
(1959) 02 KL CK 0004
In the High Court Of Kerala
Case No : A.S. No. 368 of 1955

Savithri Antharjanam

APPELLANT

Vs

Eappen and Others

RESPONDENT

Date of Decision : 20-02-1959

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : (1959) KLJ 702

Hon'ble Judges : T.K. Joseph, J;C.A. Vaidialingam, J

Bench : Division Bench

Advocate : T.S. Krishnamoorthy Iyer Joseph Madathil, for the Appellant; C.M. Kuruvilla and K.C. John, for the Respondent

Final Decision : Dismissed

Judgement

Joseph, J.—This is an appeal from a decree directing the 1st defendant to execute a sale deed in favour of plaintiffs 2 and 3 for the properties scheduled to the plaint and to deliver possession of the same to them on receipt of Rs. 10,000/-. The appeal was preferred by the 1st defendant. The additional 2nd appellant is a person who obtained a mortgage of part of the properties from the 1st defendant during the pendency of the suit. The allegations in the plaint may be briefly stated. The 1st plaintiff is the father of the 2nd plaintiff who was a minor on the date of suit. The 1st plaintiff died during the pendency of the suit and his widow was impleaded as additional 3rd plaintiff. The 2nd defendant is the husband of the 1st defendant and he holds a general power-of-attorney from the latter. The 3rd defendant is stated to be a lessee of the properties. The plaint properties belonged to plaintiffs 1 and 2. On 6-11-1950 the 1st plaintiff, acting on his own behalf and as guardian of the 2nd plaintiff, sold the plaint properties to defendants 1 and 2, executing a sale deed in the 1st defendant's name. The sale deed happened to be executed in the following circumstances. As plaintiffs 1 and 2 required some money, the 1st plaintiff approached defendants 1 and 2 on 1-11-1950 with a request for a loan and they agreed to give the same on proper

security. Accordingly, the 1st plaintiff went to the residence of defendants 1 and 2 on 6-11-1950 to complete the formalities of executing the deed of security when he was told that they were not prepared to take a security deed but that they would pay the amount in case a sale deed was executed for the properties offered as security. They further agreed that the properties would be reconveyed whenever required, on payment of the sum advanced by them. It was also agreed that if reconveyance was to be executed, before the harvest for any year was taken, defendants 1 and 2 were to be paid interest at 6 percent for that year. As respectable mediators were present at that time, the contract to reconvey the properties was not reduced to writing. Pursuant to this contract the sale deed was executed on 6-11-1950. On 15-12-1950 the plaintiffs informed defendants 1 and 2 that they were ready to repay the amount and that the properties should be reconveyed. This was followed by a registered notice sent through the plaintiffs' Advocate on 3-1-1951. Defendants 1 and 2 have declined to reconvey the properties and the suit was therefore filed for compelling defendants 1 and 2 to execute the deed on payment of Rs. 10,000/- and interest till the date of suit and to surrender possession of the properties. It was further prayed that in case this relief could not be allowed, defendants 1 and 2 should be made liable for damages amounting to Rs. 5,000/-. The plaintiffs also prayed for recovery of mesne profits at the rate of Rs. 600/- per annum as well as costs of suit.

2. Defendants 1 and 2 filed separate written statements. The 1st defendant admitted the relationship of the parties as stated in the plaint as well as the allegation that she had given a general power-of-attorney to the 2nd defendant. She denied the allegation that the sale deed was executed in the circumstances stated in the plaint. The agreement to reconvey the properties was also denied. It was further stated by the 1st defendant that the consideration paid under the sale deed belonged to her and that the 2nd defendant had no right to the same. According to her there was no request for a loan but the negotiations from the very beginning were for sale of the properties. It was also pleaded that section 92 of the Evidence Act was a bar to the agreement pleaded by the plaintiffs. She denied receipt of the registered notice dated 3-1-1951. The 2nd defendant also filed a written statement setting up identical contentions. The plaintiffs filed a replication reiterating the allegations in the plaint and denying the contention that section 92 of the Evidence Act was a bar to the suit.

3. The 1st plaintiff died some time after the institution of the suit. The plaintiff examined the additional 3rd plaintiff and another witness P.W. 2 who was an attester to the sale deed and produced a copy of the sale deed, Ext. A and a letter, Ext. B sent by P.W. 2 to the 1st plaintiff on 20-12-1950. On behalf of the defendants, the 2nd defendant was examined. The court below found that the agreement pleaded by the plaintiffs was true and that section 92 of the Evidence Act was not a bar to the same. The plaintiffs were accordingly given a decree for specific performance. The 1st defendant has therefore preferred this appeal and the additional 2nd appellant supports her. A memorandum of cross-objections

has been filed on behalf of plaintiffs 2 and 3 who are respondents 1 and 2, claiming mesne profits for which no provision was made in the decree.

4. The main question arising for decision is whether the sale deed was executed in the circumstances pleaded by the plaintiffs and whether the alleged agreement to reconvey the properties is true. It may be stated at the outset that there is no evidence regarding the negotiations which are stated to have taken place on 1-11-1950. Such evidence as the 1st plaintiff might have been able to furnish was not available as he died before he could be examined. The additional 3rd plaintiff had nothing to do with the transaction and she could not therefore give any useful evidence on the point. The defendants deny the allegation that the negotiations were for a loan of Rs. 10,000/- on the security of immovable property. There is thus no evidence to hold that the original request was for a loan and that the same was agreed to by defendants 1 and 2.

5. As regards the alleged contract to reconvey the properties, the case set up in the plaint is that on 6-11-1950 when the deed was about to be executed, defendants 1 and 2 refused to advance the amount on the security of immovable property and that they insisted on getting a sale of the properties. It is further stated by the plaintiffs that some respectable mediators were present at the time when the agreement to reconvey the properties was made. The 1st defendant who denied the alleged agreement had stated in her written statement that the omission to mention the names of the mediators shows the lack of bona fides on the part of the plaintiffs. Though the plaintiffs filed a replication in which they dealt with this statement of the 1st defendant, they were not prepared to disclose the names of the mediators, as according to them that was not a matter which need be mentioned in the pleadings. The omission to mention their names in the replication in spite of the averment in the written statement is significant. Though it would appear from the plaint that several mediators were present when the agreement was arrived at, no attempt was made to examine them or even to mention their names. What was attempted to be proved was that P.W. 2 mediated between the 1st plaintiff and the 2nd defendant. It may be stated in this connection that the 1st plaintiff had filed a schedule of witnesses before he died. No witness in this list other than P.W. 2 was examined and there is no explanation for the omission to examine the other witnesses. The sole evidence regarding the alleged agreement therefore consists of the testimony of P.W. 2 and Ext. B.

6. Before considering the evidence it may be pointed out that there is material difference between the case pleaded in the plaint and the case attempted to be proved. According to the plaint the contract to reconvey the properties was made at the residence of defendants 1 and 2 while the case sought to be proved was that it was at the house of P.W. 2. Again the oral contract is alleged to have been one between the 1st plaintiff on the one side and defendants 1 and 2 on the other. The evidence adduced is that the contract was one between the 1st plaintiff and the 2nd defendant. The plaintiffs therefore had to rely on the power

of attorney in favour of the 2nd defendant and contend that any agreement made by the 2nd defendant would be binding on the 1st defendant. It may be mentioned here that the 2nd defendant was not sought to be made liable on this basis. Another point of difference is regarding the stipulation for the execution of a contract for reconveyance of properties. This is not referred to in the plaint. There is yet another point on which the pleadings and evidence do not agree i.e., the presence of mediators. Though this is alleged in the plaint, there was no such case when P.W. 2 was examined. Such divergence between the pleadings and evidence is material in a case where the contract is not one reduced to writing.

7. The evidence may now be considered. P.W. 2 is a pleader practising at Thiruvella where the parties reside. He is an attesor to the sale deed Ext. A and it is common ground that he was consulted regarding the execution of the sale deed. His version is that on the day on which the sale deed was executed the 1st plaintiff and the 2nd defendant went to his house in the morning. The 1st plaintiff wanted a sum of Rs. 10,000/- and the 2nd defendant agreed to give the same. However, the first plaintiff was prepared to execute only an usufructuary mortgage of the property but the 2nd defendant said that the money belonged to the 1st defendant and that she was prepared to part with the same only if a sale deed was executed. The 1st plaintiff and the 2nd defendant wanted P.W. 2 to settle this difference. P.W. 2 said that a sale deed should be executed by plaintiffs 1 and 2 and that the property should be reconveyed to the plaintiffs in case the sale consideration was repaid within a fixed time. The 1st plaintiff then asked as to what provision should be made regarding this. P.W. 2 said that the 2nd defendant should get the 1st defendant to execute an agreement to reconvey the properties. The 1st plaintiff and the 2nd defendant agreed to this suggestion and they left his house. According to P.W. 2 the agreement for reconveyance was to be executed simultaneously with the sale deed and he asked them to purchase a stamp paper for the same. The 1st plaintiff, the 2nd defendant and P.W. 2 then proceeded to the document writer's office. The sale deed was then prepared and the 1st plaintiff signed it. P.W. 2 also signed it as an attesor. The 1st plaintiff and the 2nd defendant then proceeded to a house where the Sub-Registrar was brought for registering the deed. Some time after this the 1st plaintiff complained to him that the agreement for reconveyance of the properties had not been executed. P.W. 2 then sent for the 2nd defendant and the latter said that the 1st defendant was not prepared to execute such an agreement. According to P.W. 2, the 1st defendant was not present at his house while the negotiations were going on there. Thus it is seen from the testimony of P.W. 2 that what was agreed to between the 1st plaintiff and the 2nd defendant was that a contract to reconvey the properties should be executed by the 1st defendant as part of the transaction. It is admitted that such a deed was not executed and that the 1st defendant refused to do so.

8. Ext. B has to be considered along with the evidence of P.W. 2. It purports to be a reply to a letter sent by the 1st plaintiff to P.W. 2. The letter sent by the 1st plaintiff has not been produced. The relevant portion of Ext. B has been

extracted in the judgment of the court below, Ext. B may be translated as follows:

I have received the letter sent by you. I do not think that they will raise any dispute regarding reconveyance of the properties sold by you to Bhattathiri's wife as per agreement reached by us that day. I do not think they will resile from the agreement to reconvey the properties as agreed to. I will immediately inform the Madhom. I need not say that I will try to make them act according to the agreement as this is a matter in which I too have interfered and about the truth of which I also am aware. I will let you know as soon as I hear from the madhom.

Ext. B no doubt, suggests that there was an agreement on the date of the sale deed. We have stated above what P.W. 2 has to say regarding the agreement. According to him the agreement between the 1st plaintiff and the 2nd defendant was that the properties should be reconveyed if the sale consideration was paid within a definite time and a written agreement in this behalf was to be given by the 1st defendant. However P.W. 2 is positive that the talks took place at his house and not at the house of defendants 1 and 2 and that the 1st defendant was not present. In fact the reference to the written agreement for reconveyance to be given by the 1st defendant shows that the 1st defendant could not have been present. The 2nd defendant held a power of attorney from the 1st defendant and this is another circumstance which supports the defence case that the 1st defendant was not present at that time. P.W. 2 explained the reference to the "Karar" (agreement) in Ext. B as one to execute a written contract for reconveying the properties. The concluding portion of Ext. B is capable of this construction also. Thus what is gatherable from Ext. B and the evidence of P.W. 2 is that the 2nd defendant agreed to the suggestion made by P.W. 2 that the properties should be given back when the sale consideration was paid by the 1st plaintiff and that this agreement should be reduced in writing and signed by the 1st defendant who was taking the sale deed Ext. A and paying the consideration thereunder. The 1st defendant was not a party to this agreement. It was argued on behalf of the respondents that the 2nd defendant who held a power of attorney from the 1st defendant was competent to enter into such an agreement on behalf of the 1st defendant also and that the absence of the 1st defendant was not at all material. The plaintiffs have no case in the pleadings that the 2nd defendant entered into this agreement as agent or attorney of the 1st defendant. On the other hand what is stated in paragraph 5 of the plaint is that on the date of the sale deed the 1st plaintiff went to the house of defendants 1 and 2 to settle the details regarding the execution of the deed, that defendants 1 and 2 then stated that they were not prepared to advance money on a security deed but that they required a sale deed and that they further agreed in the presence of respectable mediators that they would reconvey the properties when the sum of Rs. 10,000/- was paid by the 1st plaintiff. It is also stated in paragraph 6 that it was due to the fact that this agreement was arrived at in the presence of several respectable mediators that it was not reduced to writing. This rules out the possibility of an agreement by the 2nd defendant as attorney of the 1st defendant. The power of attorney given by the 1st defendant to the 2nd

defendant is not in evidence and it is not possible to say what all powers were conferred on the 2nd defendant. Even assuming that the 2nd defendant was competent to enter into an agreement like this, it has to be considered whether there was a completed contract at the house of P. W, 2 or whether the execution of a written agreement for reconveyance was also necessary to complete the agreement. Learned counsel for the respondents contended that once an agreement for reconveyance was entered into, the fact that it was not reduced to writing was immaterial and that the agreement was enforceable, notwithstanding the omission of the parties to execute a written agreement. The question for decision is whether the written contract was a term for bargain or whether it was merely an expression of desire. As pointed out by Parker J., in *Von. Hatzfeldt Wildenburg v. Alexander* (1912-1 C.H. 284).

It is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

This dictum was approved by the Privy Council in AIR 1946 97 (Privy Council) . Applying this test to the facts of this case we are of opinion that the execution of a formal contract was a condition of the bargain and that until it was executed the contract could not be treated as complete. The written contract was to be executed by a party who was not present at the time of the negotiations at the house of P.W. 2, It was agreed that a stamp paper was also to be purchased for the purpose of preparing the written contract to be executed by the 1st defendant. According to the plaintiffs such a contract was to contain a provision regarding payment of interest on Rs. 10,000/- if the reconveyance was to be executed before the harvest was taken in the year in which money was tendered. The 3rd plaintiff who was examined as P.W. 1 stated that a stamp paper was purchased for executing the agreement. This fact supports the version of P.W. 2 that the agreement was that the 2nd defendant should see that the 1st defendant executed a written deed for reconveyance of the properties. This admittedly was not done and in the circumstances we are of opinion that there [was no completed contract for the enforcement of which the plaintiffs can sue. The court below has held that Ext. B proves the agreement pleaded by the plaintiffs. We have already stated that Ext. B is not inconsistent with the version given by P.W. 2 that a written contract for reconveyance of the properties was to be executed by the 1st defendant. The earlier part of Ext. B merely contains an expression of opinion and hope by P.W. 2 that the parties would not resile from the agreement. If the agreement included the execution of a written contract, Ext. B merely amounts to an expression of opinion that such a written contract would be executed. A circumstance relied on by the court below is that the property was worth much more than Rs. 10,000/-. This is an assumption which is not supported by any evidence. In fact plaintiffs did not even allege such a fact in the pleadings or attempt to prove the same. Reliance was also placed on the evidence of P.W. 1 that the 1st plaintiff had told her about this agreement. We do

not see how any weight can be attached to this. There are however certain circumstances which show that the parties must have intended the transaction to be an outright sale. The 1st plaintiff does not appear to have had any pressing need for money in November 1950. He deposited the sum of Rs. 10,000/- in a Bank and P.W. 1 was not able to suggest any necessity for the 1st plaintiff to raise a loan at that time. There is the further fact that the 1st defendant came into possession of funds by the sale of some properties belonging to her and that the properties covered by Ext. A were fairly close to her residence. This is spoken to by D.W. 1. Although D.W. 1 was not able to give details regarding the properties sold by the 1st defendant, the subsequent conduct of the parties shows that the intention of the 1st defendant must have been to purchase properties which could be conveniently enjoyed. If the intention of the parties was to treat this as a loan transaction the 1st plaintiff may not have parted with possession of the properties which he could have obtained by executing a lease deed. Apart from all these circumstances there is the fact that if a reconveyance of the properties was intended to be given, there was no reason why a written contract could not be executed along with Ext. A. In fact even the stamp paper for the same appears to have been purchased. The 1st defendant who was to execute such a contract was not present at the time of the negotiations at P.W. 2's house and the omission to execute such a deed clearly shows that she was unwilling to reconvey the properties. The evidence on record is thus insufficient to support the plaintiff's case of a contract to reconvey the properties. It may be that if the 1st plaintiff was alive, he might have been able to give better evidence. The case must however be decided on the evidence on record and such an evidence as is available is insufficient to support the case set up in the plaint. The decree must therefore be set aside.

9. The defendants had a contention that section 92 of the Evidence Act was a bar to proving the agreement pleaded by the plaintiffs. This was decided as a preliminary point and the decision was against the defendant. The matter was taken in revision before this court and the view taken by the trial court was confirmed. Learned counsel for the appellants urged that notwithstanding the decision in revision it was open for him to agitate the question in the appeal from the decree. Assuming that this court is competent to consider the correctness of the decision in revision, we are of opinion that the earlier decision is correct. This point however is of no importance in view of our decision on the main question whether the agreement pleaded is true.

10. In view of the conclusion reached above the memorandum of cross-objections relating to the claim for mesne profits has only to be dismissed and we do so accordingly. In the result we allow the appeal, set aside the decree and dismiss the suit. The memorandum of cross-objections is dismissed. In the circumstances of the case we direct both sides to bear their costs.