Ratnavale

v.

Appuhamy

COURT OF APPEAL,
SOZA, J., and L. H. DE ALWIS, J.,
S.C. (CA) 192/73(F),
D.C. COLOMBO 73095/M.,
NOVEMBER 22 AND 23, 1979.

Contract – Agreement to buy land on informal writing – Advance – Arrha *(deposit or earnest money) – Recoverability – Illegal contract – Severability of legal part – Promise to repay Rs. 5,000/- with Rs. 250/- if sale failed.*

The plaintiff paid the defendant Rs. 5,000/- on an informal agreement to buy defendant's land for Rs. 85,000/-. The sale fell through but plaintiff failed to repay the Rs. 5,000/-. At the time of payment the sum of Rs. 5,000/- was described as an advance but later as a deposit. In the issues it is described as an advance. At one stage the defendant agreed to repay the sum of Rs. 5,000/- with an additional sum of Rs. 250/- against expenses incurred by the plaintiff. Later the defendant resisted the calim for repayment.

Held:

1. There is a distinction between money paid as a deposit and money paid as an advance.

Money paid as a deposit is an earnest, in Roman-Dutch Law called *arrha*, to bind the bargain and is forfeited to the seller if the buyer defaults in going through with the sale. If the seller defaults then the buyer is entitled to receive back his money. If the sale goes through the deposit will be accountable as part of the purchase price.

2. Where the money has been paid as an advance or part payment of the price it must be refunded if the sale falls through no matter whose the default was and irrespective of the reason for the failure of the sale. If the sale goes through the advance will be accountable as part of the purchase price.

3. However, whether the money is a deposit or advance the agreed terms of the pact between the parties regarding its disposal will govern and by operative as to its disposal.

4. Although the main agreement of sale is of no force or avail in law because it was not notarially executed still the subsidiary parts of the agreement that are severable from the agreement to sell the land can be considered

and given effect to. Accordingly a claim for refund of an advance paid on an informal agreement to sell the land can be maintained.

Cases referred to --

1. *Cloete v. Union Corporation Ltd. (1929) TPD 508*
2. *Peris v. Vieyra (1926) 28 NLR 278, 280*
3. *Palaniappa Chetty v. Mortimer (1923) 25 NLR 209*
4. *Nagur Pitchi v. Usoof (1917) 20 NLR 1*
5. *Perera v. Abeysekera (1957) 58 NLR 505*
6. *Appuhamy v. Dissanayake (1921) 23 NLR 83*

APPEAL from judgment of the District Court of Colombo.
Nimal Senanayake with *Kithsiri P. Gunaratne* and *Miss. K. B. Dissanayake* for defendant – appellant
Ben Eliyathamby for plaintiff-respondent.

Cur. adv. vult.

December 20, 1979

SOZA, J.

In this action the plaintiff, a landed proprietor, seeks to recover a sum of Rs. 5,000/- which he paid as an advance to form part of the consideration of a land which he had agreed to buy from the defendant, a former top-ranking Civil Servant. It is admitted that the sale in respect of which the sum of Rs. 5,000/- was paid did not go through. It is also admitted that a sum of Rs. 5,000/- was paid by the plaintiff to the defendant but the defendant takes up the position that there was no promise by him to repay this money.

On an informal written document (P1) of 9.1.1970 the plaintiff entered into an agreement with the defendant to purchase a land called Rivera Estate which the defendant (qualified as a member of the middle class) held under the Land Development Ordinance. According to P1 there were the following obligations between them:

(1) The defendant to transfer the land called Rivera Estate in extent 56 acres to the plaintiff.

(2) The defendant to pay Rs. 85,000/- (inclusive of a loan of Rs. 16,000/- payable to the Government Agent) as purchase price.

(3) The defendant to apply for necessary sanction to the Government Agent to have the transfer effected within one month of the date of the agreement.

(4) The transfer to be effected after the full price is paid.

At the time the agreement P1 was entered into, the plaintiff paid the defendant a sum of Rs. 5,000/- as an advance on the purchase price. On 24.1.1970 there was a variation in the terms. The proposal to transfer was made subject to confirmation within seven days from 24th January 1970.

On 29.1.1970 the defendant in the exercise of his option to cancel the agreement, sent a telegram P2 to the plaintiff stating he was not confirming the sale and both by this telegram and a letter P3 of 31.1.1970 offered to return the Rs. 5,000/- describing it as a deposit. The plaintiff however was still keen on the land and at first rejected the offer of repayment of the money. Yet later on the persuasion of his Directors Mr. Prematilleke de Silva he agreed to receive back the money but with an additional sum of Rs. 250/- on account of the expenses he had incurred. The question of the return of the money however was not pursued by the defendant because the plaintiff agreed to go through with the sale at the higher price of Rs. 87,500/- – see note P10 written by the defendant to the plaintiff on 8.2.1970. By P10 the defendant fixed 11th February 1970 for finalising the sale. The note D4 addressed by the defendant to one Mr. Peiris a District Lands Officer also shows that the sale was expected to be finalised by the 11th February. By D4 Mr. Pieris is requested to accept the plaintiff's application for the transfer of the land and obtain the Government Agent's approval subject to the repayment of the outstanding loan. Apparently the sale did not go thgough on the 11th February. The Government Agent's sanction had not yet been obtained. On 16th February the defendant wrote letter D5 to Mr. Pieris fixing 3rd March for the sale as his wife too had to obtain the sanction of the Government Agent for the transfer of a five acre extent which appears to have been included in the extent promised to be transferred to the plaintiff –see D5A. In D5 Mr. Pieris is requested to obtain the Government Agent's sanction for the tarnsfer to the plaintiff and the defendant promises that on the 3rd March the outstanding loan also would be paid. There is also mention in this letter of the defendant's visit to India. In the event of the defendant delaying to return from India, Mr. Pieris is asked to fix a date before 10th March for the sale. At this stage reference must be made to the letter D1 of 26.2.1970 which defendant says plaintiff wrote to him. The plaintiff denies authorship of this letter and by so doing gains nothing but puts his credibility under a cloud. The same observation applies to the plaintiff's story that he took the purchase money to Kurunegala in February. In fact D1 seems quite a natural letter for the plaintiffto write and refers to the new date of sale, namely, 3rd March 1970.

On 21.2.1970 the defendant wrote letter P4 to the plaintiff that 3rd March would not be suitable for concluding the sale as he (i.e. defendant) had to delay his intended visit to India and it was doubtful whether he would be able to return by the 3rd March. However, as soon as he retruned, he would send the plaintiff a telegram and the sale could be completed by 10th March the latest. Hence the postponement of the sale from 11th February to 3rd March and later to 10th March was, it is obvious, necessitated by the

defendant's visit to India and the delay in obtaining sanction from the Government Agent and settling an outstanding loan.

On the 10th March the sale did not take place. The telegram which the defendant had promised he would send to the plaintiff as soon as he returned from India, was not sent. On the other hand the defendant appears to have been exploring other avenues for the sale of the land and he had written to one Mr. Jayawardena about this on 20.3.1970 and again on 24.3.1970 – see P5 and P6.

It is true that in the oral evidence of the plaintiff there are several inconsistencies, even falsehoods, but the truth can be gathered from the correspondence. Without openly jettisoning the plaintiff, the defendant was looking for another buyer and, no doubt, a better price. Apparently the plaintiff did not want to be a pawn in the defendant's hands until a better buyer turned up. On learning of the defendant's overtures to Jayawardena, the plaintiff on 24.3.70 through his lawyer sent letter P7/D6 to the defendant by registered post (see P7(a) of 24.3.70) accusing him of violating the agreement and calling off the transaction and demanding the return of the Rs. 5,000/-. There was however no reply from the defendant. On 9.4.70 the plaintiff's lawyer sent a reminder to the defendant by registered post (see P8 and P8a) and still there was no reply . On 23.3.70 the plaintiff and his wife who were to be the transferees wrote letter D3 to the District Land Officer saying that the proposed transfer had been called off. The plaintiff's witness Jayakody had met the defendant on 13th March and learnt that the defendant was not going through with the sale.

The defendant's version that it was the plaintiff who was playing for time as he had not all the purchase money ready is not borne out by any of the correspondence. The defendant it was who failed to get the sanction of the Government Agent for the sale and put off settling his outstanding loan. On the correspondence alone it is clear that the defendant was the defaulter. This conclusion is supported also by the evidence of Mr. Prematilleke de Silva and Jayakody. The original agreement was varied once by giving a week's time to confirm the sale and again by pushing up the purchase price to Rs. 87,500/- (sometimes quoted as Rs. 87,000/- –see paragraph 4(c)(i) of the answer). That there was a promise to repay the advance if the sale failed is evidenced by the writing P3 of 31.1.1970 and telegram P2 of 29.1.1970 (wrongly dated in the issue No. 1(b) as 7.2.1970). This promise was repeated in the presence of Proctor Prematilleke de Silva by the defendant in early February. Proctor de Silva states the plaintiff was reluctantly prepared to accept the repayment of Rs. 5,250/- and the plaintiff too agrees that this was so.

It is argued on behalf of the defendant that the promise contained in P2 and P3 is a new promise which plaintiff refused to accept and therefore created no contract. But the fact is that later when plaintiff's Proctor intervened the plaintiff agreed to receive back the money with an additional

Rs. 250/-. Hence the issue as to whether plaintiff accepted the offer of the defendant to repay the money was correctly answered in the affirmative by the learned trial Judge.

Quite apart from the defendant's promise to pay back the money, the plaintiff's claim is supportable on a consideration of the issues relating to the validity of the agreement and the responsibility for the default which caused the transaction to fall through. Here it is necessary to explain the legal principles involved.

The sum of Rs. 5,000/- paid by the plaintiff at the time the agreement P1 was signed was described as an advance though in the letter P3 and telegram P2 it was described as a deposit. When issues were framed at the trial, in issue No. 6 raised by learned Counsel for the defendant, it was described as an advance.

In considering the destination of the sum of Rs. 5,000/-, the distinction between money paid as a deposit and money paid as an advance should be borne in mind. Money paid as a deposit is an earnest, in Roman and Roman-Dutch Law called *arrha,* to bind the bargain. *Arrha* can consist of money or other things. When *arrha* consists of money, its destination can be determined by the terms expressly agreed upon between the parties to the sale. Where there are no express terms *arrha* can be considered in two situations. Firstly arrha may be in *argumentum venditionis contractae,* **a token of a purchase** contracted and completed, that is, as evidence that the parties were *ad idem* and that the sale was completed. Neither party may resile from such a contract but the *arrha* in the hands of the vendor will be imputed to account of the price at the time of fulfilment of the contract. Secondly, *arrha* may be given *poenitentiae causa* in proof of an inchoate purchase to be further perfected in accordance with the intention of the parties. Here the purchaser may resile from the contract with only the loss of the *arrha* he paid while the vendor may, if he chooses, absolve himself by paying double the amount he had received. For if the purchaser has been diligent in discharging the price and keeping faith, his deligence should not be turned to his hurt. On the other hand if the default is by the vendor, it should not be turned to his own profit. It is not necessary that in such a pact of sale, a forfeiture clause should be provided although frequently merely *ex abundanti,* and for the purpose of removing all doubt, provisions are inserted in pacts for what would have taken place without any pact and in the ordinary course of the common law. Here too at the time of performance of the contract, the amount paid will be brought into account as part of the purchase price – see **Voet 18.1.25, 18.3.3. (Berwick's Translation (1876) p. 31 and P. 47** or **Gane's Translation** (1956) vol. 3 pp. 279, 280 and pp. 293–295). **Wessels: The law of Contract in South Africa 2nd Ed. (1956) Vol. 2 pp. 1094, 1095 paragraphs 4449 and 4450** and **Cloete v. Union Corporation, Ltd.**[1]

In the modern law as developed by judicial decisions in Sri Lanka, if no contrary terms are expressly set down, *arrha* or deposit impliedly means that it is a security or guarantee for the performance of the contract by the purchaser which is forfeited if he repudiates the contract but which goes towards payment of the purchase money if the contract is performed. Of course if terms are expressly set down they will govern the disposal of the payment – see **Peris v. Vieyra.**[2]

If the seller defaults he must pay the deposit back with any other sum legally recoverable imposed by the terms of the contract. An advance on the other hand is a payment or instalment of the purchase money. In the absence of express terms to the contrary, the advance is refundable if the contract, no matter owing to whose default, fails. This is because there would then be a failure of consideration – see **Peris v. Vievra** (supra) at pp. 280–282. In the case of **Palaniappa Chetty v. Mortimer**[3] the principle was laid down that money of the purchaser lying in the hands of the vendor and not given as a deposit or agreed to be treated as a deposit, cannot be regarded as a deposit (that is, as earnest or *arrha*) given on the occasion of an agreement to purchase being entered into. Such money can be recovered by the purchaser even if he was the defaulting party – see also **Dr. G. L. Peiris: The Law of Property Vol. II (1976) pp. 210–212.**

Our law then is that where the money has been paid as an advance or part payment of the price it must be refunded if the sale falls through. This is irrespective of who is responsible for the default. But in the instant case the defaulter is, as I have said before, the defendant. Even if the money is a deposit, if the sale has failed because the seller refused or neglected to conclude the sale or is incapable of concluding the sale, the money must be paid back to the buyer. Hence the plaintiff is entitled to receive his Rs. 5,000/- back from the defendant.

But will a cause of action to recover the money accrue to a purchaser where the payment of the money is part of an agreement which not being notarially executed is of no force or avail in law in view of the provisions of section 2 of the Prevention of Frauds Ordinance No. 7 of 1840? In the case of **Nagur Pitchi v. Usoof**[4] a Full Bench of the Supreme Court held that a party who advances money on an informal agreement is entitled to a refund only if the other party refuses or is incapable of completing the transaction and the consideration for the advance therefore fails. Although this case was held by Basnayake C. J. to be wrongly decided in the course of his judgment in the Divisional Bench case of **Perera v. Abeysekera,**[5] his was the minority view. Dalton, J. in the case of **Peris v. Vieyra** (supra) found difficulty in accepting the reasoning used in the decision of **Nagur Pitchi v. Usoof** (supra) but Bertram C. J. approved it in **Appuhamy v. Dissanayake**[6]. Further the majority view in the case of **Perera v. Abeysekera** (supra) was that though the agreement to sell is not notarially executed and therefore of no

force or avail in law in view of the provisions of Section 2 of the Prevention of Frauds Ordinance, still the subsidiary parts of the agreement that are severable from the agreement to sell the land, can be considered and given effect to. That case was similar to the present one though not on all fours with it. The Court considered the claim for refund of an advance paid on an informal agreement to sell land and held it could be maintained.

In the instant case the transaction regarding the payment of Rs. 5,000/- is easily severable from the agreement to sell the land, though embodied in the same document. The part of the agreement regarding the payment of Rs. 5,000/- is valid and legal and can be considered and given effect to. The money being an advance, the plaintiff is entitled to succeed. Even if it is a deposit, the defendant being the defaulting party, the plaintiff is entitled to receive back the money.

As far as the claim in reconvention is concerned the defendant's claim for expenses in settling certain losses, had no merit whatsoever. The expenses have not even been proved. Such losses are illegal and a contravention of the terms on which the defendant held the land under the Land Development Ordinance. Hence the claim in reconvention was rightly disallowed.

The judgment of the learned District Judge is therefore affirmed and this appeal is dismissed with costs.

L. H. DE ALWIS, J.

I agree

Appeal dismissed.