Fonseka and Another v. Anthony Appuhamy

COURT OF APPEAL.
SOZA, J. AND RANASINGHE, J.
C. A. (S.C.) 47/71 (F)—D.C. NEGOMBO 1421/L
DECEMBER 6, 1978.

Contract—Mode of payment—Tender by cheque—Deed of transfer sought to be set aside for failure of consideration—Whether payment by cheque valid.

The respondent executed deed of transfer in favour of the appellants in respect of immovable property and the present action was brought by him to set aside the said deed of transfer on the ground of failure of consideration. Part of the consideration for this deed was to have been furnished by the State Mortgage Bank, to which the appellants had applied for a loan. When the Bank wrote to the respondent forwarding a cheque in respect of the sum due from the Bank with a covering letter

(D5) for the respondent's acceptance and confirmation "that the full amount due" had been paid, the respondent returned the cheque through his lawyer informing the Bank that he had filed action in the District Court of Negombo for rectification of this deed. Subsequently the Bank wrote that it was no longer prepared to lend this sum of money or any amount to the appellants and the sum remained unpaid. The question then was as to whether there had been such payment as the law would recognize, of the agreed consideration so as to conclude the contract of sale contemplated in this deed.

Held

(1) As a general rule payment means payment by money which is legal tender in Sri Lanka and a creditor cannot be compelled to accept payment by cheque. Yet payment by cheque in a particular mode may expressly or impliedly be authorised by the contract or a creditor may waive his right to insist on legal tender as in a case where he agrees to receive payment by cheque or receives payment by cheque without objection. In such event there will be absolute satisfaction of the original deed and the creditor's right of action on the deed will be extinguished, he being left with no remedy except upon the cheque. It is a question of fact whether the cheque has been so accepted as absolute payment or not.

(2) In this case the respondent had agreed to receive payment by cheque issued by the State Mortgage Bank which cheque was to be delivered not at the execution of the deed but only when the time was ripe for issue accordingly to the Bank rules. The Bank duly forwarded the cheque as agreed but the respondent returned it stating that he was taking action to rectify the deed of transfer, although he was under no obligation to so return the cheque. The State Mortgage Bank was the agent of the appellants in the matter of payment and if the consideration was thwarted, it was the result of the respondent's own action in doing what he was legally not bound to do. In the eyes of the law therefore there was payment and the respondent's action must fail.

Cases referred to

(1) *Cubitt v. Gamble, (1919) 35 T.L.R. 223.*
(2) *Norman v. Ricketts. (1886) 3 T.L.R. 182.*
(3) *Warwicke v. Noakes, (1791) Peake 98.*
(4) *Smith v. Ferrand, (1827) 7 B. & C. 19 ; 9 Dow. & Ry. K.B. 803.*
(5) *Seneviratne v. Tisseverasinghe, (1956) 57 N.L.R. 557.*
(6) *Caldera v. Perera, (1965) 68 N.L.R. 375.*
(7) *Schneider and London v. Chapman, (1917) T.P.D. 497.*
(8) *Thangadorai Nadar v. Esmailjee, (1954) 56 N.L.R. 343.*
(9) *Subbiahpillai v. Sheriff & Co., Ltd., (1955) 56 N.L.R. 553.*
(10) *A/S Tankexpress v. Compagnie Financiere Belge Des Petroles S.A., (1948) 2 All E.R. 939 ; (1949) A.C. 76.*
(11) *Palaniappa Chetty v. Saminathan Chetty, (1912) 15 N.L.R. 161 ; affd. P.C. (1915) 17 N.L.R. 56.*
(12) *Cohen v. Hale, (1878) 3 Q.B.D. 371 ; 39 L.T. 35 ; 47 L.J.Q.B. 496.*
(13) *Caine v. Coultes, (1863) 1 H & C 764.*
(14) *Palmer v. Rhodes, (1888) 5 H.C.G. 61.*
(15) *Thairwall v. The Great Northern Railway Company, (1910) 2 K.B 509.*
(16) *Startup v. Macdonald, (1843) 6 Man. & G. 593 ; 12 L.J. (Ex.) 477 ; 1 L.T. (O.S.) 172.*

APPEAL from the District Court, Negombo.

C. Ranganathan, Q.C., with *Ajit Tillekewardane,* for the defendant-appellant.

A. C. Gooneratne, Q.C., with *Tilak Gooneratne* and *Mrs. S. Jayalath,* for the plaintiff-respondent.

Cur. adv. vult.

January 19, 1979.
SOZA, J.

The two defendant-appellants in this case who are husband and wife (and will hereafter be referred to as appellants) became in 1946 the owners of the land called Talgahawela and Talgahawatte bearing assessment No. 1 San Nicholativu Road and situated at Munnakare within the Municipal limits of Negombo—see particulars given in D 13. This land was in extent 3A. 0R 6.75P. and according to plan No. 2221 dated 4th February, 1946, made by A. G. S. Gunaratne, Licensed Surveyor, was bounded as follows:

North: Lake,
East: Crown land,
South: T. P. Nos. 138780 and 182690,
West: Crown land, T. P. No. 132342 and road.

This plan has been produced marked D 30. At the time the plan D 30 was prepared there had been no buildings on the land but a road is shown as dividing it into an eastern portion and a western portion—the eastern portion made up of two parcels of land, one in extent 0A. 3R. 5P. depicted in T.P. No. 182689 and the other in extent 0A. 2R. 29.75P. depicted in T.P. No. 182686. and the western portion an extent of 1A. 2R. 12P. depicted in T.P. No. 182688.

About the year 1950 the plaintiff-respondent (hereafter referred to as the respondent) took on rent from the second appellant bare land depicted in plan D 30 and put up buildings on the eastern portion for the purpose of carrying on a timber business there. The premises with the buildings were given assessment numbers 1, 3/1, 3 and 5, San Nicholativu Road. By 1958 however differences appear to have cropped up between the parties and on 6th November, 1958, the 2nd appellant filed plaint P4(a) in case No. 49761 of the Court of Requests of Negombo to have the respondent ejected. The respondent in his answer P4 (b) filed on 7.1.1959 though not foregoing his right to compensation for the buildings erected by him, claimed a contract of tenancy in respect of the land and buildings under the 2nd appellant. This was a piece of tightrope walking by the respondent who wanted the privileges of the rent laws while not relinquishing his claims to buildings. At the trial the respondent abandoned the issues relating to compensation and pursued only those relating to his claim to be a tenant of the buildings under the 2nd appellant—see the issues dated 11.3.1959 marked D27 and the answers to them marked D28. The Court holding that the respondent was the tenant of buildings and premises bearing assessment Nos. 1, 1/1 (apparently a mistake for 3/1), 3 and 5 and not in arrears of rent,

dismissed the action—see decree P4(c) of 24.6.1959. The 2nd appellant lodged an appeal to the Supreme Court. Thereafter no doubt under the inspiration of the appellants plaint was filed against the respondent on 12.10.1959 in case No. 10773 in the Magistrate's Court of Negombo charging him with erecting unauthorised buildings (bearing assesments numbers 1, 3 and 5) on this land and the case ended with a plea acknowledging guilt by the respondent and seemingly with the demolition of those buildings—see D14, especially proceedings of 28.11.59. The respondent however has denied all knowledge of these proceedings. The buildings in question were in fact not demolished for the Supreme Court as late as 28.3.1960 upheld the decision of the Commissioner of Requests in case No. 49761 that respondent had a right to occupy them as tenant of the 2nd appellant—see P4(*d*). Further the appellants have been described as their owners from 1954 to 1968 in the Municipal Registers—see D20 to D23. The 1st appellant paid the taxes due on the premises in the years 1969 and 1970—see D15 to D19. The assessment No. 1 had been given for the garden, No. 3 for a G.I. timber shed, No. 3/1 for a cadjan tenement and land and No. 5 for a G.I. roofed boutique and land. Of these the buildings bearing assessment Nos. 3 and 5 were the most substantial. The extracts D9 to D12 of the Municipal Registers describe the appellants as the owners of these premises in 1963 and 1964.

Armed with his Supreme Court decree P4(*d*) the respondent apparently continued to remain in possession of the entire premises as tenant under the second appellant.

The next move was by the respondent. On the 17th December, 1963, the appellants by their deed No. 9754 attested by D. C. E. V. Karunaratne, Notary Public executed a conditional transfer of the premises describing them as depicted in plan D30 in favour of Madurawelage Don Felix Appuhamy *alias* Don Felix Madurawela, a cousin of the respondent's. The condition embodied in this deed which has been marked D1 is that the transferee would transfer back the premises to the appellants if they paid back the consideration of Rs. 7,500 with interest thereon at 12% within four years of the date of the deed. On the same day, that is, on 17th December, 1963, Felix Madurawela by deed No. 9755 marked D2 attested by the same Notary, parted with his rights to the respondent. This was obviously a ruse adopted by the respondent to secure a stranglehold on the land especially as the appellants were hostile to him and would have no truck with him But neither the respondent nor his cousin Felix Madurawela who clearly was his catspaw in this transaction got the buildings Nos. 3 and 5 excluded from the subject matter of the conveyances

D1 and D2. When the apppellants realised that the respondent had obtained the rights described in D2 and that time was running out, they applied for relief to the Debt Conciliation Board on 25.1.1965. There settlement D24 was arived at on 28.5.66 by which the appellants were to pay up the respondent the full sum of Rs. 7,500 with interest thereon at 8% from 17.12.1963 on or before 31.12.1966 whereupon the respondent would transfer the land back to the appellants. In the settlement it was noted that the appellants had made an application to the State Mortgage Bank for a loan of Rs. 9,500 wherewith they hoped to settle the respondent. In this application to the State Mortgage Bank dated 25.1.1965 (marked D13 in the case) it must be observed the security offered is the premises bearing assessment Nos. 1, 3, 3/1 and 5 San Nicholativu Road, Negombo of an extent 3A. 0R. 6.75P. In pursuance of the settlement D24 entered into before the Debt Conciliation Board and the order marked D25 of the Board, the impugned deed No. 888 marked X was drawn up and executed by the respondent on 29.8.1966. This deed described the property transferred as follows :

> "All that allotment of land called Talgahawela and Talgahawatte with the buildings and everything thereon bearing assessment numbers 1, 3, 3/1 and 5 St. Nicholativu Road and Regina Road . . . . bounded on the North by St. Nicholativu Road, East by Regina Road, South by land bearing T.P. 182690 and on the West by St. Nicholativu Road and containing in extent one acre and sixteen decimal six perches (1A. 0R. 16.6) as depicted in survey plan No. 1297 dated 10th October 1965 made by Michael D. Fernando, Licensed Surveyor".

The plan of Surveyor Fernando referred to in this Schedule has been marked in the case as D8. The extent of the land as shown in this plan D8 is 0A. 3R. 35P. after excluding lot X (on the North-West) and Lot Y (on the East) reserved for roads and building lines. Inclusive of Lots X and Y the extent is 1A. 0R. 16.6P. The schedule of deed X goes on to describe the premises further as a divided and defined portion of the land depicted in plan D30. The premises depicted in D8 were mortgaged by deed No. 889 dated 29.8.66 (P1) to the State Mortgage Bank.

The attestation of the Notary Public to the deed X states the consideration (Rs. 9,100) was not paid in his presence but the body of the deed contains the usual declaration admitting and acknowledging receipt of the money. The attestation of the Mortgage Bond P1 in favour of the State Mortgage Bank states that the consideration (Rs. 9,500) was retained by the Mortgage Bank in accordance with the rules of the Bank to be paid to the

vendor on deed X, that is, to the respondent, in full settlement of the consideration due on the deed X and the balance, if any, to the mortgagors, that is, the appellants after the "effectual registration" of the deeds X, P1 and the mortgagee's address and production of the extended extracts of encumbrances. On the day the deeds were executed, that is, 29.8.1966 the respondent wrote letter D3 to the Manager of the State Mortgage Bank referring to deed X and stating that by it he had transferred the land to the appellants for Rs. 9,100. In this letter he proceeded to instruct the Bank as follows :—

> " A sum of Rs. 9,100 an account of the consideration on this Deed of Transfer is still due to me from the applicants. Please pay the same to me when the loan becomes available for payment under the rules of the Bank. I confirm that on payment to me of this sum, I will have no further claim as respects the consideration on this deed.
>
> Please cross the cheque 'Payee's Account only'".

On 29.8.1966 the appellants for their part wrote letter D29 to the State Mortgage Bank confirming the execution of deed X and authorising the payment of the Rs. 9,100 to the respondent. On 27th February, 1967, the State Mortgage Bank wrote letter D5 forwarding cheque for Rs. 9,100. (copy marked D4) for respondent's acceptance and confirmation that "the full amount due" had been paid. The respondent through his lawyer by letter D7 of 4.3.1967 wrote to the Bank saying he was returning the cheque as he had filed suit No. 1153/L in the District Court of Negombo for rectification of the deed X. By an omission however the cheque had not been enclosed with D7 and when the Bank brought this to the respondent's notice, his lawyer by letter D6 of 21.4.1967 returned the cheque. The plaint filed in case No. 1153/L has not been produced but from the answer D26 which the appellants filed in that case it appears that some contention was raised in regard to buildings bearing assessment Nos. 3 and 5. Yet the decree P2 that was entered in the case is silent in regard to these buildings. It does not exclude them. On the contrary all the buildings are included and in any event would pass with the soil. The rectification ordered merely brings the schedule into line with that given in both deed D1 and deed D2 and I cannot see what advantage this conferred on the respondent. If the question of the buildings No. 3 and 5 was agitated in this case and was not specifically dealt with in the decree so much the worse for the respondent. In fact I rather think that it is the appellants who should have sought such a rectification so as to bring the deed of re-transfer into line with the deeds D1 and D2 and with the application D13 to the State Mortgage Bank. A

comparison of the plan D8 (according to which the schedule of deed X was prepared) with plan D30 (according to which the schedule in deeds D1 and D2 was drawn up) shows, especially when regard is had to the title plan references, that the Schedule as rectified included the land described in the Schedule of deed X. The land depicted in D8 is roughly the eastern portion of the land depicted in D30 conveyed on D1 and D2. Therefore the letter P3 written by the Manager of the State Mortgage Bank to the Secretary of the District Court of Negombo on 12.10.1968 that the Bank cannot lend Rs. 9,500 to the appellants as the respondent " has established his rights to the buildings bearing Nos. 3 and 5 " proceeds on a misapprehension of the facts. The mortgage bond P1 was not cancelled and has been described in the evidence of Mr. H. B. Kapuwatte, the Manager of the Bank as being in abeyance. The State Mortgage Bank was no longer prepared to lend the sum of Rs. 9,100 or any amount and the money due on the deed X remains unpaid.

With so much notice of the facts I can now turn to the main question in the case—should the deed X be set aside for failure of consideration ? Has there been payment such as the law would recognise of the agreed consideration so as to conclude the contract of sale contemplated in the deed X. As Wessels says in his *Law of Contract in South Africa*, 2nd Ed. (1951) Vol 2 pages 606 and 607, paragraph 2128 :

> " Payment is the prestation of that which forms the object of the contract. The debtor is the person who undertakes the prestation, and therefore he is the person who ought to perform the contract. He may promise either to give or to do something, or else to omit to do something, and he performs the contract by fulfilling his promise to his creditor. The debtor may specially appoint someone to make the payment for him. "

As a general rule payment means payment in money which is legal tender in Sri Lanka, that is payment in rupees and cents in the legal currency of Sri Lanka—see The Monetary Law Act, No. 58 of 1949, s. 4 and s. 52. A creditor is entitled to insist on payment in cash as distinct from payment in any other form. It is well settled, that, apart from express or implied agreement to that effect, he cannot be compelled to accept payment by cheque however good the drawer's credit and however large his bank balance. Yet payment by cheque in a particular mode may expressly or impliedly be authorised by the contract. A creditor may waive his right to insist on legal tender as where he agrees to receive payment or requests payment by cheque (*Cubitt v. Gamble* (1), *Norman v. Ricketts* (2), *Warwicke v.*

Noakes (3), *Smith v. Fernand* (4) and *Seneviratne v. Tisseverasinghe* (5)) or receives payment by cheque without objection (*Caldera v. Perera* (6).) It may be shown that parties contemplated in their contract that payment should be made by cheque or that the course of dealing between the parties warrants payment in this term—(*Schneider and London v. Chapman* (17), *Thangadorai Nadar v. Esmailjee* (8), *Subbiapillai v. Sheriff & Co. Ltd.* (9) and *A/S Tankexpress v. Compagnie Financiere Belge Des Petroles SA.* (10)). The creditor may agree to receive payment by cheque and treat such payment as an absolute discharge of the debt. In such event there will be absolute satisfaction of the original debt and the creditor's right of action on it will be extinguished. He will then be left with no remedy except upon the cheque. It is a question of fact whether the cheque was accepted as absolute payment or not—see *Seneviratne* v. *Tisseverasinghe* (*supra*), *Smith v. Fernand* (*supra*), *Chitty on Contracts*, 22nd ed. (1961), Vol. 1, page 477, paragraph 1077, *Wessels* (*ibid*), Vol. 2, page 622, paragraph 2228, and *Weeramantry's 'The Law of Contracts'* (1967), Vol. 2, page 665, paragraph 689. It is however more usual for the creditor to accept the cheque as a conditional discharge or without any special agreement at all. In the latter case the law presumes that the cheque was accepted as a conditional discharge. Where a cheque has been accepted as a conditional discharge and it is dishonoured the creditor can sue upon the original cause of action (*Wessels* (*ibid*) page 622, paragraph 2229, *Palaniappa Chetty v. Saminathan Chetty* (11)). Here the cause of action on the original debt is not extinguished but only suspended and revives when the cheque is not honoured. As Cockburn, C.J. said in *Cohen v. Hale* (12) :

> "It is very true that a man who takes a cheque may be estopped from proceeding to enforce payment of the debt until presentment of the cheque, and if the cheque is ultimately paid the debt is extinguished. All that happens in the meantime is that the right of action is suspended. But when the cheque is presented and dishonoured, the debt, the remedy for which was suspended until presentment of the cheque, may be treated as a debt subsisting all along, just as if the cheque had never been given. The giving of the cheque only suspends the remedy, it does not extinguish the debt".

The law on the question has been succinctly stated by Wood Renton, J. (as he then was) in *Palaniappa Chetty v. Saminathan Chetty* (*supra*) at p. 166:

> "A cheque or promissory note given and received in respect of a debt may be so given and received either as conditional or as an absolute satisfaction of the debt. In the former case, when the cheque or note is actually or practically dishonoured, and satisfaction of the claim on the written instrument cannot be obtained, the original claim on the debt revives, and may be enforced. In the latter the original claim on the debt is extinguished by the giving or acceptance of the cheque or note as an absolute payment of the debt. The law presumes conditional payment. But this presumption may be rebutted by evidence that absolute payment was intended by the parties".

In the instant case what was the agreement between the parties in regard to payment? The respondent agreed to receive payment by cheque issued by the State Mortgage Bank. The cheque was not to be delivered at the execution of the deed but only when ripe for issue according to the Bank rules. On the basis of this agreement the respondent executed the deed of transfer and by D3 so informed the Bank. The transfer was executed on the promise of payment by the Bank at some future date. The Bank duly forwarded the cheque as agreed to the respondent who however returned it saying he was taking action to rectify the deed of transfer. It is significant that the respondent at no time took up the position that he was insisting on cash instead of a cheque or that there was anything wrong with the cheque. There was no legal obligation to return the cheque to the State Mortgage Bank as far as the respondent was concerned. The rectification of the deed did not entail the revision of the consideration as between the appellants and the respondent. In the matter of the payment the State Mortgage Bank was the agent of the appellants and any question relating to payment arising from the rectification would have been the concern of the appellants and the Bank. If the consideration was thwarted it was the result of the respondent's own action in doing what he was legally not bound to do. In the eyes of the law therefore there was payment. Thus in *Caine v. Coulton* (13) the attorney of the plaintiff in the case wrote to the defendant requesting him to remit the balance due to the plaintiff with an additional amount described as the costs due to the attorney. The defendant sent a bank bill for the amount of the balance only but did not include the costs. The plaintiff's attorney wrote in answer that he would not receive the bank bill unless the costs were paid, nor did he return the bill. It was held that the objection to the remittance not being in money was waived and the bank bill was refused only because it did not include the costs. Martin, B. pointed out that all that was

due was the balance of the debt. The claim for costs was a separate matter. This was one of the grounds for His Lordship's conclusion that there was payment in law. In the case of *Schneider and London v. Chapman* (*supra*) decided by De Villiers, J.P., Wessels and Bristowe, JJ. the question was whether payment for certain stacks by cheque was a good payment or not in the circumstances of the case. The respondent in the case had forwarded a cheque in payment of the amount due to the appellants who however returned the cheque. One of the contentions of the appellants was that the tendering of a cheque was not payment within the meaning of their agreement. Yet in a number of prior transactions between the same parties payment had been made by cheque. Considering this fact and the mercantile usages of the day the Court held that the contract itself contemplated that a cheque should be received. Wessels, J. pointed out that the real reason for the refusal of the cheque was that the appellants found they had made a bad bargain. They had underestimated the height of the stacks and sold too cheaply. The Court held there was good payment. In the course of their judgments De Villiers, J.P. and Wessels, J. referred to the case of *Palmer v. Rhodes* (14). Here payment due on a contract for the sales of shares had been made by cheque but was refused. The reason for the refusal to accept the cheque was not due to the fact that it was not in cash. In fact even if payment had been made in cash it would not have been accepted because the shares had already been sold. Laurnee, J. held that payment by cheque under the circumstances was good. In the case of *Thairwall v. The Great Northern Railway Company* (15) both Bray, J. and Coleridge, J. held that where the creditors could be taken to have agreed to receive payment by cheque sent by post, the posting of the cheque was equivalent to payment even though the cheque was lost in the post. This principle had been laid down in earlier cases like *Norman v. Ricketts* (*supra*) and *Warwicke v. Noakes* (*supra*).

In the instant case had the State Mortgage Bank paid the respondents Rs. 9,100 in cash on account of the appellants at the execution of the deed X and thereafter if the respondent returned the money owing to the institution of proceedings for rectification of the deed, could it have been said there was a failure of consideration ? Obviously not. The fact that payment was made later and by cheque does not make the position any different because this was the mode of payment agreed upon. The appellants fulfilled their promise when their agents the State Mortgage Bank forwarded the cheque D4 to the respondent. The usual presumption that payment by cheque is only a conditional discharge of the debt is rebutted by the respondent's

own letter D3. In this letter D3 the respondent, it is reasonable to infer, wants payment by cheque according to the Bank rules whereupon he would have " no further claim as respects the consideration on this deed ". Quite understandably the respondent thought there was no hazard in relying on the credit of the State Mortgage Bank and accepting their cheque. In these matters the law leaves the parties to their bargain. The cheque was to be in absolute satisfaction. There is here a legal and valid contract of sale. There is no failure of consideration for it is the respondent who chose not to present the cheque for encashment. Any frustration in the matter of realisation of the money on the cheque was due to the respondent's own misguided action in returning the cheque. He is in the same position as he would have been had he received cash and later returned it. At the very least there has been a good tender of performance. In law this is equivalent to performance and payment—see *Startup v. Macdonald* (16). This action is clearly misconceived and must fail. The appeal is allowed. Let decree be entered dismissing respondent's action. The respondent will pay the appellants the costs of this suit both here and in the court below.

RANASINGHE, J.—I agree.

Appeal allowed.