Privy Council Appeal No. 10 *of* 1946

Sara Veeraswami alias Sara Veerraju – – – *Appellant*

v.

Talluri Narayya (deceased) and others – – – *Respondents*

Pothula Kondayya and others - - - - - *Appellants*

v.

Talluri Narayya (deceased) and others – – – *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1948

Present at the Hearing :

LORD UTHWATT
LORD MACDERMOTT
SIR MADHAVAN NAIR

[*Delivered by* LORD MACDERMOTT]

These consolidated appeals are from two judgments and two decrees dated the 3rd February, 1943, of the High Court of Judicature at Madras which reversed a judgment and two decrees dated the 29th July, 1941, of the Court of the Subordinate Judge of Cocanada.

The appeals arise out of two connected suits. Of these one—No. 38 of 1940—was brought by the appellant, Sara Veeraswami or Veerraju, (hereinafter called the appellant-plaintiff) against the first and second respondents for specific performance of an alleged oral agreement to reconvey certain properties which had been sold to them. The other suit—No. 32 of 1940—was brought by these respondents against the appellants and others to obtain possession of the said properties. The first named respondent having died in the course of the proceedings his legal representative, the third respondent, was added as a party to each suit.

The circumstances of the dispute leading to this litigation have been fully stated in the judgments of the Courts in India and for present purposes the narrative may be limited to a brief summary of the salient features. In November, 1932, the appellant-plaintiff and his father (who died in 1939) found themselves in urgent need of a sum of Rs.6,000 to save their lands from sale in execution proceedings initiated by a judgment creditor named Bandaru Sooranna. They succeeded in obtaining this amount by transferring the properties now in question to the original respondents. The sale deed effecting this transaction was executed on the 30th November, 1932, and duly registered. It evidences an outright and unconditional sale. On the same day the original respondents leased the properties to one Pothula Kondayya, the father-in-law of the

appellant-plaintiff. In 1937 this lease was renewed at a reduced rent for a further three years. These facts were not in dispute, but there was an acute conflict between the parties as to what took place when the sale and the subsequent extension of the lease were arranged. The appellants contended that the first approach to the original respondents was for a loan of Rs.6,000 to be secured by a mortgage of the lands; that the original respondents refused to take a mortgage and insisted on a sale; and that it was then orally agreed that the properties should be sold for Rs.6,000, and that the original respondents would reconvey what was sold if the said price was repaid to them within a period of five years. The appellants further contended that in 1937 the appellant-plaintiff and his father offered the Rs.6,000 and sought a reconveyance, but that the original respondents met this offer with a counter-proposal which was then accepted, namely, that the rental payable under the lease should be reduced and the period within which the lands might be bought back under the original arrangement extended for another three years. The respondents denied these allegations in their entirety and contended that, apart from the leases, the only agreement concerning the lands was that manifested by the sale deed. In 1940 the appellants again sought a reconveyance. This was refused by the original respondents and on the 24th June, 1940 they and the appellant-plaintiff filed their plaints in the present suits.

The issues raised for determination by the Board are two in number. They may be stated thus:—

(1) Did the parties to the sale deed orally agree (*a*) that the lands sold would be reconveyed if the price of Rs.6,000 was repaid within the period of five years and (*b*) that this period should be extended for a further three years?

(2) If so, can the appellants avail themselves of such agreement having regard to section 92 of the Indian Evidence Act, 1872?

The first of these issues is altogether one of fact. Both sides led oral evidence before the Subordinate Judge which, if believed, was amply sufficient to support their respective versions of what occurred. The appellants' case turned mainly on the evidence of two witnesses, P.Ws. 1 and 3. The Subordinate Judge accepted their testimony in preference to that of the witnesses called for the respondents. He states in his judgment that he was much impressed by the evidence of P.Ws. 1 and 3 and adds—" In my opinion there is a ring of truth in what P.Ws. 1 and 3 say while there is a ring of untruth in what D.Ws. 1, 3 and 5 say ". He then sets out a series of circumstances which need not be detailed here but which, in his opinion, went to support the appellant-plaintiff's case. The High Court did not attach the same weight to these circumstances. It found none of them conclusive and some of no value at all. Much may indeed be said for this view; but it is clear that the conclusion of fact reached by the Subordinate Judge was based primarily on the oral testimony and his estimate of the witnesses who all, it must be remembered, gave their evidence in his presence. That, as has been repeatedly pointed out, is an important consideration. The gist of the numerous decisions on the subject is clearly stated by Viscount Simon in *Watt* v. *Thomas* (1947) A.C. 484 at 486 where he says:—

" But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first

instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The High Court, however, found itself unable to accept the evidence of P.Ws. 1 and 3 with regard to the oral agreement and, in consequence, decided for the respondents. The reasons given for disregarding the testimony of these witnesses are stated very shortly in the judgment of the Court as follows:— " P.W.1 is the plaintiff himself, and it has been shown in cross-examination that P.W.3 was not a disinterested witness." In the opinion of their Lordships these reasons afford no adequate ground for disturbing the view taken by the trial Judge; nor can they find any other fact or circumstance in the case which would justify the conclusion that his judgment of fact was unsound. Their Lordships therefore hold that the oral agreement alleged by the appellants has been established and they accordingly answer the first issue in the affirmative.

The second issue was decided by the Subordinate Judge in the appellants' favour. The High Court passed no opinion upon it having ruled as already stated on the issue of fact.

Section 91 of the Indian Evidence Act makes provision as to the proof of the terms of contracts, grants and other dispositions of property which have been reduced to documentary form. Then comes Section 92, the relevant parts of which read as follows:—

> " When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:
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> . . . . . .
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> *Proviso* (2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."
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> . . . . . .

On the wording of this enactment the question under discussion comes to this—does the oral agreement as to reconveyance contradict, vary, add to or subtract from the terms of the sale deed? If such be the effect of the oral agreement then, on the facts of the present case, the purpose for which it was tendered in evidence cannot well be disassociated from its effect and—unless saved by one of the provisos to the section—it will be inadmissable and must be disregarded in determining the rights of the parties to it.

The answer to this question demands enquiry as to the true character of the relevant transaction and it therefore becomes necessary to regard more closely the nature of the arrangement which led to the execution of the sale deed on the 30th November, 1932. There can be little doubt that that arrangement contemplated and provided for the lease and the reconveyance as well as for the sale to the original respondents. The agreements to sell and to reconvey may therefore be taken as contemporaneous. Such an arrangement may, on occasion, amount to but a single transaction of the nature of a mortgage. On the other hand it may contemplate two distinct transactions, an absolute sale followed by a re-sale in certain events. It is not always easy to discern the true intendment but that an arrangement of this sort can constitute an agreement for an absolute sale and a subsequent re-sale without any relationship of debtor and creditor about it has long been recognised by this Board, as in *Bragwan Sahai* v. *Bragwan Din* (1890) 12 All. 387, and by the Courts in India. Here, if the arrangement was in truth a mortgage the appellants

must fail; for in that case the oral agreement would obviously contradict the terms of the sale deed. Neither side, however, sought to establish a mortgage relationship and, apart from that consideration, there is nothing to indicate that such a relationship existed at any material time between the parties or that any agreement they made was incompatible with the plain terms of the sale deed. In their Lordships' opinion the correct way of stating the position is to say that the agreement reached covered several matters but that the intention was that each of these should be effected as a separate and independent transaction. There was to be an outright sale and that, upon the happening of a certain event, was to be followed by a reconveyance of what had been sold. The second transaction, by its very nature, premised the previous completion of the first. Both, it is true, may be taken as arranged at the same time and agreement upon one part of the bargain may well have promoted agreement as to the rest. But such considerations do not necessarily affect the final result of the bargaining. The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached. An oral stipulation may be purely collateral to the written agreement which it has induced, and that though both touch on a common subject matter. See, for example, the well-known cases of *Morgan* v. *Griffith* (1871) L.R. 6 Ex 71; and *Erskine* v. *Adeane* (1873) 8 Ch. App. 756.

Such being the character of the agreement in question their Lordships find it impossible to hold that it contradicted, varied or subtracted from the terms of the sale deed. On the contrary, it left those terms and the interest passing thereunder to the purchaser entirely unaffected. Can it then be said to have *added* to the terms of the sale deed? The words " adding to " which are part of section 92 must receive their due weight, but in the opinion of their Lordships they do not suffice to exclude the oral agreement relied upon by the appellants. It is, of course, literally correct to say that as the agreement for reconveyance related to the lands sold it added a further stipulation respecting those lands. That, however, is not an appropriate test of the applicability of the section which is concerned to defeat the modification of a particular document. It is not enough to ask if the oral agreement relates to what has been sold. To be excluded it must bear, in some one or more of the ways specified in the section, upon the terms of sale as contained in the instrument. To add a stipulation which is quite unconnected with the terms of sale is not, in the view of their Lordships, an addition of the kind struck at by the section.

On the facts none of the provisos to the section is in point with the possible exception of the second. But on the view just expressed its precise scope ceases to be material and it becomes unnecessary to discuss it further.

In dealing with this second issue their Lordships have refrained from embarking on a detailed consideration of the Indian cases which were cited in the course of the argument and which, in so far as they touch upon the matter in hand, are not altogether in harmony. They would add, however, that the conclusion they have reached reflects, in respect of the principles concerned, much that has already been accepted by several of the Indian Courts, and they would refer in particular to the judgments of the Full Bench in *Harkisandas Bhagwandas* v. *Bai Dhanu* (A.I.R. 1926 Bom. 497 and I.L.R. 50 Bom. 566), and the judgment of Maung Ba J. in *Ma Nan Shein* v. *U Yaing* (A.I.R. 1927 R. 314).

For these reasons their Lordships think that the Subordinate Judge was right in his view of section 92 and they accordingly hold in the appellants' favour on the second issue as well as the first.

They will therefore humbly advise His Majesty that the consolidated appeals be allowed, that the decision of the High Court be reversed and the decision of the Subordinate Judge restored. The respondents will pay the costs of the appeals to the High Court and to the Board.

(60297) Wt. 8062—31 180 7/48 D.L. G. 338

In the Privy Council

SARA VEERASWAMI ALIAS
SARA VEERRAJU

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AND OTHERS

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DELIVERED BY LORD MACDERMOTT

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