WICKREMARATNE
v.
THAVENDRARAJAH

COURT OF APPEAL
ATUKORALE, J. AND RODRIGO, J.
C. A. (S. C.) 71/75 (F)–D. C. MOUNT LAVINIA 2501/ZL –16.
NOVEMBER 16, 17 AND 18, 1981.

Evidence Ordinance sections 91, 92–Indenture of lease of a business executed between the plaintiff and defendant–Action filed for ejectment by plaintiff on basis of such lease–Defence taken that document was a sham and the true transaction a letting of premises and not of business–Does section 92 of the Evidence Ordinance shut out oral evidence in regard to true nature of transaction ?

The plaintiff filed this action on the basis of an indenture of lease (P4) in terms of which he claimed to have leased to the respondent the *business* of Modern Drapery Stores carried on at Wellawatta for a period of three years. The cause of action he relied on for the ejectment of the defendant was that he had sublet and/or assigned and/or parted with possession of the said premises where the business was carried on and had also failed to pay the rents that fell due for three consecutive months ending 31st March, 1971. He prayed, inter alia, for a cancellation of the said lease P4 and for ejectment of the respondent from the business and the premises and for the return of certain movables claimed to have been handed over with the business.

The respondent in his answer while admitting the bare execution of P4 denied that what was leased to him was the business of Modern Drapery Stores and pleaded that it was the premises in question which were let to him by the plaintiff and that the execution of the indenture of lease P4 was a subterfuge or a camouflage in order to recover rent in excess of the authorised rent for the premises. At the trial, the learned District Judge held in favour of the defendant that it was a lease of the premises in question and not of the business. The plaintiff's action was dismissed.

In appeal it was argued on behalf of the appellant that section 92 of the Evidence Ordinance prohibited the reception of oral evidence to show that the document P4 was not in reality a lease of the business at all but only a colourable device or a sham for letting out premises which were rent controlled at a rental in excess of the authorized rent and was thus a cover to circumvent the rent laws. It was submitted that to permit oral evidence to be led on this question would be to permit such evidence to contradict the express terms of P4 and to thereby contravene section 92. Learned Counsel for the respondent submitted that section 92 cannot stand in the way of leading oral evidence for the purpose of showing that the transaction evidenced by P4 was not the real agreement between the parties but only a sham in order to circumvent the rent laws.

Held

Section 92 of the Evidence Ordinance cannot exclude oral evidence where it is for the purpose of showing that the document does not embody the real agreement between the parties thereto and that there was in fact no agreement as set out therein ; but that it was only a sham to conceal the real agreement which was to let certain premises at a rental in excess of the authorised rent

Cases referred to

(1) *Fernando v. Cooray, (1957) 59 N.L.R. 169.*
(2) *Penderlan v. Penderlan, (1948) 50 N.L.R. 513.*
(3) *Tyagaraja v. Vedathanni, [1931] A I.R. (P.C.) 70.*

APPEAL from the District Court, Mount Lavinia.

H. W. Jayewardene, Q.C., with *L. V. R. Fernando, V. Siriwardena*, and *Ronald Perera*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *P. Karalasingham, Siva Rajaratnam* and *A. H. M. Reeza*, for the defendant-respondent.

Cur. adv. vult.

January 19, 1982.

ATUKORALE, J.

In his plaint the appellant averred that by Indenture of Lease No. 849 dated 26.6.1969 (which was annexed to the plaint marked A and also produced in evidence as P4) he leased out to the respondent the business called and known as Modern Drapery Stores carried on by him at premises No. 5, W. A. Silva Mawatha, Wellawatta, at a monthly rental of Rs. 275/– for a period of 3 years commencing from 1.1.1969. For a first cause of action he pleaded that in contravention of the express terms of the said lease the respondent had sub-let and/or assigned and/or parted with the possession of the said premises to one Mohideen and had further failed to pay the rents that fell due for the 3 consecutive months ending on 31.3.1971. He thus prayed for a cancellation of the lease P4, for the ejectment of the respondent from the business and the premises and also for the return of the movables valued at Rs. 3,625/– which were handed over to the respondent together with the business and referred to in the second schedule to the plaint. For a second cause of action he pleaded that on 13.6.1969 the respondent took over from him the articles set out in the third schedule to the plaint undertaking to return the same to him at the expiry of the lease of the business of Modern Drapery Stores and claimed their return or their value, namely Rs. 6,596/–.

The respondent in his answer admitted the bare execution of the Indenture of Lease P4 but denied that the business of Modern Drapery Stores was leased out to him. He pleaded that P4 was a subterfuge or a camouflage for the purpose of recovering rent in excess of the authorised rent for the premises in question which he averred were let to him by the appellant furnished at a monthly rental of Rs. 275/– from September 1966. He also claimed in reconvention a sum of Rs. 11,421.30 cts. being excess rent recovered from him by the appellant for the period September 1966 to February 1972 in respect of the premises. He further stated that the appellant had recovered from him a sum of Rs. 3,000/– as an advance or deposit from him ; the appellant was entitled to recover as an advance or deposit only a sum of Rs. 305.85 cts. (being 3 months' rent) and the appellant has thus recovered a sum of Rs. 2,694.15 cts. in excess of the authorised advance or deposit which sum too he claimed in reconvention from the appellant.

At the trial in the lower court several issues were framed, the main of which arising for determination by the learned District Judge being issue No. 1 raised on behalf of the appellant and issues Nos. 10 and 11 raised on the respondent's behalf. They are as follows :-

(1) Did the plaintiff by the said lease bond let to the defendant the business known as Modern Drapery Stores carried on in premises No. 5, W. A. Silva Mawatha, Colombo 6, at a monthly rental of Rs. 275/– ?

(10) Did the plaintiff let to the defendant the furnished premises bearing No. 5, W. A. Silva Mawatha at a rental of Rs. 275/– per month ?

(11) If issue 10 is answered in the affirmative.–

(*a*) can the plaintiff have and maintain this action ?

(*b*) what is the authorised rent of the premises ?

(*c*) what amount has the plaintiff recovered in excess of the authorised rent ?

The appellant gave evidence and called two witnesses. The respondent gave no evidence nor did he call any witnesses. The learned District Judge in his judgment observed that the appellant's own evidence was that he did not at any time carry on the business of Modern Drapery Stores and held, on the first issue, that there was no lease of this business but only of the premises in question. He took the view that it was irresistible to conclude that " bond P4 of 26.6.1969 constituted only a rental of the premises and in the words in paragraph 2 of the answer the 'lease marked A was a subterfuge or *camouflage'* for the purpose of recovering excess rent for the premises bearing assessment No. 5, W. A. Silva Mawatha ". On the basis of this finding he answered the first issue against the appellant and issue No. 10 in the respondent's favour. Consequently issue No. 11 (*a*) was also answered in the negative. On issue No. 11 (*b*) he accepted the evidence of the appellant as to what was the authorised rent and on that footing he held on issue No. 11 (*c*) that the appellant had recovered a sum of Rs. 6,046.62 cts. as excess rent in respect of the premises for the period July 1969 to 31.7.1974. He thus dismissed the appellant's action and entered judgment for the respondent in the said sum of Rs. 6,046.62 cts. with costs. The appellant has now appealed from this judgment.

The main question arising for our adjudication in this appeal is a question of law namely, whether, as contended before us by learned counsel for the appellant, the provisions of s. 92 of the Evidence Ordinance (Chap. 14, Vol. 1, (C.L.E.)) prohibit the reception of oral evidence to show that the purported lease of the business of Modern Drapery Stores upon document P4 is in reality not a lease of the business at all but was only a colourable device or a sham or a blind for letting out rent-controlled premises at a rental in excess of the authorised rent and was thus a cover for circumventing the rent restriction laws. Learned counsel for the appellant submitted that under s. 92 of the Evidence Ordinance where the terms of a contract have been reduced to the form of a document no oral evidence can, as between the parties thereto, be admitted to, inter alia, contradict or vary the terms therein. In support of his submission he relied on the decision in the Divisional Bench case of *Fernando v. Cooray* (1). He maintained P4 was on its face clearly and plainly a letting of a business and not of the

premises. To permit oral evidence to be led to show that the letting was not of the business but of the premises would, he urged, be tantamount to admitting oral evidence to contradict the express terms of P4 and would be a contravention of the provisions of s. 92. Learned counsel for the respondent, on the other hand, maintained that s. 92 does not stand in the way of leading oral evidence for the purpose of showing that the transaction evidenced by P4 was not the agreement between the parties but was only a sham or fictitious agreement signed by the parties with a view to surmounting and circumventing the rent laws. P4 is a cloak intended to conceal their true agreement, namely, the letting and hiring out of premises at a rent in excess of the authorised rent. He submitted that where a party to a document seeks to establish that there was no such agreement as set out in the document and that the document is a sham not intended to be acted upon s. 92 of the Evidence Ordinance will have no application and such oral evidence was therfore admissible. He relied on the decision in *Penderlan v. Penderlan* (2) and submitted that the decision cited by learned counsel for the appellant has no application to the question for adjudication by us.

A perusal of P4 indicates clearly and unmistakably (and this fact was not disputed before us) that it purports to be a lease of the business of Modern Drapery Stores and not of the premises in which the business is carried on. There appears to be no ambiguity in the terms contained in P4. Its terms are explicit. Admittedly it has been signed by both parties. It would therefore raise a strong presumption that it embodies the real agreement between the parties. But the appellant during the course of his evidence stated that he never carried on the business of Modern Drapery Stores although it is so mentioned in P4. On this evidence the learned District Judge, having concluded that this business 'as a going concern' was not leased out to the respondent and that it was the sole concern of the respondent himself, has reached the finding that P4 was a subterfuge or a camouflage to hide the letting of the premises at excess rent. At the hearing before us, however, it also transpired that the appellant in his complaint to the Police (P8) on 21.9.1971 (shortly before the institution of the present action) had stated that on 26.6.1969 he gave the premises in question to the respondent on a monthly rental of Rs. 275/– on an agreement for 3 years. The agreement referred to in P8 is no doubt a reference to

P4. This item of evidence also lends support to the respondent's case that there was no agreement to lease out the business as stated in P4. There is therefore, in my view, sufficient oral evidence by way of admissions by the appellant himself to prove that there was no agreement between the parties as evidenced by document P4 and that P4 was only a ruse to conceal their true transaction which was one of letting and hiring of the premises at a rental of Rs. 275/- per month—a rental which according to the finding of the learned District Judge and conceded by learned counsel for the appellant was much in excess of the authorised rent. Although the learned District Judge was in error when he stated that 'the bond P4 of 26.6.1969 constituted only a rental of the premises', yet for the reasons set out above he was correct in holding that P4 was a subterfuge or a camouflage for recovering excess rent. It would therefore necessarily follow that the agreement embodied in P4 was a fictitious one never intended to be acted on by the parties themselves. The question that arises for consideration is whether in a situation like this parol evidence of the appellant which shows that there was in fact no agreement between the parties as set out in the document P4 is excluded by s. 92 of the Evidence Ordinance. There is no dispute that if this parol evidence is not so excluded then it becomes relevant and admissible.

A question similar to the one in the instant case arose for consideration by their Lordships of the Privy Council in *Tyagaraja v. Vedathanni* (3). There it was contended by the appellants that under s. 91 and s. 92 of the Indian Evidence Act (1872), the provisions of which are the same as the corresponding section in our Ordinance, oral evidence was inadmissible to establish that it had been agreed that the provisions for the respondent's maintenance contained in a document were not to be acted upon as the document was only intended to create evidence of the undivided status of the family. In holding that the sections do not render the oral evidence inadmissible, Sir John Wallis in the course of his judgment observed as follows :

> "When a contract has been reduced to the form of a document, s. 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and s. 92 excludes oral evidence for the purpose of contradicting, varying, adding to or

subtracting from such terms, ... s. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on s. 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement . . . . . that as in the present case, the document was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter stands exactly on the same footing as evidence that the defendant's signature was forged."

Their Lordships in that case were of the opinion that there was nothing in either s. 91 or s. 92 to exclude oral evidence to show that there was no agreement between the parties and therefore no contract. With great respect, this appears to be the correct legal position under our sections of the Evidence Ordinance. s. 91 precludes the admission of oral evidence to prove the terms of a contract of grant or of any other disposition of property which have been reduced to the form of a document. s. 92 enacts that when the terms are proved by the document no evidence of any oral agreement or statement shall be admitted as between the parties thereto or their representatives in interest to contradict or vary them. It is thus clear that the oral evidence referred to in the two sections is to be excluded only upon the proof of a contract, grant or other disposition of property. Evidence which is intended to show that there was in fact no contract, grant or other disposition of property would not, in my view, offend against the provisions of either section. I am therefore of the opinion that neither s. 92 nor s. 91 can have any application unless there has been in the first instance a contract or a grant or any other disposition of property between the parties.

In *Penderlan v. Penderlan (supra)* the plaintiff who was the owner of a land and a fibre mill executed a deed in respect thereof in favour of her brother, the 1st defendant. It was a transfer in the nature of a conveyance for a consideration of Rs. 5,000/–. No

consideration passed and there was no change of possession either. It was a transfer to enable the 1st defendant (who had conceived the idea of applying for the post of Vidane Aratchy) to clothe himself with the necessary property qualification. There was a promise by the 1st defendant to retransfer the property within a month. He failed to do so and put the plaintiff off from time to time promising to retransfer. He then effected a retransfer excluding the fibre mill which he sold to the 3rd defendant. At the trial the plaintiff led oral evidence to prove the true nature of the transaction entered between herself and the 1st defendant. It was held by Basnayake, J. (as he then was) with Dias, J. agreeing, that the prohibition contained in s. 92 of the Evidence Ordinance did not extend to a case where it is sought to prove that the transaction is fictitious and not what it purports to be. During the course of his judgment he observed that evidence of the fact that an instrument was never intended to be acted upon was not excluded by s. 92.

In *William Fernando v. Roslyn Cooray (supra)* tha plaintiff who was the owner of two allotments of land sold the same to the defendant for a certain sum of money. The sale was, according to the terms of the deed, subject to the condition that the defendant shall reconvey the same to the plaintiff within two years from the date of sale if the plaintiff shall repay to the defendant the said sum together with interest at 15% per annum from the date of sale until repayment, as aforesaid. The plaintiff was to remain in possession of the land. The plaintiff failed to make repayment within the period as agreed upon. The defendant then entered into possession of the land. The plaintiff filed action for a declaration that the deed was really security for the repayment of money and not a transfer and that he be restored to possession. The defendant pleaded that the deed was an outright transfer subject to the condition set out therein and that on the plaintiff's failure to repay the money within the stipulated time she became entitled to possession of the land. The question that arose for decision was whether it was open to the plaintiff to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. It was held (Basnayake, C.J. dissenting) that s. 92 of the Evidence Ordinance excluded such parol evidence. I do not think this case has any application to the facts of the present case.

In that case the parties reached a certain agreement. There was to be an out right sale of the property and upon the happening of a certain event it was to be followed by a retransfer of the land that was sold. There was thus a real agreement between the parties. The plaintiff tried to show by oral evidence that the sale with a condition to retransfer within a stipulated time amounted to a mortgage of the property. This evidence would have directly contradicted the terms of the deed as it would have reduced the interest conveyed from that of an absolute sale, subject to a condition, to that of a mortgage. Such evidence would offened the provisions of s.92. On a consideration of all the above matters I am therefore of the view that s.92 of the Evidence Ordinance does not exclude oral evidence to show that the document P4 did not embody the real agreement between the parties thereto and that there was in fact no agreement as set out therein but that it was only a sham to conceal the real agreement which was to let and hire the premises at a rental in excess of the authorised rent.

Learned counsel for the appellant also contended that he is entitled to an order for the return of the movables described in schedule 2 of the plaint and the articles described in schedule 3. In regard to the movables referred to in schedule 1 the respondent has by letter P11 of 22.2.1974 informed the appellant that she is ready to return them on the refund of the sum of Rs. 3000/- deposited with the appellant as security therefor. He has further stated that if any item of movables is not returned by him the value of such items as set out in schedule 2 could be deducted by the appellant and the balance be paid to him. In view of this letter I think it is just to order the respondent to deliver to the appellant the movables referred to in schedule 2 of the plaint. We make order accordingly. On the return of all the said movables the appellant is ordered to refund the security of Rs. 3000/-. If, however, the respondent fails to return any movable the appellant will be entitled to deduct its value as given in schedule 2 from the security with him.

In regard to the articles referred to in schedule 3 of the plaint it appears to me that they have been handed over to the respondent on a separate agreement - vide P6. They consist of articles used in connection with the earlier business of Ratna Stores. The appellant is entitled to their return. Accordingly we make order that the respondent should deliver those articles to the appellant. If he fails

to return any article he will pay the appellant the value of such article as given in that schedule. The learned District Judge is directed to stipulate a date, not to exceed one month, for the return of the movables and articles by the respondent. Subject to the above variations the decree of the lower court is affirmed and the appeal is dismissed. In all the circumstances of this appeal there will be no order for costs.

RODRIGO J. — I agree.

Appeal dismissed