[IN THE PRIVY COUNCIL]

1961 *Present :* **Viscount Simonds, Lord Tucker, Lord Cohen, Lord Guest, Mr. L. M. D. de Silva**

L. SELLATHURAI and another, Appellants, *and* ANNALEDCHUMY, Respondent

*Privy Council Appeal No. 34 of 1960*

*S. C. 134 of 1958—Application in Revision in D. C. Colombo, 36064/M*

*Contract—Dowry deed—Portion of dowry to be given within a specified period on condition that grantees should transfer certain property to grantor—Subsequent sale of the property to a third party—Right of grantees to sue grantor—Construction of deed—Recitals in deed—Can they be basis of a written promise ?—Prescription Ordinance, s. 7.*

A dowry deed was executed under which a part of the dowry was immediately given to the grantees (husband and wife). It further provided (if the word " give " can be interpreted not only as referring to an act *in praesenti* but also as importing a promise to pay at a future date) that when a second sum of Rs. 15,000 was paid by the grantor within a period of one year the grantees should effect a transfer of certain scheduled lands in favour of the grantor.

The sum of Rs. 15,000 was not paid to the grantees within one year of the deed or at all. Repeated demands were made for payment and were ignored, but at no time was a demand accompanied by an offer to effect a transfer of the scheduled lands. In the present action claiming payment of Rs. 15,000 the grantees did not by their plaint make any offer to effect a transfer of the lands upon payment of Rs. 15,000 and, after the defendant had filed her answer, put it out of their power to do so by selling the lands. The sale price substantially exceeded Rs. 15,000.

*Held*, that it was contrary to well established equitable principles that the plaintiffs should at the same time obtain payment of the sum of Rs. 15,000 and retain the lands which they had agreed to transfer, unless they could show that time was of the essence of the contract. The severity of the penalty for failing to pay within the prescribed time should make any Court reluctant to enforce the letter of the agreement. The plaintiffs having put themselves in a position in which they were unable to perform their part of the contract were not entitled to enforce the performance of the contract by the defendant.

*Quaere*, whether a claim based on an antecedent contract referred to in the recitals in a deed or upon a covenant implied in the recitals should be regarded as a written promise.

APPEAL from a judgment of the Supreme Court delivered on October 30, 1958.

*Walter Jayawardena*, for the plaintiffs appellants.

*T. O. Kelloek*, with *D. J. Thampoe*, for the defendant respondent.

*Cur. adv. vult.*



2—J. N. R 11—2,033 (11/61)

June 20, 1961. [*Delivered by* VISCOUNT SIMONDS]—

This appeal from a judgment and decree of the Supreme Court of Ceylon is concerned with the rights of the parties under a Dowry Deed of the 10th September, 1949. The appellants claim that under and by virtue of this deed there is due to them from the respondent the sum of Rs. 15,000. Their claim was sustained by the District Court of Colombo but on appeal was rejected by the Supreme Court of Ceylon.

The parties to the deed were Nallathamby Sellathurai (since deceased), his wife the respondent, Annaledchumy and Sellammah, the widow of Suppiah, who were called the Dowry Grantors, and the appellants Leelawathy, the daughter of the first two parties, who was called the dowry grantee, and her husband Karthigesu Sunthera Rajah. It is an ill drawn document giving rise to many difficulties and it is necessary to state it fully. It is in a form appropriate to a deed poll, though in fact signed by all the parties that have been named. It recites that a marriage had been arranged between Karthigesu and Leelawathy, that it was agreed that a cash dowry of Rs. 30,000 and jewels worth Rs. 5,000 should be given to the dowry grantee by the first and second named dowry grantors, that in consideration of the said agreement the dowry grantors did thereby give cash Rs. 15,000 and jewels to the value of Rs. 5,000 to the dowry grantee, and that the dowry grantee was entitled by virtue of mudusom and inheritance from her late mother to certain lands described in the Schedule (these lands are referred to in the body of the deed in language which is not easily intelligible) and that " it was agreed between the dowry grantors and the dowry grantee that when the balance cash dowry of Rs. 15,000 was paid within a period of one year then the dowry grantee undertake and agree to effect a transfer of the said lands in favour of the first and second named dowry grantors " and that Karthigesu and his wife Leelawathy were willing to accept the said dowry. Then followed the operative part of the deed by which the first and second named dowry grantors " for and in consideration of the natural love and affection which we have and bear unto our daughter Leelawathy, and for and in consideration of the marriage of my said daughter Leelawathy with the said Sunthera Rajah do hereby by way of dowry give, convey, make over, transfer and assign unto the said Leelawathy wife of Sunthera Rajah, her heirs, executors, administrators and assigns, the said cash dowry, jewels to have and to hold the same unto the said dowry grantee and her aforewritten for ever ". The deed ended with the statement that " Sunthera Rajah and wife Leelawathy do hereby thankfully accept this dowry ". The notary public who attested this deed certified that two cheques amounting to Rs. 15,000 were issued on the Imperial Bank of India. It was admitted that contemporaneously they were handed over to the dowry grantees and that the jewels were also handed over.

The second sum of Rs. 15,000 was not paid to the dowry grantee within one year of the deed or at all. Repeated demands were made for payment and were ignored, but at no time was a demand accompanied by an offer to effect a transfer of the scheduled lands. Accordingly in the year 1955 the appellants issued the plaint out of which this appeal arises claiming payment of Rs. 15,000 with interest from the date of the

Dowry Deed. The father of Leelawathy had in the meantime died and the sole defendant was the respondent Annaledchumy, who by her answer to the plaint denied all liability and pleaded that in any event the claim was barred by prescription. The plaintiff-appellants did not by their plaint make any offer to effect a transfer of the said lands upon payment of Rs. 15,000 and after the defendant-respondent had filed her answer put it out of their power to do so by selling them. The sale price substantially exceeded Rs. 15,000.

At the hearing before the learned District Judge, evidence was given which, even if admissible, cannot give much assistance in the interpretation of a deed which is strangely obscure. The first question that appears to arise is as to the true construction of the operative part of the deed. Do the words " by way of dowry give, convey, make over, transfer and assign . . . the said cash dowry and jewels " refer not only to the sum of Rs. 15,000 which was in fact given upon the execution of the deed but also to the balance of Rs. 15,000 which was to be paid upon the condition stated in the recital ? Their Lordships are of opinion that they refer only to the Rs. 15,000 immediately given. Admittedly this ignores the use of the word " said " in the phrase " said cash dowry ", but it appears better to commit this slight violation of the language than to regard the word " give " as bearing a double meaning, first as referring to an act *in praesenti*, the giving of the Rs. 15,000 which were in fact then given, and secondly as importing a promise to pay a further Rs. 15,000 at a future date. If, however, contrary to their Lordships' opinion, the latter meaning is accepted, it is clear that in respect of the second Rs. 15,000 nothing more than a chose in action, a contractual right, was established and the nature of that right can only be ascertained by referring to the recitals in the deed. From these it appears that the payment of the second sum of Rs. 15,000 is the subject of a bargain which must now be considered.

The Supreme Court, taking the view that the claim could only be founded on the oral agreement which was stated in the recital and that that agreement must necessarily have preceded the deed, held that the action was barred by S. 7 of the Prescription Ordinance. Before their Lordships it was urged that the recital itself imported a covenant to pay and further that the covenant thus imported must be regarded as a written promise, and in support of this contention numerous authorities were cited such as *Aspdin v. Austin* [1], and *Jackson v. North Eastern Railway* [2]. Their Lordships find it unnecessary to decide this question, for, whatever answer may be given to it, they approve and accept the second ground on which the Supreme Court allowed the appeal and rejected the present appellants' claim. It would in their opinion be contrary to well established equitable principles that the appellants should at the same time obtain payment of the second sum of Rs. 15,000 and retain the lands which they had agreed to transfer unless they could show that time was of the essence of the contract. The severity of the penalty for failing to pay within the prescribed time should make any Court reluctant to enforce the letter of the agreement. When to that consideration there is added the circumstance that the lands could (as their

[1] *5 Q. B. 671.* [2] *7C. D. 573.*

Lordships were informed) themselves according to Tamil custom be regarded as part of the dowry of the appellant Leelawathy, it is transparent that a grave injustice would be done by allowing the appellants to take advantage of the fact that the respondent had delayed in making payment even though that delay was prolonged. It was urged that in this case there was no question of time being of the essence of the contract. But this ignores the substance of the bargain, which was nothing else than that the appellants should receive the further sum of Rs. 15,000 and should in return transfer certain lands. Unless they can establish that the time limit imposed for the performance of the bargain was of the essence of the contract, a Court, applying well established equitable doctrine, will not allow them to require performance by the respondent of her part of the bargain without being ready and willing to perform their part. They see no reason to think that the Supreme Court has come to a wrong conclusion and adopt their words " the plaintiffs having put themselves in a position in which they are unable to perform their part of the contract are not entitled to enforce the performance of the contract by the defendant ". They add for the sake of clarity that the same result follows, whether the claim is based on a contractual right arising out of the operative words of the deed or on an antecedent contract referred to in the recital or upon a covenant implied in the recital itself.

For the reasons that have been given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

*Appeal dismissed.*