G. R. No. 17729

[G. R. No. 17729. March 07, 1922]

L. P. FIEGE AND E. E. BROWN, PLAINTIFFS AND APPELLANTS, VS. SMITH, BELL & COMPANY, LTD., AND J. C. COWPER, DEFENDANTS AND APPELLEES.

D E C I S I O N

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STATEMENT

The defendant, Smith, Bell & Co., Ltd., is a corporation organized under the laws of the Philippine Islands, with its principal office in the city of Manila. In 1918, the defedant Cowper was in the employ of the defendant corporation, which, among other things, was engaged in the sale of machinery and equipment for the use of manufacturers of coconut oil.

As the result of negotiations with the company, on May 6, 1918, Cowper wrote the following letter:

> "I have arranged with Mr. Schmidt of your company, that I, Mr. J. C. Cowper, and Mr. L. P. Fiege shall receive half of the profits received from this deal."

This letter referred to what is known in the evidence as the Harden contract. Later, both plaintiffs here became associated with Cowper in finding purchasers and in the sale of such machinery for the defendant corporation. Outside of the above letter, there is no written contract as to what the plaintiffs should receive or the defendant

should pay them for their services, and there is but little, if any, oral evidence of any contract between Fiege, Brown, and Cowper, as one party, and the defendant corporation, as the other.

As a result of their services, a number of purchasers were found for the machinery with whom the defendant corporation entered into written contracts for its sale and delivery, and undertook in good faith to carry out the terms and provisions of the different contracts with the respective purchasers. The plaintiffs Fiege and Brown now claim that the signing of the respective contracts by the company with the respective purchasers made and constituted a complete sale of the machinery, and that their compensation should be based upon the gross amount of the contracts, which should be construed as completeed sales. In other words, when the contracts were signed, their services were complete and their commissions were earned.

Claiming that the defendant company has breached its contract, and refused to account or settel with the plaintiffs for their services, they commenced this action, to recover from the defendant corportaion, and because Cowper refused to join the plaintiffs, he was made a defendant in an action.

Among other things, the complaint alleges that, under the terms and conditions of the contract, the plaintiffs and their associate Cowper were to seek buyers for the machinery which were acceptable to the defendant company, and that the prices were to be fixed by the plaintfiffs, as brokers, but which should, in no case, be less than P10,000 for each expeller, and that the date of delivery should not be specific but only approximate.

> "That for their services the plaintiffs and associate, as partners, acting as brokers for the defendant company, were to receive one-half of the difference between the cost of the machinery and equipment laid down in Manila, P. I., and the prices at which same were sold to buyers secured by the said brokers."

That the plaintiffs secured orders for machinery and equipment and which were delivered to, and accepted by, the defendant company, as follows: (Here follows a list of the contracts, dates, with whom made, and amounts aggregating to P313,000.)

It is then alleged that, for the purpose of carrying out the respective contracts, the defendant imported all of the specified machinery, but that it has failed and refused and still refuses to make any settlement with the plaintiffs or to render any accounting of the cost of the machinery, or to make any payment, either in full or on account, of the services rendered. That the plaintiffs have no way to determine the amount of the compensation which they should receive, and that it can only be ascertained by means of an accounting, which the defendant company should make. That they are entitled to recover approximately P35,000. and they pray that the defendant company be required within a reasonable time to furnish the plaintiffs a full and complete accounting, and to pay them the amount found to be due for the services rendered, upon which they should have interest from the time the machinery was imported, and for such other and further relief as may be just and equitable.

For the answer, the defendant admits that at the times alleged the plaintiffs were associated, as partners, under the firm name of the Philippine General Commercial Company; that it is a corporation as alleged; and that in the year, 1918 it engaged the plaintiffs to act as brokers for the sales of machinery and equipment, and they delivered purchaser's contracts to the defendant company, which it accepted, amounting to P313,000, as alleged in paragraph 6 of the complaint. That the defendant J. C. Cowper was formerly a partner of the plaintiffs, and withdrew from the partnership on August 8, 1918, and that he had an interest in the amount which the plaintiffs should recover, but refused to join with them, and denies all other material allegations of the complaint, and, as a further and separate defense, alleges that the plaintiffs and defendant Cowper secured orders for machinery and equipment, for which the company "agreed to pay plaintiffs and the defendant J. C. Cowper, in equal shares, one-half of the net profits derived by said defendant, Smith, Bell & Co., Ltd.,

from said orders."

> "That delivery has been accepted on only one of the orders set out in the said complaint, to wit, that of A. Chicote, six expellers, P75,000, dated August 11, 1918."

It is then alleged that outside of P2,000 paid by the by the Insular Coconut Oil Co., on its order of August 22, 1918, no other payments have been made on the respective contracts by any of the other purchasers, which were secured by the plaintiffs. That until such payments have been made, the defendant company cannot ascertain the net profits, but that it has not received any profits whatever from any of the other orders, and that, as soon as full payment of any order is made by the purchaser, the company will render an accounting to plaintiffs, and pay them any amount found due.

Upon such issues, the case was tried, and a judgment was rendered for plaintiffs for P6,511.17, without interest or costs, from which they appealed, claiming that the court erred in failing to find that the plaintiffs were entitled to commissions on two different contracts; that the court erred in holding that plaintiffs' recovery should be based upon the defendant company realizing a profit on the respective contracts; and in rendering judgment without interest or costs.

JOHNS, J.:

The defendant company, having admitted that the plaintiffs procured purchasers for machinery for the amount alleged, the important question here is how much plaintiffs have earned on account of their services, and when it becomes due and owing. There is no controversy as to the rate of compensation. Both parties agreed that it should be "one-half." Plaintiffs claim that it should be one-half of the difference between the cost of the machinery laid down at Manila and the price specified in the contracts with the respective purchasers. The company contends that the plaintiffs were to receive

"one-half of the net profits." That exclusive of the admissions made no money has been received or collected on any of the remaining contracts, and that the company has in good faith endeavored to enforce the contracts and collect the money, but it has been unable to do so, and that, at such time in the future as any money is collected, it is ready and willing to account to the plaintiffs.

Although the oral evidence pro and con is more or less conflicting, the trial court found that the letter of May 6, 1918, above quoted, was the basis of the contract under which the services were rendered, and that the plaintiffs were only entitled to recover one-half of the net profits that the company made out of its contracts with the purchasers, and limited the amount of plaintiffs' recovery to the one-half of the net profits, which the company had actually received and collected under the contracts, or P6,511.17.

April 15, 1918, Fiege, Brown and Cowper formed a partnership known as the Philippine General Commercial Company to do a general brokerage business. It is admitted that on May 6, 1918, Cowper wrote the letter above quoted, and that the different members of the firm and the defendant company knew that the letters was written and received. August 15, 1918, the respective members of the firm signed a writing, which, among other things, recites:

> "It is further agreed that whatever commissions may be due or become due to the members of the copartnership on orders for machinery or merchandise shall be paid by Smith, Bell & Co. pro rata among the three partners, etc." and that on the same date the three members of the firm addressed the following letter to the defendant company:
>
> "The undersigned hereby request that all commissions that may accrue on orders for machinery or merchandise accepted or pending acceptance in which we, or any of us, may be interested, be paid as same fall due to the undersigned individually in

> pro rata shares of one-third of such commissions * * *."

The contract with Harden was dated May 16: with Vicente Sotelo two contracts were dated August 16, and two August 20; one with A. Chicote was August 11; and the other August 22, all in the year, 1918. When you consider the dates of the respective contracts, the recital in the agreement between the members of the firm, and the letter to the firm of August 15, become important. The firm agreement recites "that whatever commissions may be due or become due," and the letter recites "that all commissions that may accrue on orders for machinery or merchandise accepted or pending acceptance."

The expellers were not to be sold for less than P10,000. As we construe the contract, the plaintiffs and Cowper during his partnership, as one party, were to divide equally the profits of each contract, and plaintiffs are entitled to one-half of the profits out of each contract, and until such time as the company made a profit on a given contract, plaintiffs' commission was not earned as to that contract. There was no profit through the mere signing of the contract by the purchaser and its acceptance by the company. There would not be any profit until the purchaser paid all the money and complied with his contract. Until such time as the company realized a profit on the contracts, there was nothing to share or divide.

The authorities cited by the attorneys for the appellants are good law, but, under the facts in this case, they are not in point.

Plaintiffs' commission was to paid out of, and is limited to, net profits, and, except as to the amount found by the trial court, there is no evidence of net profit on any of the contracts.

No tender was made before October 15, 1919, the date of filing the complaint, and none is alleged in the answer.

September 8, 1920, through its attorneys, the defendant wrote a letter to plaintiffs' attornney, in which they say they are willing to pay as commissions on contracts for the sale of machinery the sum of P6,511.17, "in full settlement of all claims which they have upon our clients on that behalf as of this date," and we "hereby tender you the sum of P6,511.17 in full settlement of all claims due by our clients as of this date."

As applied to the existing facts, it might be questioned as to whether this was a good tender of the P6,511.17. But, assuming that one year after the defendant had collected the money upon the contracts, and it does not include interest on the money collected or the accrued costs.

The evidence shows, and the company in effect admits, that from and out of moneys which it had previously collected on the contracts, the plaintiffs were entitled to have and receive P6,511.17. Under the contract between the plantiffs and the company, this money should have been paid to the plaintiffs when it was collected.

The lower court found that the plaintiffs were not entitled to interest and costs. That was error. In so far as it found that the plaintiffs were entitled to judgment for P6,511.17, the judgment of the lower court is affirmed. In all other respects, it is reversed, and a judgment will be entered here in favor of the plaintiffs for P6,511.17, with interest from the 15th of October, 1919, at the rate of six per cent per centum, together with costs in favor of the plaintiffs in both this and the lower court.

This judgment to be without prejudice to plaintiffs' right to recover any other profits which may have accrued or which may hereafter accrue upon any of the remaining contracts. So ordered.

Araullo, C. J., Johnson, Street, Malcolm, Avanceña, Villamor, Ostrand, and *Romualdez, JJ.,* concur.

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