

TILAKARATNE
v
JAYATILAKA AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 300/89(F)
D.C. KEGALLE 2285/L
FEBRUARY 13, 2001
FEBRUARY 19, 2002

Trusts Ordinance – Sections 5, 5(1) and 5(3) – Attendant Circumstances – Oral Agreement to sell land – Prevention of Frauds Ordinance – Section 2 – Applicability – Fraud

The plaintiffs-respondents instituted action seeking an order to direct the defendant-appellant to accept a certain sum and execute a deed in favour of them as agreed upon by the parties. It was their position that the defendant-appellant was holding the property on trust. The defendant-appellant contended that he never entered into any agreement to sell the property, and further contended that in any event that even if there is an Agreement to sell, it is void in view of section 2 of Frauds Ordinance. The District Court held with the plaintiff-respondent.

Held

- (i) There existed an oral agreement to sell the property. Though the plaintiffs-respondents were able and willing to pay the consideration the defendant-respondent in violation of the agreement refused to execute the Deed.
- (ii) On an examination of the evidence no trust would be established or inferred.
- (iii) The agreement could only tantamount to an Agreement to sell. The Agreement is not in conformity with the provisions of S.5(1) Trust Ordinance, therefore does not create a trust.
- (iv) The oral agreement and the attendant circumstances did not give rise to a trust there is no evidence of a fraud in the circumstances section 2 of the Frauds Ordinance would apply.

APPEAL from the District Court of Kegalle.

Cases referred to:

1. *Saverimuttu v Thangavelautham* – 55 NLR 529 at 532
2. *Lakshmanan Chettiar v Muttiiah Chettiar* – 50 NLR 337 at 344
3. *Swami Sivagnananda v The Bishop of Kandy* – 55 NLR 130
4. *Don v Don* – 31 NLR 73

A.K. Premadasa, P.C., with *C.E. de Silva* for defendant-appellant

S.C.B. Walgampaya, with *S.A.I.S. Suraweera* and *W.A.N.Jayantha* for plaintiff-respondent.

Cur. adv. vult

May 22, 2002

SOMAWANSA, J.

The plaintiffs-respondents instituted action No.2285/L in the District Court of Kegalle seeking an order from Court to direct the defendant-appellant to accept a sum of Rs. 40,000/- and execute a deed in favour of the plaintiffs-respondents as agreed upon by the parties and further claimed damages for non execution of the deed. The plaintiffs-respondents' pleaded case was that the defendant-appellant who is the owner of the property in suit agreed to transfer the same to the plaintiffs-respondents for a consideration of Rs. 40,000/- and in view of the agreement to sell, the defendant-appellant handed over possession of the land and the house standing thereon which is the property in suit to the plaintiffs-respondents and the plaintiffs-respondents came into occupation of the same. Further it is averred by the plaintiffs-respondents that in view of this agreement with the defendant-appellant they made arrangements to obtain a loan from the State Mortgage Bank in a sum of Rs. 40,000/- and having prepared the necessary deed to transfer the property in suit, requested the defendant-appellant to sign the deed. However the defendant-appellant refused to sign and as a result of his failure to transfer the property has caused damages in

a sum of Rs. 25,000/-. Therefore, the plaintiffs-respondents claimed that in the circumstances the defendant-appellant was holding the said property in trust on behalf of the plaintiffs-respondents. 20

The defendant-appellant's position is that he never entered into any agreement with the plaintiffs-respondents to sell this property to the plaintiffs-respondents and in any event if any agreement to sell did exist it became null and void in view of section 2 of the Prevention of Frauds Ordinance which required that such agreement to be reduced to writing and notarially executed. Further, on or about September 1979 the plaintiffs-respondents forcibly and unlawfully entered the property and is in possession of the same thereby causing damage to the defendant-appellant in a sum of Rs. 40,000/-. In the circumstances, the defendant-appellant is seeking for a dismissal of the action, ejection of the plaintiffs-respondents, a declaration that the defendant-appellant is the owner of the land and damages for wrongful occupation. The plaintiffs-respondents filed a replication praying for a dismissal of the defendant-appellant's claim in re-convention. 30

At the commencement of the trial parties admitted that the defendant-appellant is the owner of the property in suit. The plaintiffs-respondents raised 04 issues while the defendant-appellant raised 04 issues. The learned District Judge by his judgment dated 16.11.1989 held in favour of the plaintiffs-respondents and it is from this judgment that the defendant-appellant has preferred this appeal. 40

Considering the question of any agreement to sell, though the defendant-appellant denied any agreement to sell, the three letters written by the defendant-appellant to the State Mortgage and Investment Bank marked, P2, P8 and P12 clearly establish the fact that there was an agreement to sell the property in suit to the plaintiffs-respondents by the defendant-appellant. This is further established by the fact that the plaintiffs-respondents were given possession of the property in suit. The mother of the defendant-appellant admitted in her evidence that the possession of the property was given to the plaintiffs-respondents in view of the intended sale. 50

It may also be noted that she admitted the signatures on P2, P8 and P12 as that of the defendant-appellant. She also admitted

that the defendant-appellant wanted money to go abroad and as such intended selling the property to the plaintiffs-respondents. However she admitted that it was she who objected to the sale and prevented the signing of the deed. 60

In the light of the above reasoning I am inclined to take the view that there existed an oral agreement to sell the property in suit to the plaintiffs-respondents and that though the plaintiffs-respondents were able and willing to pay the consideration the defendant-appellant in violation of the agreement was refusing to execute the deed.

The next question that has to be decided is whether the said agreement, with the attendant circumstances would give rise to a trust in favour of the plaintiffs-respondents. On an examination of the evidence, I am inclined to take the view that no such trust could be established or inferred. The agreement at the most would amount to an agreement to sell the property in suit. Certainly, no evidence that the defendant-appellant had any intention to create a trust and there is no evidence that any consideration passed on the said agreement or that the defendant-appellant benefitted from the agreement. Only person who derived any benefit from the agreement was the plaintiffs-respondents who entered into occupation of the premises in suit. The fact that the plaintiffs-respondents raised a loan from the State Mortgage Bank to purchase the property in suit will not be sufficient to establish a trust as the money from the loan never passed on to the defendant-appellant. 70 80

At this point, it would be pertinent to refer to section 5 of the Trusts Ordinance. The relevant sub-sections of section 5 reads thus:

“5. (1) Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

(3) These rules do not apply where they would operate so as to effectuate a fraud”. 90

It is apparent that in the instant case the agreement is only an oral agreement neither reduced to writing nor is it notarially executed. Hence it appears that this agreement is not in conformity with the provisions laid down in section 5 (1) of the Trusts Ordinance and therefore does not create a valid trust. On the other hand, as there is no evidence of any fraud on the part of the defendant-appellant provisions contained in section 5 (3) of the Trusts Ordinance also will not apply to the instant case. It was stated by the Privy Council in *Saverimuttu v Thangavelautham* ⁽¹⁾ at 532 - 100

“that a breach of such an agreement (an oral agreement to sell land to another for a consideration) is undoubtedly dishonest but the dishonest conduct resulting from the breach does not amount to fraud within the meaning of the proposition that the Statute of Frauds may not be used as an instrument of fraud. If the contrary view were taken the Ordinance would be totally ineffective”.

In *Lakshmanan Chettiar v Mutiah Chettiar* ⁽²⁾ at 344 it was observed by Howard, C.J. - 110

“A finding as to fraud cannot be based on suspicion and conjecture for fraud like any other charge of offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt”.

In *Swami Sivagnananda v The Bishop of Kandy* ⁽³⁾ it was held -

“When a prospective purchaser of certain premises is permitted, pending the purchase to occupy the premises on payment of a stipulated sum of money his occupation is at best, that of a licensee and not that of a contractual tenant entitled to claim the protection of the Rent Restriction Act. If the contemplated sale does not take place, the duration of the licensee expires and the licensee becomes a trespasser liable to be ejected”. 120

As stated earlier on an examination of the evidence led in the instant case it appears to me that this is a case where the defendant-appellant has gone back on his oral agreement to sell the

property in suit. There is no evidence that he intended or in fact perpetrated a fraud. There is no evidence that the defendant-appellant enriched himself at the expense of the plaintiffs-respondents. In the circumstances, I am inclined to take the view that section 2 of the Prevention of Frauds Ordinance would also apply to the instant case. In *Don v Don* (4) it was observed by Drieberg, J. 130

“The principle that equity does not allow the statute of fraud to be used as an instrument of fraud does not apply to cases where the fraud alleged is merely a refusal, to sign a written agreement after an informal promise is given, that such a written agreement will be signed. Oral evidence of such an informal promise is inadmissible.

The principle that the statute should not be used as an instrument of fraud does not extend to cases where the absence of writing is due merely to non performance of an informal contract to execute a formal agreement to reconvey land, for it is not fraud for a party under those circumstances to say “I have agreed but I will not sign an agreement”. 140

Fry in his book on Specific Performance 6th Edition at 575 says –

“The law is clearly established that an allegation that it was part of the parol contract that the contract should be reduced to writing does not withdraw the case from the operation of the statute, and that after a parol contract a refusal to sign a written one is no fraud of which the court can take cognizance.” 150

In the light of the above reasoning, I am inclined to take the view that the learned District Judge has erred in his finding that the oral agreement and the attendant circumstances gave rise to trust in favour of the plaintiffs-respondents and his judgment is liable to be set aside.

It is also necessary at this point to consider the defendant-appellant's claim in re-convention for damages on the basis of wrongful occupation by the plaintiffs-respondents. It is admitted by the defendant-appellant that the plaintiffs-respondents entered into occupation in September 1979. However he alleged that the plain- 160

tiffs-respondents entered into occupation unlawfully and by force. But it is strange that up to date the defendant-appellant has done nothing about it. There is no evidence that he even made a complaint to the police or some other authority. The mother of the defendant-appellant admitted in her evidence that the possession of the property was given to the plaintiffs-respondents in view of the intended sale. In the circumstances it is apparent that the defendant-appellant cannot succeed in his claim for damages. 170

For the foregoing reasons, I set aside the judgment of the learned District Judge dated 16.11.1989 and dismiss the action of the plaintiffs-respondents. The claim of the defendant-appellant in re-convention for damages is disallowed. Subject to this variation the appeal is allowed with costs.

DISSANAYAKE, J. - I agree.

The Appeal allowed.