

KRISHNAMOORTHY v. KUMARASAMY AND ANOTHER

COURT OF APPEAL

WIMALARATNE, J. (PRESIDENT) AND RODRIGO, J.

C.S. (S.C.) 193/74(F)

D.C. COLOMBO 67411/M

FEBRUARY 25, 1980.

Lease – Grant of lease on a commission basis for a period of three years on a notarially executed agreement.

The plaintiff (grantor) sued the defendants (grantees) to enforce a notarially executed Articles of Agreement granting a business on a commission basis. The business was run in premises of which the plaintiff was a tenant. The defendants alleging that the Agreement was induced by false representations made by the plaintiff prayed for its cancellation. Subsequently contradicting the earlier plea, they alleged that the transaction was a cover for sub-letting.

Held :

The clauses of the Agreement afforded intrinsic evidence to show that the transaction was really meant to be what the document said it was. This was further confirmed by the evidence of subsequent conduct of the parties.

Cases referred to:

- (1) *Charlis Appuhamy v. Abeysekera* 56 NLR 243.
- (2) *Devairakkam v. Samarasinghe* 65 NLR 18.
- (3) *Andiris Appuhamy v. Kuruppu* 65 NLR 21.

APPEAL from judgment of the District Court of Colombo

P. Wimalachandiran with *C. S. Hettihewa* for plaintiff-appellant.

S. Ruthiramoorthy with *K. Mahendran* for defendants-respondents.

Cur adv vult.

28th March, 1980.

RODRIGO, J.

What is in issue in this case is the notarial document, P2. It purports to contain Articles of Agreement whereby the grantor "gives the above business on a commission basis" to the grantees. The grantor is the plaintiff-appellant (plaintiff) and the grantees are the defendants-respondents (defendants). The defendants contended that this agreement was induced by false representations by the plaintiff and prayed for its cancellation. The District Judge held with them. Hence this appeal by the plaintiff.

The premises are business premises. They are owned by one Caldera. He had rented it to a Perumal Achari who had surrendered

the premises back to Caldera after his tenancy. Thereafter in July 1965 Caldera rented out on the document D1, the premises to the plaintiff with the furniture and fittings therein. It was signed by both parties. Sub-letting was prohibited.

The plaintiff then registered his business. The business registration is P1. Its name was "Krishna Stores". The place of business was these premises and the business was "Dealers in provisions, groceries and oilman goods." It was registered in October 1965.

Towards the end of the following year the plaintiff had found the going rough. The 1st defendant was the manager of a business opposite the plaintiff's place of business. His business instinct prompted him to fish in troubled waters. He arrived at a deal with the plaintiff in terms of P2.

The document P2 was the instrument by which they closed the deal. It was executed before a Notary. Its material clauses are these.

"P2
67411/M

Sgd. Illegible
25.3.67.

S. VELAUTHAPILLAI
NOTARY PUBLIC
COLOMBO.

No. 1713

ARTICLES OF AN AGREEMENT made and entered into at COLOMBO on this FIFTEENTH DAY of NOVEMBER one thousand nine hundred and sixty six by and between KANDIAH KRISHNAMOORTHY of No. 294, Nagalagam Street, Grandpass Colombo (hereinafter called and referred to as the Grantor) of the One Part and (1) NAGAMUTHU KUMARASAMY and (2) MURUGESU KADERAVELU both of 120 Centre Road Pettah Colombo (hereinafter called and referred to as the Grantees.)

WITNESSETH

WHEREAS the Grantor is the owner of the business carried on under the name style and firm of "SRI KRISHNA STORES" dealers in sundry goods carried on at premises No. 294, Nagalagam Street, Colombo.

AND WHEREAS the Grantor has agreed give to the Grantee the said business on a commission basis for a period of THREE YEARS commencing from the Fourteenth day of November One thousand nine hundred and sixty six together with the articles therein which are morefully described in the schedule hereto upon the terms and conditions hereinafter stipulated.

(1) The Grantees have this day paid to the Grantor a sum of rupees two thousand four hundred (Rs. 2,400) being one years commission (the receipt whereof the Grantor doth hereby admit and acknowledge).

(2) The monthly commission payable is a sum of rupees two hundred (Rs. 200/-) payable on or before the fourteenth day of each and every month commencing from the fourteenth day of December one thousand nine hundred and sixty six.

(3) This agreement shall be in force for a period of three years.

(4) The Grantees shall not sublet or handover the business to a third party during the continuance of these presents without the written consent of the Grantor having been first obtained.

(5) In the event of the Grantees finding it difficult to carry on the said business they shall give three months notice to the Grantor and the Grantor shall take over the business and refund any sum that may be due to the Grantees.

(6) The Grantor doth hereby agree with the Grantees that all transactions and dealings he may have had with any party prior to the handing over of the business hereof to the Grantees the Grantor shall be solely responsible and undertakes to discharge such liabilities and thereby absolve the Grantees from all such responsibilities.

(7) The Grantor shall be responsible for the payment of rents in respect of the premises wherein the business is continued to be and absolve the Grantees from such payment.

(8) The Grantees are liable for payment of the monthly electrical bills, water bills and such payments pertaining to the business including salaries of workmen, salesmen and absolves the Grantor from such responsibilities.

(9) The Grantees do hereby agree to keep the premises wherein the business of sundry boutique is carried on strictly in conformity with the regulations of the Municipal Council and in the event of any

prosecutions or fines being imposed the Grantees do hereby agree to pay same and absolve the Grantor from any such liabilities.

(10) It is specifically agreed between the Grantor and the Grantees that within the aforesaid period of three years the Grantor agrees to sell the said business at a reasonable price fixed by Mr. S. L. M. Majeed to the Grantees and the Grantees shall purchase same and they estimate the business and good will at a sum of rupees twelve thousand (Rs. 12,000/-) but the Grantees in any event reserve to themselves the option to renew this commission agreement at the termination of the period of three years herein stated and the Grantor doth hereby agree to give to the Grantees a further commission agreement thereafter.

(11) In the event of the failure by the Grantees to hand over peaceful possession of the sundry business to the Grantor at the termination of the period of three years, the Grantees agree to pay to the grantor a sum of Rupees Fifteen (Rs. 15/-) a day until such time as the Grantees hand over possession to the Grantor.

(12) The parties hereto bind themselves their respective heirs executors administrators to these presents.

IN WITNESS WHEREOF the parties hereto have to these presents and to three others of the same tenor and date set their respective hands at Colombo on the day month and year at the beginning hereof.

THE SCHEDULE ABOVE REFERRED TO

- (1) one Avery scale 5 tons.
- (2) Weighing scale from 1 ounce to 14 lbs.
- (3) two glass almirahs.
- (4) five wood racks.
- (5) four wooden tables.
- (6) five pictures.
- (7) measuring measure from quarter measure to one measure.
- (8) one forty five gallon barrel.
- (9) 5 lbs. lozenger bottles (four)
- (10) one counter for placing sundry goods.

WITNESSES

Sgd. Illegible.
Sgd. Illegible

Sgd. Illegible.
Sgd. Illegible.
This is the signature of
Sgd. Illegible.
Murugesu Kaderavelu."

The first monthly payment of commission of Rs. 200/- was due on 15th of December, 1966. On 1st March 1967 the plaintiff by letter P3 sent through a proctor demanded from the defendants the payment of commission in arrears from 14th January 1967 to February 14th 1967 – one month. The 1st defendant by his letter dated 14th March 1967 sent through a Proctor repudiated liability. The letter is in these terms:

"P4

14th March 1967.

S. A. Villavarayan Esqr.,
Proctor S.C. & N.P.
Dam Street
Colombo 12.

Dear Sir,

With reference to your letter dated 1st March 1967, addressed to my client Mr. N. Kumarasamy, I am instructed by him to deny liability to pay any money whatsoever to your client. Your client had fraudulently represented to my client that he was the owner of the furniture and fittings lying at premises No. 294, Nagalagam Street, Grandpass and that he had the right to let the said premises to my client. My client relying on the false representation of your client was induced to enter into the agreement referred to in your letter and also pay a sum of Rs. 2400/-.

My client has now discovered that the said representations were false and that your client adopted this ruse as he had no right to sub-let the premises without the consent of the owner, and your client was not the owner of the furniture fittings lying in the said premises.

I am instructed by my client to demand the immediate payment of the sum of Rs. 2400/- paid by my client and also damages sustained by my client and the excess rent recovered by your client.

Thanking you,

Yours faithfully,

Sgd....."

The plaintiff then filed action. It was to enforce the agreement P2 and recover the arrears of commission due and continuing commission thereunder.

Issues were suggested and adopted on two different dates. The plaintiff's issues were merely directed to enforcing the agreement. The defendant's issues were based on alleged false representations by the plaintiff as to his having the owner's consent (owner of the premises) to let the premises and as to he being the owner of the furniture and fittings therein. When, on the first day, two issues were suggested on behalf of the defendants that the agreement was a mere cover for a sub-letting prohibited by the Rent Act and that the representations made by the plaintiff were false to his knowledge, that is, the representations referred to, they were successfully objected to on behalf of the plaintiff that no such thing had been pleaded. Whereupon the defendants were allowed to amend their answer. But even in the amended answer filed no such averments were made and advisedly so as Counsel had appreciated the contradiction involved in a plea that the agreement is a mere cover for sub-letting and a plea that the agreement was induced by false representations. He could have of course, pleaded in the amended answer that the representations were false to the plaintiff's knowledge. But he let the original plea that the representations were false to stand unaltered. Why the two pleas are contradictory is discussed below. It is important to note that on the second day when further issues were suggested, that was the date of trial, the issues relating to the agreement being only a cover for sub-letting and to the representations being false to the plaintiff's knowledge that had been recorded on the first day, were recorded again as adopted overlooking the fact that the amended answer has not brought in averments to back those two issues. These two issues however remained as part of the defendants' issues, stealthily as it were.

It has to be kept in mind in the forefront of this case that this is not an action, unlike in the generality of cases of this nature, by the owner of the premises to eject the tenant and the sub-tenant on the ground that the premises had been sub-let without his written consent. Here no action has been filed to date of judgment in this case by the plaintiff's landlord against the plaintiff and the defendants.

The defendants have repudiated the agreement P2 and it therefore becomes necessary to determine whether they were entitled to do so with impunity. This is so because the plaintiff has not accepted the repudiation and has held the defendants to the agreement.

The District Judge has approached this question in two ways as there were issues both ways. First, whether the agreement was a sham. Second, whether it was voidable for false representations to

the knowledge of the plaintiff. The two questions are contradictory of each other for, if the agreement was a sham the second question does not arise. A sham agreement is not an agreement at all. It is just a colourable device. It is not meant to be acted upon. It merely hides something else that both parties are aware of, and which both parties intend to hide. There cannot be a sham agreement without a conspiracy between the two parties to it. In the case of false representation there is an agreement but it is entered into by one side on the faith of induced beliefs which are later belied. No party can be heard to say both. The District Judge has not had his attention drawn to it.

The District Judge has concluded that the agreement is a blind for sub-letting. He has given his reasons, that is, on a consideration of the agreement itself and the document D1 by which the plaintiff's landlord Caldera rented out the premises to the plaintiff. In the words of the learned District Judge himself:

“On a consideration of the documents P2 and D1 it does seem to me that the position of the defendants that the document P2 does not set out the real nature of the transaction which was entered into between them and that it was merely a blind to cover what was in fact a sub-letting of the premises to the defendants. . . represents the true and accurate version of the transaction.”

For one thing this was not the position of the defendants notwithstanding an issue to that effect; and how the issue came about I have set out before. They do not say so in their amended pleadings either and they did not take up that position in their evidence. The agreement P2 has been set out earlier. The document D1 is in these terms.

“I, T. C. Caldera of No. 449, Pilapitiya, Kelaniya have this day rented out to Mr. K. Krishnamoorthy premises No. 294, Nagalagam Street, Grandpass, on a monthly rent, for rupees Seventyfive (Rs. 75/-) with furniture and fittings.

I have received a sum of Rupees four hundred and fifty (Rs. 390/-) as a deposit to be deducted for the last six months of the tenancy.

My tenant cannot sublet any part of portion of the premises without my consent in writing and also any alterations to the building.

The tenancy shall be terminated on giving three months notice by either side. The rent from 1st July 1966. I agree to pay at Rs. 75/- per month. (sic)

Colombo, 1st July 1965.

Sgd.
Landlord.

Sgd.
Tenant.”

I cannot see what the learned District Judge saw in these two documents to reach such a finding.

In the case of *Charles Appuhamy v. Abeysekera*⁽¹⁾, Nagalingam, N.P.J. had occasion to examine an agreement in relation to a “Hotel and Tea Kiosk” by which the defendant had purported to take a lease of the said business. It was styled “Indenture of lease”. He criticised this title and observed that it should have been more properly entitled “Articles of Agreement”. He, however, found the agreement to be a perfect lease of the business in question notwithstanding the contention of the plaintiff that this was a blind for sub-letting. He said,

“If one examines the document P1 one would seek in vain to gather from the document any letting and hiring of any immovable property – much less of 39, Brownrigg Street, Kandy, where the business was carried on; but on the other hand what is “leased” is the Hotel and Tea kiosk known and registered as the Kandy Restaurant. That the parties did not regard the transaction that was entered into or the instrument recording such transaction as one of a lease of immovable property in manifest from the circumstance that there is no description given of any immovable property. But on the other hand a full description is given of the various fittings, equipment and furniture of the business”

Then again, he continues:

“Any business, if it is to be conveyed as a going concern, excepting that of a hawker or a pedlar, must ordinarily have a place of business and when the management of a business is handed over, particularly a business of the nature of a hotel and tea kiosk, it is impossible to imagine that possession of the place where the business is carried on could be withheld. A

business of a hotel and tea kiosk does not merely consist of the equipment but must necessarily include the building . . . , and also of the goodwill attaching to such business which may be the most valuable part of the whole concern, namely, the name of the business and the situation of the premises where the business is carried on, for, as is well known, a reputed name as well as a favourable site, both attract custom.

On a proper reading of the document P1, it is impossible to resist the conclusion that the transaction entered into between the parties was one not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the "leases" in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the goodwill and the improvements and advantages gained or accrued thereto in the meantime; and as ancillary to the object which the parties had in contemplation it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant."

This case was followed and applied in the case of *Devairakkam v. Samarasinghe*⁽²⁾ in considering the document therein by which a business of "Oilman stores" as in this case was let on hire to the defendant. Herat, J. called the judgment by Nagalingam SPJ a brilliant judgment. He upheld the document.

In the case of *Andiris Appuhamy v. Kuruppu*⁽³⁾, Sri Skandarajah, J. had to consider a document by which business known as "Ajantha Hotel" had been let on hire to the 2nd defendant holding that, in the circumstances of that case, the document was a sham to cover an act of sub-letting. He observed:

"To take the document alone into consideration as was done in the case of *Charles Appuhamy v. Abeysekera* would be to be led into error. It should be remembered that in that case the action was by the landlord against his alleged tenant and not one by the landlord against his tenant alleging that the landlord had sub-let a portion of the premises as in this case. The correct approach would be to examine the facts and circumstances of each case in order to ascertain whether they fall within the principle relied on by Counsel."

He arrived at his conclusion that the agreement was a sham by considering the following matters, namely,

- (a) Witness Piyadasa Perera was the one who arranged the transaction between the tenant and the 2nd defendant. He says "It was I who arranged **these premises** to be taken over by the Tamil people.
- (b) In paragraph (7)d. of the amended answer the appellant avers "That the 1st defendant was carrying on a hotel under the name of Ajantha Hotel in a portion of **the said premises**."
- (c) The Rs. 1000/- is to be set off for the last five months of "**occupation**".
- (d) When the tenant was giving evidence it was put to him that 1D1 was prepared in order to fall in line with the law and he said "I got permission of the landlord to lease **these premises** out."

It can be seen that the agreement under consideration in this case stands up to the test laid down by Nagalingam SPJ more satisfactorily than the agreement that he was considering. The agreement here is titled Articles of Agreement and that is what Nagalingam SPJ suggested in the case before him should have been the proper title. Going through the Clauses of the agreement before us one finds intrinsic evidence of the transaction being really meant to be what the document says it is. In Clause (4) thereof the defendants are prohibited from handing over the business or the premises to a third party. In Clause (5) the plaintiff undertakes to take back the business in case the defendants find it difficult to carry on and refund any sum out of the Rs. 2400/- taken by him that may be found due. In Clause (6) the plaintiff undertakes to discharge the liabilities that the business had incurred prior to the handing over of the business. In Clause (7) the plaintiff holds himself responsible for the payment of rents in respect of these premises. Clause (10) is very important and is a pointer to the transaction being genuine. In that Clause a person called Xajeed has been nominated to assess the value of the goodwill which has been agreed upon tentatively at Rs. 12,000/- in the event of the defendants desiring to purchase the business and its goodwill. Then in Clause (11) a penalty is agreed upon at Rs. 15/- for every day in the event of the defendant overholding the business at the end of the three year period. The schedule thereto lists items of furniture and fittings which are usually appurtenant to a business. Support is derived for holding that this agreement expresses a genuine transaction when one considers the

evidence of the subsequent conduct of defendants and of the plaintiff. For a number of months the defendants carried on this business under the business name registered by the plaintiff. The defendants had even printed a calendar during the time they carried the business prominently displaying therein the business name of the plaintiff. When, however, the defendants put the name of the 1st defendant "H. Coomarasamy" as the proprietor of the said "Sri Krishna Stores" in the calendar, the plaintiff promptly sent a letter of demand to the defendants through a Proctor claiming damages from the defendants for wrongfully describing themselves as the proprietors of the said business. There was no reply to this from the defendants. In addition it is the evidence of the defendants that they were at first desirous of purchasing this business, though he called it a purchase of the premises. They could not have been negotiating for the purchase of the premises from the plaintiff when admittedly they knew that the plaintiff was not the owner of the premises. There is nothing, according to the evidence, in the conduct of the defendants leading up to the execution of the agreement, P2, to suggest that they were negotiating with the plaintiff for a sub-letting of these premises from him. Even in the letter dated the 14th of March 1967 (P4) sent by the defendants to the plaintiff by which they repudiated the agreement there was no mention or suggestion therein of the agreement that was entered into being a sham for a sub-letting of the premises. They were complaining therein of false representations alleged to have been made by the plaintiff. It was suggested at the hearing before us that the purchase by the defendants of the stock-in-trade on the day before the execution of this agreement (D2A) pointed to the transaction being other than a hiring of the business. Even the trial Judge did not consider the purchase by the defendants of the stock-in-trade on D2A to have any such significance. In the cases referred to earlier the sale of the stock-in-trade was not considered as bearing on the question of an impugned hire or lease of a business. The substantial test as pointed out in the cases listed above when considering whether an alleged agreement to hire out a business is a sham and a cover for sub-letting is always as to how the most valuable asset of the business namely goodwill of the business was treated and whether it was meant to be handed back as a going concern. It must not be forgotten that it was not the defendants' case either in their pleadings or in evidence that this agreement was a sham.

I am of the firm view that on a consideration of the matters above discussed the agreement P2 embodies a genuine transaction for the hiring out of the plaintiff's business to the defendants and that the finding of the learned trial Judge that the agreement is a sham is insupportable and must be set aside.

The next question is whether there had been false representations to the knowledge of the plaintiff as to any matter that would have induced the defendants to enter into this agreement to their damage and material prejudice. In the first place the question arises as to whether there had been any false representations at all by the plaintiff. The two things that were relied upon as matters of false representation are the alleged ownership by the plaintiff of the furniture and fittings in the premises and his having had the consent of his landlord to sub-let these premises. The learned trial Judge devotes a substantial part of his judgment to considering the question of sub-letting of the alleged false representation of the plaintiff that he was the owner of the furniture and fittings but at the end of it arrives at a blind alley. It is his view that the defendants are estoppel from questioning the title of the plaintiff to the premises, that is, his right to let the premises and his title to the furniture and fittings. This view he holds on the basis of the defendants' being deemed the tenants of the plaintiff in the circumstances. Even so, it is important to bear in mind, that if the transaction in question is genuine as it is in my view, the question of sub-letting of the premises to the defendants does not arise, for the defendants being put into possession and occupation of the premises by the plaintiff is only ancillary to the effective hiring out of the business as is pointed out in detail in the passages quoted by me from the judgments listed above. It is idle for the defendants to contend that they would not have gone into occupation of these premises but for the representation by the plaintiff that he had authority to sub-let these premises to them for the reason that for a letting of a business on hire a question like that does not arise at all. The agreement was notarially attested, and the parties have had the benefit of entering into this transaction before a Proctor Notary who is presumed to know what this was about. The attestation states that the matters of the agreement had been explained to the parties. Besides, the 1st defendant is not a villager. He is an experienced businessman. He had been the Manager of the business opposite the place of business of the plaintiff. When he was negotiating, in my view, for the purchase or hiring out of this business, he knew, in as much as the transaction is genuine, that any representation as to the authority in the plaintiff to sub-let these premises was beside the point and irrelevant. That the defendants had been let into possession of these premises for the purpose of carrying on the plaintiff's business does not appear to have been doubted even by the plaintiff's landlord for he has not filed any action to eject the plaintiff on a ground of sub-letting up to the date of the judgment below.

As to the furniture and fittings it does not lie in the mouth the defendants to show they did not belong to the plaintiff. Under our law, it is not necessary that a person who hires furniture and fittings should be the owner as long as he can give effective possession of

the things hired to the hirer. It is not the case that the defendants were disturbed by anybody in their possession of the furniture and fittings.

Misrepresentations to entitle the defendant to a cancellation of the contract must contain four elements. One of them is that, if the representation is merely incident in contractum, that is, it is incidental or immaterial, the prejudiced party cannot have the contract set aside. The test whether a misrepresentation is of such a character is objective. This means that the question is decided not by the defendants' statement as to whether he would or would not have entered into the agreement had he known the truth but by considering whether a reasonable person would, in the circumstances, have entered into the contract. Another element is that the statement relied on as a misrepresentation must be one but for which he would not have made the contract. As I have already stated it was not material that the plaintiff should have been the owner of the furniture and fittings or that he should have had his landlord's consent. See for a discussion of the law on this aspect of the matter, Wille on the Principles of South African Law, 4th Edition, page 324.

What emerges is evidence of sharp practice by the defendants and by the 1st defendant in particular. The plaintiff's landlord had acted in collusion with the 1st defendant to practice a frame on the plaintiff by seeking to let these premises to the 1st defendant for a more substantial rent without having to go through the process of an action for ejectment of the plaintiff in the first instance. It is with a view to defrauding the plaintiff in collusion with the plaintiff's landlord that the defendants had set about questioning the title of the plaintiff and not because of alleged misrepresentations by his or sham agreements between them.

For these reasons the plaintiff is entitled to succeed in this action. The claim in reconvention must also necessarily fall as the payments that are claimed back had been paid to the plaintiff as incidents of a valid contract or agreement.

I therefore, set aside the judgment of the learned trial Judge dismissing the plaintiff's action and allowing the claim in reconvention of the defendants. The plaintiff is entitled to the reliefs that he has claimed for in the plaint and I make order granting the said reliefs to the plaintiff and dismiss the claim in reconvention of the defendants.

Accordingly, I allow the appeal of the plaintiff-appellant with costs.

WIMALARATNE, J. – I agree.

Appeal allowed.