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BCURKE v. MALCOLM

JUDGMENT

Delivered 14th day of September, 1954.

Kelly, J.

Evidence in this case was heard at Wau on 9th August, 1954, and at the conclusion of the evidence Mr. White, Counsel for defendant, addressed on the evidence and referred to:-

Trueman v. Hurst (1785) 1 T.R.p.40 (99 E.R.p.960)
Lane v. Hill (1852) 18 Q.P.p.252 (118 E.R.p.94)
Siqueira v. Noronha (1934) A.C.p.332
Firm Rishum Chand v. Seth Girdhari Lal (1934) 50 T.L.R.p.465
Chitty on Contracts 19 Ed. pp.79,82.

After Mr. Tonking, Counsel for plaintiff, addressed on evidence the matter was adjourned to Port Moresby for authorities in support of plaintiff's claim. On 6th instant, the following authorities were referred to by Mr. Kirke of Counsel:-

Hals. 2nd ed., pp.294,295,296,299 & 300
Dails v. Lloyd & Anor. (1845) 12 Q.B.p.531 (116 E.R.p.967)
Foster v. Allanson (1788) 2 T.R.p.479 (100 E.R.p.258)
Knowles & Ors v. Michel & Anor. (1811) 13 East.p.249 (104 E.R.p.366)
Highmore v. Primrose (1816) 5 M. & S. p.65 (105 E.R.p.975)

In April 1951, the parties entered into an agreement to fell and transport timber on behalf of New Guinea Goldfields Limited. In April, 1952, the partnership was dissolved by mutual consent,

On the dissolution the parties "listed the receipts and expenses". Neither party is an accountant. The defendant received £100 and one G.M.C. truck. Included, or deemed to be included, in the assets of the partnership was a Miners Homestead Lease. By mutual consent this lease was valued at £500 and plaintiff paid the defendant £250 for defendant's share therein.

Plaintiff alleges that some time later defendant claimed an interest in one power saw, whereupon it was agreed to ask an accountant, Francis Joseph Leydin, of Wau, to prepare a full statement of accounts in connection with the partnership business. Defendant denies this allegation.

Accounts were prepared by Leydin. Following on those accounts plaintiff claims from defendant £169.17.11. "for monies found to be due by the defendant to the plaintiff on accounts stated between them".

Defendant has counter-claimed against plaintiff for £68 "supplying and installing a reconditioned gear box and two back springs in the plaintiff's jeep". The jeep in question had been used in the partnership affairs.

Dealing with plaintiff's claim. At the conclusion of the

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"listing of the receipts and expenses" in April 1952, defendant received, as abovementioned, £100, one G.M.C. truck, and £250 as half share of the Miners Homestead Lease.

Plaintiff received one G.M.C. truck and the Miners Homestead Lease. The evidence is not definite, but it would appear that plaintiff received also one steam engine and one power saw.

Plaintiff admitted in evidence that on the distribution of the assets he and defendant both considered the partnership wound up and the whole venture settled. But Leydin was asked to prepare accounts after defendant, as alleged by plaintiff, had subsequently claimed an interest in the power saw.

According to plaintiff he informed defendant that defendant had no interest whatsoever in the power saw but defendant maintained that he had, whereupon the parties mutually agreed to ask Leydin to prepare a full statement of accounts. Defendant denied that he claimed any interest in the power saw and he denied that he agreed to have accounts prepared by Leydin; and he states that he knew nothing about Leydin's accounts until he was handed a copy by plaintiff, whereupon he, defendant, went to Leydin to "know what it was all about" as he could not understand the figures.

Plaintiff admitted that defendant did not press any claim for any interest in the power saw.

In deciding which party is right as to whether there was a mutual agreement to reopen the matter and submit to Leydin for accounts I have the evidence of Leydin to assist me. He stated that he dealt only with plaintiff; that he did not know defendant in preparing his accounts; and that shortly after he had delivered the accounts to plaintiff the defendant called on him and claimed that certain transactions were not included in the accounts - he had a "recollection of G.M.C. truck spare parts but there may have been other matters as well".

On consideration of the evidence on the question I find that defendant did not agree to submit the partnership matters to Leydin for accounts. On that finding and on the authorities quoted by counsel I am of the opinion that when the parties agreed to dissolve the partnership and when they "listed the receipts and expenses" and when defendant received the £100 and the £250, and when the assets were distributed in pursuance of the agreement for dissolution, the whole venture was closed and both parties were bound by the settlement, and that plaintiff is not entitled to reopen the matter.

Plaintiff therefore fails in his claim.

Dealing with defendant's counter-claim. On 31st July, 1953, plaintiff's solicitor wrote defendant demanding payment of the £169.17.11,

claimed by plaintiff. On 5th August, 1953, defendant wrote plaintiff demanding payment of £68 for installation of the gear box and two springs in plaintiff's Jeep, and enclosing an account for £292.12.6 for materials and spare parts supplied by defendant for the partnership's two G.M.C. trucks.

This amount of £292.12.6 was not taken into consideration by Leydin in his accounts. When cross-examined as to why he did not pursue his claim in respect of the amount defendant stated "it was only a threat".

Defendant counter-claims the £68 for work done and materials provided on the basis that such were not partnership matters. In both evidence in chief and cross-examination defendant stated that he was more than satisfied - he was happy - to receive his £100 and one G.M.C. truck and the £250 on the settlement in April 1952, as the business was not making money. And in both evidence in chief and cross-examination he admitted that on the settlement in April 1952,, he had no intention of claiming for the gear box and springs which he alleges he installed in plaintiff's jeep (and incidentally, not for the spare parts for the two G.M.C. trucks either) but it was only after plaintiff claimed against him for the £169.17.11 that he decided "to be in it too".

In my view he was too late. He waived whatever rights he may have had, if any, in respect of plaintiff's jeep on the settlement in April 1952. And for the same reasons which preclude plaintiff from reopening the matter the defendant is precluded from reopening the matter.

Defendant therefore fails in his counter-claim.

No order as to costs.

(Sgd) A. Kelly, J.