

(1966) 06 KL CK 0001
In the High Court Of Kerala
Case No : S.A. No. 732 of 1962

Govinda Pai

APPELLANT

Vs

Rama Pai

RESPONDENT

Date of Decision : 13-06-1966

Acts Referred:

Citation : (1966) KLJ 819

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Advocate : K.N. Narayanan Nair and C.R. Panicker, for the Appellant; S. Bhoothalinga Iyer, for the Respondent

Final Decision : Allowed

Judgement

T.C. Raghavan, J.—The appellant, the second defendant, and his brother, the first defendant, were employees in a trade conducted by Dw. 1; and Dw. 1 started a criminal case against them for breach of trust. Two or three months thereafter the said defendants and their father and paternal uncle executed a usufructuary mortgage (Ex. D) in favour of Dw. 2 for Rs. 440/- containing a recital that the amount was to be paid to Dw. 1 in discharge of amounts taken by the first defendant from the trade for the maintenance of the family. The document recited further that Rs. 15/- were taken for the expenses of the document; that Rs. 425/- were to be paid to Dw. 1; and that another sum of Rs. 50/- was also paid to Dw. 1 towards the same liability. On the same day a lease deed (Ex. A.) was executed by the executant of Ex. D taking back the property on a monthly rent of Rs. 4-8-0. Within ten days of these documents Dw. 1 filed a petition before the criminal court stating that since his witnesses turned hostile, he was not in a position to substantiate his complaint. The criminal court thereupon discharged the accused (vide Ex. 1). More than 13 years thereafter the plaintiff (the respondent is his heir) purchased the rights under Exx.D and A for Rs. 250/-. The document recited that no rent was paid during all the 13 years, that the mortgage amount due was Rs. 425/- and that the arrears of rent due were

Rs. 660/-. Nevertheless, the document said that the consideration for the mortgage would be Rs. 160/- and for the arrears of rent Rs. 90/- (vide Ex. B). A few-months thereafter the suit giving rise to the second appeal was filed for arrears of rent and for recovery of possession of the property on the basis of the lease back (Ex. A.) The second defendant-appellant alone contested. He contended that no consideration passed under Ex. D and that Exx. D and A were executed only as consideration for discontinuing the prosecution against himself and his brother. He contended further that the plaintiff did not pay any consideration for the assignment under Ex. B. His further contention was that Exx. D and A were intended to stifle a criminal prosecution; and that for that reason they were illegal and unenforceable.

2. The trial court agreed with the contention of the appellant that Ex. D was not supported by consideration in the sense that neither Dw. 2 nor the plaintiff paid any money. The trial court also held that Dw. 1, Dw. 2 and the executants Exx. D and A all knew that it was intended only for discontinuing the prosecution; and that therefore, the documents evidenced an illegal contract which could not be enforced. The trial court consequently dismissed the suit: but on appeal the lower appellate court came to a different conclusion. It held that at the most the motive behind Ex. D alone could have been the dropping of the prosecution; but that, at any rate, the object of or the consideration for Ex. D could not have been the dropping of the prosecution. In that view it decreed the suit.

3. Regarding the law on the question there cannot be any doubt. The bond will be invalid and unenforceable only if it was executed as consideration for dropping the threatened prosecution or the prosecution already started. The pre-existing civil liability by itself is no criterion for concluding that the bond was executed only in discharge of it. On the other hand, even a threat of prosecution may not by itself be sufficient to hold that the bond was in consideration for dropping the prosecution. It must be established that the execution of the bond formed part of the consideration for dropping the prosecution or discontinuing it. Even if the party threatened to be prosecuted or against whom a prosecution had already been commenced thought that if he executed the bond the prosecution would be dropped and the prosecution was in fact dropped, that again is not proof positive that the bond constituted the consideration for such dropping of the prosecution. In such a case the motive that impelled the executant to execute the bond might be his expectation that if he executed the bond the complainant might drop the prosecution: still, it cannot be said that the execution of the bond was consideration for dropping the prosecution. The dropping of the prosecution must be the direct result of bond, in other words, the object of or the consideration for the bond must have been the dropping of the prosecution. This question has necessarily to be decided not merely on the recitals in the bond, but on all the circumstances; the question has to be considered on the basis and in the light of the knowledge of the parties concerned--whether they consciously treated the execution of the bond as consideration for dropping the threatened prosecution or discontinuing the prosecution already commenced. (Vide AIR 1941 95 (Privy

Council) ; Sudhindra Kumar Rai Chaudhuri v. Ganesh Chandra Ganguli AIR 1938 Cal. 840; and Ramchandra Laxman and Others Vs. The Bank of Kolhapur,)

4. In the case before me the version of the appellant is that Dw. 1, Dw. 2 and the executants of Exx. D and A knew that the documents were executed as consideration for dropping the prosecution as well. In other words, it was not merely intended to discharge the civil liability of the appellant and his brother, but was also intended to drop the criminal case. The appellant has a further case that neither Dw. 2 paid any amount to Dw. 1 nor the plaintiff paid any amount to Dw. 2 when he took the assignment.

5. Plaintiff and the appellant have both been examined, in addition to Dws. 1 and 2. From the evidence of Dws. 1 and 2 what appears is that Dw. 2 knew of the pendency of the prosecution. He was asked a specific question whether the dropping of the prosecution was not in consideration for the execution of the mortgage; and his answer was rather evasive. He did not say that it was not intended for that purpose; he only said that he did not definitely know. Dw. 2 then said that he paid the amount to Dw. 1; but there is no record to evidence it. On this point the evidence of Dw. 1 contradicted the version of Dw. 2. Dw. 1 said that he executed a receipt, though not a registered receipt, to Dw. 2. Dw. 1 was also asked whether the execution of the documents was not intended as consideration for dropping the prosecution as well; and his answer was more damaging to the plaintiff. He said that the dropping of the prosecution was the result of the execution of the documents. At any rate, I do not propose to decide the question merely on the evidence of these two witnesses, though their evidence can be said to go a long way to establish that both of them knew that the execution of the documents was intended also as consideration for dropping the criminal case.

6. I shall now consider some of the circumstances, which can be relied on more safely. It is admitted that for over 13 years no rent was received from the executants of Exx. D and A. There is, as already indicated, no reliable evidence to show that Dw. 2 paid the amount under Ex. D to Dw. 1. Even in Ex. B, the assignment by Dw. 2 to the plaintiff, there is no recital that Dw. 2 already paid the amount to Dw. 1. Moreover, there is a recital therein that the assignee will have no right of recourse against the assignor. Still further, the amount then due is said to be over Rs. 1,000/-; but the assignment is only for Rs. 250/-. Again, Pw. 1, the plaintiff, says that though he has accounts, his accounts will not show the payment of Rs. 250/- to Dw. 2. All these circumstances can only indicate that no amount could have passed either under Ex. D or under Ex. B. I may add that from the circumstances and the evidence already discussed the irresistible conclusion is that Dws. 1 and 2, and even the plaintiff, knew that the execution of the documents was only to achieve the dropping of the prosecution. It follows that the conclusion of the lower appellate court that at the most the motive behind the execution of Exx. D and A might alone have been the dropping of the prosecution and that the execution of the documents was not in consideration for

the dropping of the prosecution is erroneous. The second appeal is therefore allowed, the decision of the lower appellate court is set aside and the decision of the trial court is restored. The appellant will get his costs here and in the lower appellate court. The order regarding costs passed by the trial court will stand.