger, dated the 20th instant, purporting to be in reply to his letter of 19th instant addressed to you, with instructions to state in reply that he (our client) is not a little surprised at the statements contained in the said letter of Mr. Borger, for in the first place every attempt has been made by him in proper time to have the tenants ejected from the premises as you have been informed of by our client's letter to you of the 19th instant, and in the next place Mr. Borger never made any suggestion some three months ago, or at any other time, either in the presence of Mr. Halpern, or anyone else, with regard to an arrangement which was to be followed by our said client, in fact our client is unable to conceive what arrangement is referred to in the said letter of Mr. Borger. Our client is not aware of any default or neglect in his part which would justify you to avoid the contract which you have entered into with our client by your letter of the 10th January last, and confirmed by your letter of the 21st January last.

Under these circumstances we are instructed by our client to request you (which we hereby do) to be good enough to let our client know through us whether you want the building upon the demised premises according to the plan already approved of by you at once.

Our client being prepared to complete the building in four months from the commencement thereof.

Yours faithfully,
G. C. CHUNDER & Co.

[ORR, ROBERTSON & BURTON to G. C. CHUNDER & Co.]

Messrs. G. C. Chunder & Co.

Re No. 4, Gobind Chund Dhur's Lane.

DEAR SIRS,

Calcutta, 30th August, 1901.

YOUR letter of the 26th instant to Messrs. Graham & Co. has been handed to us with instructions to reply.

Our clients desire us to state in the first place that although the negotiations for the lease of the above premises, such as they were, were originally carried on in their name, yet as a matter of fact they have never had any personal interest in the matter at all, they merely having allowed their name to be used as agents for or on behalf of J. J. Stein, Esq., the predecessor of Messrs. Stein, Forbes & Co., who are, they understand, ready and willing to accept any responsibility or liability there can be in the matter, although our clients deny that any such responsibility or liability can possibly exist. Under these circumstances we have to request that you will address any further communication you think it necessary to send on the subject to us as representing Messrs. Stein, Forbes & Co. Subject to what we have above written, our clients desire us to state that they are advised that no concluded or binding agreement for the lease of the above premises was ever come to, and that they must decline all re-sponsibility in the matter. The facts stated by Mr. Borger in his letter of the 20th instant are correct and can be substantiated should occasion arise. If your client has suffered any inconvenience or loss he has himself to thank. The facts being as above stated, you will understand that as our clients have no concern whatever with the premises, they certainly do not desire your clients to erect any building upon them, although of course should he desire to do so on his own account it is no concern of theirs whether he carries this desire into effect or not.

Yours faithfully,
ORR, ROBERTSON, & BURTON.

On the 6th of February 1902 Huq brought this suit against Graham & Co., claiming specific performance and damages in addition to or in substitution for specific performance.

Graham & Co. filed their written statement on the 19th of November 1902. They admitted the letters set out above. They did not repeat the defence put forward in their solicitors' letter of the 30th of August 1901. They merely said that they were told by Mr. Halpern that Borger had a conversation in or about April or May 1901 with the Plaintiff, in the course of which Borger said to Huq, "that, since he " had been so dilatory over the whole " business, the entire matter was now off"; and that thereupon " the Plaintiff made some " excuses about the unusual delay, and expressed " himself satisfied that the matter of the said

“ proposed lease should be dropped and considered as cancelled.” That was the only semblance of defence set up in the written statement ; but it is to be observed that Graham & Co. did not venture to say, and never have said in any pleading or in any letter, that, after the contract was signed, Borger continued to be their agent or that he had any authority to cancel their agreement.

The next thing that occurred after the written statement was filed was that Graham & Co. obtained a commission to examine Borger, who was then in the United States. In his examination Borger did not state that he had any authority from Graham & Co. to terminate the contract or to represent them for any purpose after the contract was signed. He said that the suggestions referred to in his letter of August 20th, 1901, “ were that Plaintiff should tear down the old buildings on the premises and erect new one in their place, and that these changes should be completed within three months from the 10th of January 1901,” and that “ these suggestions ” were made to Plaintiff between the 1st and 21st of January 1901. Then he stated that he had an interview, in the presence of Halpern and two of his munshis, with the Plaintiff, and that the following conversation took place :—

“ I said that he had failed to carry out his agreement as to the alterations, and as I had received notice to quit the premises occupied by me as warehouses, it became necessary that I should have other accommodation. The Plaintiff having failed to carry out the agreement, it was necessary for me to make other arrangements, so I notified him personally and verbally, in the presence of Mr. Halpern and the two munshis, that, in virtue of his not having carried out his promises, I considered myself and principals released from any agreement or liability ; that I should proceed to make my own arrangements to the erection of a warehouse without further reference to the Plaintiff.”

Then he added :—

“ The arrangement was, as I have already stated, that if Plaintiff would erect buildings upon the premises in question according to plans approved by us, we would take a lease of the premises provided the erection was completed within three months from January 10th, 1901, for five years at Rupees 500 a month.”

Their Lordships have thought it right to set out all the correspondence that passed between the parties and their solicitors in reference to the question at issue, as well as the evidence of Borger, on which the Court of Appeal principally relied. The correspondence tells the whole story, and tells it very plainly. It is perfectly consistent with everything that Huq said in his examination. It is absolutely inconsistent with any one of the various and conflicting defences put forward on behalf of Graham & Co., and it is equally inconsistent with the only part of Borger's evidence which can be regarded as in any way material to the defence.

In a suit for specific performance it is of some importance to distinguish between negotiation and contract and to ascertain what the contract is, when and by whom it was made, and who the parties are who are bound by it. This case seems to have been presented in such a loose and confused manner that neither of the Courts below appears to have been able to obtain a clear and just view on any one of these points. The learned Judge of first instance begins his judgment with these observations :—

“ In the transactions to which this case refers they ” (that is, Graham & Co.) “ lent their name to Forbes, Stein & Co., . . . and, as the case has been argued before me, no distinction has been drawn between the nominal Defendants and Forbes, Stein & Co.”

Now there is nothing whatever in the evidence tending to suggest that the name of Stein, Forbes & Co. was ever mentioned to Huq until it occurred in the solicitors' letter of the 30th of August 1901. When the dispute arose, Graham & Co., no doubt,

endeavoured to shift the responsibility on to Forbes, Stein & Co., but the Plaintiff's solicitors did not accept that view. The learned counsel for Graham & Co. attempted to take the same line in his cross-examination of Huq, but Huq said at once :—

“I have a clear objection to making Forbes, Stein & Co. responsible for my claim instead of Grahams, because I have nothing to do with them. That's my only reason.”

And the matter dropped then and there.

Now the firm of Forbes, Stein & Co. were not in existence when the contract in question was made. Graham & Co., in their written statement, say that they were acting on behalf of “J. J. Stein, the predecessor of the firm . . . of Stein, Forbes & Co.” But they do not suggest that Huq was aware of that circumstance. Then the learned Judge says that the contract was “a verbal one.” The Court of Appeal also say that “the agreement was originally an oral one made between Borger and the Plaintiff.” But, in fact, there was no contract between Borger and the Plaintiff. There was nothing but negotiation until the contract was made by the letter of the 10th January 1901, accepted by Huq. The Court of Appeal say :—

“The Defendants are a well-known firm of merchants in Calcutta. They have no interest whatever in the subject-matter of the suit, and they were acting throughout for the firm of Messrs. Forbes, Stein & Co. A Mr. Borger was an assistant in the firm of Stein, Forbes & Co., and the negotiations for the lease took place between Borger and the Plaintiff, and the Defendants took no personal part whatever in the matter.”

That seems to be equally inaccurate. No doubt in their written statement the Defendants alleged that they had no personal interest in the subject-matter of the suit, whatever that allegation means. But it seems rather a strong thing to say that a firm “took no personal part whatever in the matter” when they actually signed a contract in writing drawn up by themselves, binding them to carry out certain terms which they had allowed or directed a man coming from

their office and professing to act for them to negotiate on their behalf. They are the real and the only Defendants. They are not "nominal Defendants," as Stephen J. calls them. It may or may not be true that they intended to act on behalf of a firm not yet formed, or, as Borger says, "on behalf of J. J. Stein, whose business in Calcutta they were financing." But Huq was not concerned with their undisclosed intentions. As between Huq and Graham & Co., the burthen of the contract rested with Graham & Co. and no one else.

The case seems to their Lordships to be perfectly clear, and the suit undefended. If the practice in Calcutta be the same as it is in this country, the Plaintiff might have moved for a decree of specific performance on the written statement being put in, and he would have been entitled to such a decree at once and as a matter of course.

Now what are the defences that have been put forward? The first defence was that there was "no concluded or binding agreement." That defence was abandoned as soon as it was made, and nothing more has been heard of it. The next defence, if it can be called a defence, is to be found in the written statement which has already been referred to. Well, that defence has also been abandoned. Even if it amounted to a defence at all, and if it is to be taken as a plea of release, it could hardly be supported when Borger, the Defendants' own witness, says that though he considered the agreement at an end that was not the Plaintiff's view. "The Plaintiff," says Borger, "did not consider the agreement at an end."

The only other defence is founded on Borger's statement that the real agreement was that "we," that is, Graham & Co., for whom he was acting in the negotiations, "would take a lease of the

“ premises provided the erection of the proposed
“ buildings was completed within three months
“ from January 10th, 1901.” That statement
appears to their Lordships to be absolutely
incredible. If the agreement was really con-
ditional, why was the condition not stated in the
contract of the 10th of January. Graham & Co.
were bound to be all the more careful in defining
the terms of the contract, because they were
acting, as they say, not for themselves but for an
undisclosed principal. It is difficult to suppose
that any person, however careless he might be in
the conduct of his own affairs, would be so
culpably remiss in the conduct of business
entrusted to him by another as to omit from a
contract which he drew up himself the most
important of all the stipulations it was intended to
contain. It is still more difficult to believe that
such a stipulation could have been part of the
contract when we come to the letter of the 30th
of August 1901. The Defendants were then
casting about for some plausible defence to an
inconvenient claim. Instead of relying upon
what would have been a perfectly valid defence,
if only it had been true, and which, if true, must
have been brought back to their recollection by
the claim, they took refuge in the absurd pretence
that there was no concluded agreement at all.

There is another observation which lies on the
surface :—If a person who has drawn up a con-
tract with his own hand and signed it, wishes to
persuade the Court that somehow or other an
important term has been omitted by inadvertence
or mistake, he is surely bound to pledge his oath
to the truth of the story, and not the less so
when his opponent comes forward and swears
that there is no foundation for the suggestion.
Surely his advocate is not to be listened to, if
he himself will not venture to go into the
witness box in support of the story he asks the
Court to believe.

There is no doubt, and, indeed, Huq admits that in the course of the negotiations he promised to clear the ground and erect the proposed buildings as soon as practicable, and that he said that when the land was ready the buildings might be finished in the course of three or four months. But it is very improbable that any person in Huq's position would have agreed to the stipulation which Borger says was part of the contract. No person in his senses would have bound himself to such a contract when the land, to the knowledge of both parties, was in the occupation of tenants who had been there for a long time, and who could not be dispossessed at a moment's notice. Besides, there was no reason for any such stipulation. It was more for the interest of Huq than for the interest of anybody else that the buildings should be erected as soon as possible. He could not expect to get any more rent from tenants he was going to turn out, and he would get no rent at all from his new tenants until the buildings were finished.

Time was not made of the essence of the contract by the terms of the written agreement. But it is clear that in the contemplation of both parties the buildings were to be completed without unreasonable delay, and it cannot be disputed that, in case of undue delay on the part of Huq, the other parties to the contract might have made time the essence of the contract by giving notice that they would not hold themselves bound to complete unless the buildings were finished within a specified time, assuming the time specified to be such as the Court would hold to be reasonable under the circumstances. But then, Graham & Co. never gave any such notice. They seem not to have troubled themselves at all about the matter. It is not suggested that they authorised Borger to act on their behalf in determining the contract. It is plain

that Borger assumed to act on his own behalf and in his own interest. And so the Chief Justice understood him. It was inconvenient to him. He had got other premises, and so on behalf of himself and his principals—meaning, no doubt, not Graham & Co., but Stein, Forbes & Co., in whose service he seems to have been at the time—he took upon himself to determine the contract, a thing which neither he nor Graham & Co. could do without proper notice, and which Borger could not do in any case without authority from Graham & Co.

Comment was made on the circumstance that Huq did not bring forward corroborative evidence to prove that he really did take proceedings against his tenants. But it must be remembered that the statement to that effect in his letter of August 1901 had never been challenged, and that there was not the slightest reason why he should come to the trial armed with official and documentary evidence to rebut and disprove insinuations which had never been made. Their Lordships may add that, having considered Huq's evidence in the light of comments made upon it in the Appellate Court, their Lordships see no reason to doubt the perfect truthfulness and accuracy of his testimony.

Their Lordships think that the Defendants have been wrong throughout, and they will humbly advise His Majesty that the decree of the Appellate Court should be reversed with costs, and the decree of Stephen J. restored.

The Respondents will pay the costs of the Appeal.
