**(1972) 03 MAD CK 0050**

**In the Madras High Court**

**Case No :** Original Side Appeal No''s. 8 and 9 of 1966

Rajababu Fathima Buhari and Another — APPELLANT

Vs

S.V. Ramakrishna Mudaliar and Others — RESPONDENT

**Date of Decision :** 10-03-1972

**Acts Referred:**
Transfer of Property Act, 1882 — Section 69

**Citation :** (1972) ILR (Mad) 573

**Hon'ble Judges :** K. Veeraswami, C.J;Raghavan, J

**Bench :** Division Bench

**Final Decision :** Allowed

## Judgement

Raghavan, J.—The above two appeals are preferred by the first and second Defendants against the decree in Original Suit No. 43 of 1962. The question that arises for consideration in these appeals in whether there can be a contract of honour or what is familiar by known as a gentleman''s agreement purported to have been drawn up on 24th which is not enforceable in a Court of law based on the judgment of the Court of Appeal in Rose and Frank Co. v. J.R. Crompton & Bros. Ltd. (1924) All. E.R. (Reprint) 245 affirmed by the House of Lords.

2. The facts of the case lie in a narrow compass. The Plaintiffs are father and son and the Defendants are wife and husband. The first Plaintiff, the father, is the owner of 3 items of properties described in schedule ''A and ''B'' to the plaint which among others were bequeathed to him by his adoptive father late S.V. Ramaswami Mudaliar subject to other dispositions under his last Will and testament dated September 10, 1937, which was duly probated. The ''A'' schedule property consists of (1) House and ground bearing door No. 46 in Rattan Bazaar Road and (2) House and ground bearing door Nos. 197 and 198, Mount Road, Madras and the ''B'' Schedule property is a bungalow and ground with the lease-hold right therein measuring 51 grounds and 1,132 sq. ft. the ground belonging to Sri Adikesava Perumal Devasthanam, called Serles Gardens, Greenways Road, Adayar, Madras. The absolute interest in the said lands was

acquired by the first Plaintiff as a result of certain proceedings taken by him. By a Deed of transfer, dated March 4, 1941, the first Plaintiff''s adoptive mother transferred all her interest in the said properties with the result that in or about 1941 he has been the absolute owner of the ''B'' Schedule properties and has been in possession of the same ever since 1941. Certain mortgages were created over the suit properties by the first Plaintiff and the total of the principal amounts borrowed was about Rs. 1,23,000 and the mortgagees were conferred the power of private sale u/s 69 of the Transfer of Property Act. Interest was largely in arrears in respect of all these mortgages in the beginning of 1959 and the mortgagees took steps u/s 69 of the Transfer of Property Act to auction the hypotheca. Rs. 1,90,000 was required to discharge all the aforesaid four mortgages and other pressing debts. It is in that context and with a view to avert the auction sales of the properties in public auction which the mortgagees brought, that the first Plaintiff, on the advice of his Advocate Sri V.S. Rangachari, approached the second Defendant for financial help and as a result of negotiations the sales of the aforesaid properties was agreed to and it was further agreed that the Plaintiffs should execute 2 sale deeds in the name of the first Defendant of the ''A'' and ''B'' Schedule properties for Rs. 1,90,000, one on 26th March 1959 in respect of the property described in the ''B'' Schedule for Rs. 1,05,000. With the sums thus advanced the mortgages standing on the aforesaid properties were fully discharged and the sales of the properties in public auction by the mortgagees were averted and the purchasers were put in possession of the properties. The case of the Plaintiffs is that during the negotiation and discussions at the time of the sale, an arrangement was arrived at between V.S. Rangachari and Narayana Iyer (Agent of the first Plaintiff) on the one hand and M. Kamal acting for the second Defendant on the other, the terms of which were as follows:

(a) The Plaintiffs shall execute a deed of conveyance of the property described in Schedule ''A'' in the name of the first Defendant for the sum Rs. 1,05,000 the second Defendant providing the said sum with which the mortgages subsisting on the said properties and certain other sundry debts of the Plaintiff discharged.

(b) The Plaintiffs shall also execute another deed of conveyance of the property described in the Schedule ''B'' hereto in the name of the first Defendant for the sum of Rs. 85,000 the second Defendant providing the said sum with which the two subsisting mortgages in favour of his son and certain other pressing sundry creditors were to be discharged.

(c) that the ''A'' and ''B'' Schedule properties will be put in possession of the first Defendant as and from the date of sale.

(d) That the first Defendant will reconvey the said properties to the Plaintiffs on payment by the Plaintiffs of the purchase amount within three years with 10 per cent of the purchase price as solatium to the first Defendant along with the actual amount spent on improvements if any effected by the Defendants on the properties and deliver back possession of the ''A'' and ''B'' Schedule properties to the Plaintiffs.

The Plaintiffs'' case is that Clause, (d) of the abovesaid agreement relating to reconveyance was agreed to be treated as a gentlemen''s understanding and not to be incorporated in the formal sale deed of the properties and that the gentlemen''s understanding was reduced to writing as A Record of Fact which was in the hand writing of K. Narayana Iyer, the agent of the first Plaintiff. The said Record of Fact was signed by M. Kamal, who it was stated was acting on behalf of the Defendants in all the negotiations. The said understanding was signed both by M. Kamal and K. Narayana Iyer. The Plaintiffs'' case is that on 28th May 1960 the first Defendant in pursuance of the aforesaid agreement and at the request of the Plaintiffs reconveyed the ''B'' Schedule property to the Plaintiffs for a sum of Rs. 95,000. That amount was fixed as the Defendants wanted 10 per cent solatium on the sale price and a further sum of Rs. 1,25,000 being the cost of repairs stated to have been effected to the property and the second Defendant agreed to give vouchers in due course and the Plaintiffs were put in possession of the ''B'' Schedule property and the second Defendant continued to occupy the same as the Plaintiffs'' tenant. The period fixed in the gentlemen''s agreement was 3 years from the date of the execution of the sale deeds (P-2 and P-3) and the Plaintiffs wrote to the second Defendant requesting for the reconveyance of the ''A'' Schedule property offering a similar solatium of 10 per cent on the purchase price. The Plaintiffs'' case is that the second Defendant did not send a reply to the notice The Plaintiffs therefore arranged to tender the said sum in cash. But as the Defendants were not available to receive the sum the present suit is filed seeking to enforce the agreement to reconvey the ''A'' Schedule properties and directing the Defendants or the first Defendant with the concurrence of the second Defendant to reconvey the properties on receiving Rs. 1,15,500 and on such terms which the Court deems fit and proper and for other reliefs.

3. The first and second Defendants filed separate written statements. The case of the first Defendant is that she purchased ''A'' and ''B'' Schedule properties which were worth Rs. 3,00,000 or Rs. 4,00,000 and of ''B'' schedule properties under two sale deeds, dated 31st March 1959 and 26th March 1959 for valuable consideration, that at no time either before or at the time of the purchase of the said properties was there any agreement much less a gentlemen''s understanding to reconvey to the Plaintiffs those properties, that the alleged Record of Fact purported to have been drawn up on 24th March 1959 is false, that she was not a party to the so-called record of fact, dated 24th March 1959, that she never authorised her husband, the second Defendant, to enter into any such agreement, that one M. Kamal referred to in the plaint had no authority to enter into any such arrangement agreeing to reconvey the properties, that there was no necessity or occasion for her to embark upon and agree to such an agreement and that in view of the phenomenal rise in price of immovable properties the so-called Record of Fact, which is not binding on her appears to have been brought about that in fact there were no discussions as far as she was

 

aware between the second Defendant or his so-called agent M. Kamal regarding the alleged arrangement and that the arrangement will not bind her at all. The further contention put forward by her is that she is not a benamidar for the second Defendant and that the properties were purchased with her monies and for her benefit, that the second Defendant paid the market value of the properties at the time of the sale and that the Plaintiffs'' case that the ''A'' Schedule properties were worth Rs. 3,00,000 or Rs. 4,00,000 and of ''B'' Schedule properties Rs. 3,00,000/- at the time of sale is false. Without prejudice to her contentions the further plea put forward by her was that the said Record of Fact, dated 24th May 1959 is illusory, vague, indefinite and devoid of particulars, that there was no recital therein that any firm commitment was made by her agreeing to reconvey the properties in three years, that the said Record of Fact was not referred to in the two later sale deeds which were executed a few days later (exhibits P-2 and P-3 relating to ''B'' and ''A'' Schedule properties), that the ''B'' Schedule properties which were purchased by her under exhibit P-2 were resold to the Plaintiff not in pursuance of any arrangement or agreement, but because the property purchased consisted of an old dilapidated house in respect of which she was unable to secure any tenants and that several lakhs of rupees had to be spent to repair the said dilapidated building and that she did not consider the investment on the same as profitable. Lastly the first Defendant contended that the said Record of Fact, dated 24th May 1959 is vague and inadmissible in evidence, that it does not constitute a contract under the provisions of Indian Contract Act, that the same is not enforceable under the provisions of the Specific Relief Act and the present suit for enforcing the said Record of Fact is not maintainable, as the specific performance claimed is not in respect of contract to which she was a party.

4. The second Defendant filed a separate written statement wherein he denied the existence of any agreement to reconvey the properties. His contention was that the alleged Record of Fact, dated 24th May 1959 is wholly false, that he was not a party to the said alleged agreement, that Kamal mentioned therein was never his agent and that the plaint allegations that the 2nd Defendant assured the 1st Plaintiff that he would stand by the terms of the said Record of Fact notwithstanding their not signing the same, is false. The further contention of the second Defendant is that the allegation that the properties were purchased in the name of the first Defendant not with her monies but with monies advanced by him is not correct and that the Plaintiffs are not entitled to any of the reliefs claimed.

5. We may in this connection refer to the amendment of the plaint by the addition of paragraph 12(b). The original plaint was laid on the basis that the first Defendant was only a benamidar for the second Defendant and that since the second Defendant had agreed to reconvey the properties the first Defendant was bound to reconvey the same. The alternative case as to what would happen when it is established that the first Defendant was not a benamidar, was not, however, pleaded in the original plaint. The amendment sought is in respect of

 

this alternative case. The amendment is to the effect that even on the alternative basis, namely, that even if the first Defendant is not a benamidar but a real owner, the second Defendant being the husband of the first Defendant acted as such agent of the first Defendant at the time when the properties were negotiated for purchase and that the agreement for reconveyance entered into by the second Defendant would bind the first Defendant also and that the first Defendant would be estopped from denying the agreement, dated 24th March 1959. The trial Judge allowed the amendment and permitted the Defendants to file an additional written statement.

The following principal issues were framed:

(1) Did the first Defendant agree to reconvey ''A'' and ''B'' Schedule properties to the Plaintiffs as alleged in paragraph 9(d) of the plaint and is such an agreement evidenced by the ''Record of Fact'', dated 24th May 1969?

(2) Whether the ''Record of Fact'' set out in the plaint is admissible in evidence and if so whether it is true, valid and supported by consideration?

(3) Is Kamal the agent of the Defendants or either of them in the matter of putting through the said conveyance and the said agreement to reconvey?

(4) Were the conveyances of ''A'' and ''B'' Schedule properties in the name of the first Defendant executed in the circumstances, set out in paragraphs 9 and 10 of the plaint?

(5) Are the Plaintiffs not entitled to specific performance of the agreement to reconvey the ''A'' Schedule properties against the defendant?

6. Consequent upon the amendment of the plaint, the learned trial Judge framed additional issues which ran as follows:

(a) Whether, even on the footing that the first Defendant was not a benamidar for the second Defendant, the first Defendant will be bound to reconvey the suit properties on the basis of the agreement entered into with the Plaintiff and the representations made to him by the second Defendant?

(b) Whether the second Defendant was the agent of the first Defendant in the transactions?

(c) Whether he had authority to agree to reconvey the suit properties on the terms alleged by the Plaintiff?

(d) Whether, even if he had no such authority the first Defendant will be bound by the agreement actually entered into by the second Defendant with the Plaintiff or on the representations of the second Defendant were within Plaintiff?

(e) Whether the first Defendant induced the Plaintiff to believe that the agreement entered into by the second Defendant and the representations of the second Defendant were within the scope of the second Defendant''s authority, and whether, assuming that they were misrepresentations, they will still bind the first Defendant?

(f) Whether the first Defendant is estopped from denying the agreement for reconveyance and refusing to act upon it?

The trial Judge went elaborately into the question whether the first Defendant was only a benamidar for the second Defendant. The finding recorded by the learned trial Judge was that the first Defendant was the benamidar for the second Defendant. On the next question, whether the second Defendant agreed to reconvey the properties on the terms alleged in the plaint, the trial Judge came to the conclusion that exhibit P-1 which is stated to be the Record of Fact is true, that it was signed by Kamal as agent of the second Defendant, that the properties must have been worth more than Rs. 1,90,000 in March 1959, that the reconveyance of the ''B'' Schedule properties in May 1960 by the first Defendant in favour of the first Plaintiff was only in pursuance of agreement of reconveyance. The learned Judge after referring to the circumstances and the truth of the agreement came to the conclusion that the agreement was true and that Kamal signed the agreement on behalf of the second Defendant. The learned Judge drew an adverse inference against the Defendants from the fact that Kamal was not examined by the Defendants and that adequate facilities were not given even to summon Kamal as a Court witness. The learned Judge further found that the agreement for reconveyance was an integral part of the sale deed exhibits P-2 and P-3 and when the second Defendant brought about the transactions of sale, he acted as the agent of the first Defendant, that the first Defendant had knowledge of the agreement of reconveyance and that consequently the agreement of reconveyance was binding on the first Defendant. In the result, the trial Judge granted a decree for specific performance directing the two Defendants to reconvey the properties described in Schedule ''A'' to the plaint and permitted the Defendants to withdraw the sum of Rs. 1,15,500 deposited into Court. Against the said judgment and decree of the learned trial Judge Original Suit Appeal No. 8 of 1966 is preferred by the first Defendant and Original Side Appeal No. 9 of 1966 is preferred by the second Defendant. Both the appeals were heard together.

7. Before dealing with the several contentions raised in the appeal, we will broadly refer to the general features of the case. In 1959 the first Plaintiff owned the ''A'' and ''B'' schedule properties among various other properties. He created a mortgage over the second item in ''A'' Schedule in favour of Inderchand Bhandari for a sum of Rs. 38,000 and over item 1 in favour of Bapalal & Co., for Rs. 23,000. Both the mortgagees were conferred the power of private sale u/s 69 of the Transfer of Property Act. The first Plaintiff created 2 mortgages over the ''B'' Schedule properties in the name of the Defendants'' son Mohamed Farook Buhari, the first mortgage was on 25th January 1957, the amount borrowed was Rs. 32,000 and the second mortgage was on 28th February 1957 the amount borrowed was Rs. 30,000. Both the aforesaid mortgages had also conferred on the respective mortgagees a power of private sale. In respect of the aforesaid 4

 

mortgages interest was in arrear in the beginning of 1959. The mortgagees Inderchand Bhandari and M/s Bapalal & Co. gave notices demanding payment of the amounts threatening to bring the properties to sale in exercise of power of sale contained in the respective mortgages. Sri V.S. Rangachari, an Advocate of this Court, who is the first Plaintiff''s lawyer, offered to raise the requisite money from Mr. Buhari (the second Defendant) so that all the debts could be discharged. Meanwhile the mortgagees Bupalal and Bhandari were pressing for immediate payment. Buhari was unwilling to lend money on mortgage but offered to purchase ''A'' and ''B'' Schedule properties and clear all the liabilities charged on the said property. It is later suggested by the second Defendant that the sale deeds should be taken in the name of first Defendant. It is under those circumstances that the sale deeds exhibit P-2, dated 26th May 1959 relating to the properties described in the present ''B'' Schedule and exhibit P-3 dated 31st March 1959 relating to the two items covered by the ''A'' Schedule came to be executed by the first Plaintiff in favour of the first Defendant for a total consideration of Rs. 1,90,000 and the purchasers were to be put in possession of the properties purchased. The Plaintiffs'' case is that on 24-3-1959 in the process of negotiation culminating in the sales referred to above, an arrangement was arrived at, which was recorded as follows:

Telephone address:

Telephone No. 61678. S.V. Ramakrishnan. Ramamandirum. 170, Poonamallee High Road, Kilpauk, Madras, 10 24th March 1959

Record of fact.

This is to record the gentleman''s understanding between Mr. S.V.R. and Sri A.M. Buhari that Mr. Buhari will see to it that in case the purchase amounts as per the sale deeds in favour of Messrs. A.M.B Buhari is repaid within 3 years from this date, the properties will be reconveyed to Messrs. S.V.R. who will also have to pay in addition to sale price 10 per cent thereof as solatium of the actual amount spent on improvement if any.

(Sd) Narayana Iyer.

(Sd) V.S. Rangachari.

(Sd) Kamal 24th March 1959.

The aforesaid memorandum is stated to be a Gentleman''s understanding. In Oxford Concise Dictionary Gentleman''s agreement is defined as an agreement resting on gentleman''s honour and not a formal contract. To the same effect is the definition in Chamber''s Twentieth Century Dictionary. In Rose and Frank Co. v. J.R. Cromption & Bros. Ltd. (1924) All E.R. (Reprint) 245 such a clause is called as the Honourable pledge clause and is described as follows:

This arrangement is not entered into nor is this memorandum written as a formal or legal agreement and shall not be subject to legal jurisdiction in the Courts either of the United States or England. But it is only a defined expression and regard for the purpose and intention of the parties concerned to which they each honourably pledge themselves.

Thus the caption of the memorandum itself shows that it is a record of the purpose and intention of the parties concerned which they pledge themselves to fulfil, but that such an arrangement is not an enforceable legal document.

8. The Plaintiffs'' case is, that the aforesaid memorandum though not signed by the parties themselves having been signed by their representatives and as such binding upon the parties and is specifically enforceable. It may be seen that neither in the sale deed (exhibit P-2) nor in the sale deed (exhibit P-3), which was executed later is there any reference to this earlier Record of Fact. The Defendants have totally denied the existence of the aforesaid memorandum and their further contention, is that in any event, Kamal is not their representative, that neither the first nor the second Defendant agreed to enter into any such arrangement themselves, that they never authorised anyone to enter into any such arrangement or to sign any such arrangement on their behalf and that the Record of Fact is a fabrication.

Thus, it is seen that unless the Plaintiffs establish that the first Defendant agreed by herself or by her duly authorised agent to reconvey the properties to the first Plaintiff, a suit for specific performance cannot be maintained.

9. We may in this connection refer to a few circumstances to establish that the agreement exhibit P-1 could not have come into existence.

10. Assuming for arguments sake that exhibit P-1 is true we have next to see whether it is enforceable at law. It is not enforceable at law for the following reasons:

(i) that it has not been conclusively established that Kamal was an agent of the first or second Defendant or both and that he was authorised to agree to the terms contained in exhibit P-1 and (ii) that there is no intention to create a binding obligation entered into by the second Defendant on behalf of the first Defendant to reconvey the suit property to the first Plaintiff; (iii) The document merely says that "Buhari will see to it, that in case the purchase amount as per the sale deeds is repaid within 3 years from this dute, etc.", which is vague.

11. In this connection Mr. M.K. Nambiar, the learned Counsel for the Appellants placed considerable reliance upon the judgment of the House of Lorda in Rose and Frank Co. v. J.R. Cromption & Bros. Ltd (1924) All E.R. (Reprint) 245. There the Defendants an English Manufacturing Company entered into an agreement with the Plaintiffs, an American Company, by which the Plaintiffs were to be the sole agents for the sale of the Defendant''s goods in the United States and Canada. The agreement was in writing. One of the terms therein was that

This arrangement is not entered into nor is this memorandum written as a formal or legal agreement and shall not be subject to legal jurisdiction in the law Courts either in the United States or England. But this is only a definite expression and regard for the purpose and intention of 3 parties concerned to which each of them honourably pledged themselves to the fullest confidence-based on past business with each other--that it will be carried through by each of the 3 parties with mutual loyalty and friendly co-operation.

The Defendants determined this agreement without notice and the Plaintiffs brought an action for damages for breach of the contract, which they alleged was contained in the document of 1913, one of the clauses of which has been extracted above and for non-delivery of goods ordered by them in 1919 in accordance with the course or business prescribed in the document. Lord Phillimore held that the agreement was not a legally binding contract but that orders already accepted by it under it were binding, approving the view of Seruttion, L.J., in the Court of Appeal. In the Court of Appeal Seruttion, L.J. observed as follows:

It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is rapidly implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other''s good faith and honour, and to exclude all idea of settling disputes by any outside intervention with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such intention I can see no reason in public policy why effect should not be given to their intention.

Relying on this decision the learned Counsel for the Appellant contents that exhibit P-1, which is styled as a gentlemen''s agreement, is not enforceable at law as Buhari, one of the parties, only stated that he would see to the reconveyance of the properties, but never undertook any binding obligation on behalf of his wife to have the reconveyance of the properties executed.

12. The learned Counsel next referred to a series of cases where promoters of foot ball pools insert on the back of the coupons to be filled in by an entrant a term winch states that the entry shall give rise to no legal relationship or liability. The first of the cases cited by the learned Counsel is the decision in Jones v. Verson''s Pools Limited (1938) 2 All. E.R. 626, Atkinson, J., followed the decision of the House of Lords in Rose and Frank Co. v. J.R. Cromption & Bros. Ltd. (1924) All E.R. (Reprint) 245 referred to above and held that the conditions of the pool prevented the Plaintiff from bringing any action to enforce payment. To the same effect is the judgment of the Court of Appeal in Appleson v. H. Littlewood Limited (1939) 1 All. E.R. 464 where the learned Judges following the decision in Rose and Frank Co. case (1924) All. E.R. (Reprint) 245 held that such

 

arrangements were not contrary to public policy and that no action could be brought to enforce such arrangements.

13. The contention of the learned Counsel for the Appellants is that the learned Judge failed to consider the basic question whether exhibit P-1 was enforceable at law. His contention is that there is no intention to create a legal obligation and, therefore, there is no enforceable contract. In this connection, the learned Counsel referred to Cheshire and Fifoot, on the Law of Contract (seventh edition) page 94 to 99. When parties enter into an agreement, which is supported by consideration, the question whether in addition to the above requirements a third contractual element, viz. the intention of the parties to create a legal relation is necessary. There is considerable support for the view that it is essential for the Plaintiff, who wishes to establish the existence of a contract to prove that the creation of a legal relationship was intended. If no such intention can be established, there can be no contract. If, on the other hand, such an intention can be established, the Court may proceed to consider whether there is a valid offer and acceptance and whether there is consideration. Such cases may fall either under a category social family or other domestic agreements on the one hand or commercial agreements on the other. In the case of social family or other domestic agreements the intention can be inferred from the language used by the parties and the circumstances in which they use it. On the other hand, the intention is presumed in the case of commercial agreements rebuttable by the parties seeking to deny it. We may give some examples falling under the first category (domestic agreements). They are.--Balfour v. Balfour (1919) 2 K.B. 571 Simpkins v. Pays (1955) 3 All. E.R. 10 and Buckpitt v. Oates (1968) 1 All. E.R. 1145, In the case of commercial agreements where intention to create legal relationship is presumed, such, presumption could be rebuted in the case of (i). advertisements as illustrated by Carlill v. Carbolic Smoke Ball Co. (1893) 1 K.B. 256; (ii) Where they expressly declare that it is not to be binding in law. The most remarkable instance of a clause expressly outlawing an agreement is to be found in Rose and Frank Co. case (1924) All. E.R. (Reprint) 245. The other cases which are illustrative of this aspect are the Football Pool cases.

14. The words inserted in such an agreement to exclude legal relations may be ambiguous. In such cases the onus of proving intention to create a legal. obligation lies upon the party who asserts it. As an illustration to the above principle Edwards v. Skyways Ltd. (1964) 1 All. E.R. 494 may be usefully referred.

15. The transaction in the present case is a commercial agreement and therefore the question will be whether the presumption which exists to create legal relations in making a contract has been rebutted. We are of opinion that the materials on record are sufficient to rebut the presumption and they are as follows:

(i) No binding agreement is entered into between the first Plaintiff and the second Defendant or by the first Plaintiff with the first Defendant, who is the principal contracting party under exhibits P-2 and P-3;

 

(ii) It has not been established that Kamal who executed exhibit P-1 represented either the first Defendant or the second Defendant; and

(iii) The language used in the document is not positive to create a legal liability. What the second Defendant has offered is only to see to the first Defendant executing the reconveyance deal which is not the language where a legal relationship is intended to be created and mutual obligations flow therefrom. In this connection we may refer to Chitty on Contracts, volume I, paragraphs 42 and 48.

16. Our attention is further drawn to The Law of Vendor and Purchaser by Roy Nilner Stenham. We extract the following passage from page 2:

3. Mere agreement or promises, intended to create mere social, political, or family obligations or obligations of honour, or understood by both parties as a just, do not create a contract. There must be an intention to create obligations enforceable between the parties by legal sanctions. In other words, it must be intended to create jural relations. This intention is sometimes referred to as an animu contrahendi. Mere statements of intention, hope, anticipation, or expectation do not create enforceable obligations. An agreement intended to create moral obligations only, and not legal rights or obligations, does not create a contract. Also, the agreement may be subject to a third person''s consent, or any other condition precedent to it becoming operative as an enforceable agreement. An agreement, though purporting to be made by one party without prejudice to his rights, will operate according to its tenor and affect the rights of each party accordingly. A stipulation whose enforcement against the party concerned rests upon his mere will has no contractual effect.

We may further observe that there is no consensus ad idem, in regard to the agreement to reconvey the properties. The stipulation that the second Defendant would see to the first Defendant executing the reconveyance deed rests merely upon the will of the second Defendant and there can be no consensus between the first Plaintiff and the second Defendant creating a binding obligation compelling of the second Defendant to have the reconveyance deed executed. If the second Defendant so choose, he could have persuaded the first Defendant (real owner) to execute the reconveyance. But if the second Defendant did not move in the matter, the first Plaintiff cannot seek to compel the second Defendant to persuade the first Defendant to complete the reconveyance deed. It is open to the second Defendant to refuse to do so and when he has so refused the first Plaintiff cannot compel him. It is equally open to the first Defendant to accede or refuse to accede to the request of the second Defendant, even if the second Defendant choose to call upon her (the first Defendant) to reconvey the properties.

17. It is, however, contended that the second Defendant being the husband of the first Defendant, who took an active part in bringing about the sales exhibits P-2 and P-3, he must be deemed to be the agent of his wife and as such bound

 

to implement the offer made by him. We have already held that the language of the document relating to reconveyance of the property not being specific does not create a binding obligation. The terms viz., the second Defendant would see to it etc. are too uncertain to create a legal obligation. It is a well established rule that the terms of a Contract must be certain that the parties to the contract must agree to its terms and that if the terms are not certain the contract cannot be specifically enforced. As was held in Davies v. Davies 36 Ch. D. 359 an undertaking to retire from business so far as the law allows has been held to be too uncertain to create a contractual obligation. Similarly a promise that if satisfied with the Plaintiff as a customer the Defendants would favourably consider an application by him to renew a subsidiary contract has also been held to be too uncertain for enforcement. See Montreal Gas Co. v. Vasay (1900) A.C. 595. Further tenancy for the duration of the war has been held in Lace v. Chantler (1944) K.B. 368 to be too uncertain.

18. The Court''s duty is to implement the intention of the parties when the essential terms of the contract have been agreed upon. In our opinion, the essential terms of the contract relating to reconveyance not having been specifically agreed to between the parties, the suit for specific performance cannot be enforced.

19. In Fry on the Specific Performance of Contracts (sixth edition) at page 129 in paragraph 277 it is stated that

If what passed between them was but treaty of negotiation, or an expectation of contract, or an arrangement between them of an honorary-nature no specific performance can be had.

20. Our attention was drawn in this connection to Simpkins v. Pays (1955) 3 All. E.R. 10, Edwards v. Skyways Ltd. (1964) 1 All. E.R. 494 dealing with the intention of parties to create a legal relationship and also the need for the terms of a contract to be certain. The decisions in the above cases depended upon the facts established and the earlier decisions viz., Rose and Frank Co. v. J.R. Cromption & Bros. Ltd. (1924) All E.R. (Reprint) 245, and Balfour v. Balfour (1919) 2 K.B. 571 have been considered therein. We are, therefore, of opinion (i) that exhibit P-1 not having been signed by the parties to the agreement; (ii) that Kamal referred to therein not having been established on evidence to be the agent of the second or the first Defendant; (iii) that there having been no intention to create a legal relationship between the parties; (iv) that there being no ad idem between the first Plaintiff and the first Defendant on the question of reconveyance of the properties and (v) that the terms relating to reconveyance not being certain and therefore not being specifically enforceable in a Court of law we are of opinion that no decree for specific performance can be passed on the basis of Exhibit P-1.

21. In the result, the appeals are allowed with costs. The decree passed by the trial Judge is set aside.

 