1976 : 18

IN THE PRIVY COUNCIL No.15 of 1975

ON APPEAL
FROM THE FIJI COURT OF APPEAL

BETWEEN :

AMRATLAL JAMNADAS (S/O JAMNADAS)
(Defendant) Appellant

- and -

GULAB BEN (D/O RATANJI) (Plaintiff) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from the Judgment and Order of the Fiji Court of Appeal (Gould V.P., Marsack J.A. and Bodilly J.A.), dated 31st July 1974, which dismissed with costs an Appeal by the Appellant from a Judgment and Order of Stuart J. made in the Supreme Court of Fiji on the 25th day of February 1974, whereby he adjudged that the Respondent was entitled to specific performance of a certain agreement dated the 26th day of September 1969 (hereinafter called "the agreement") whereby the Respondent alleged that the Appellant had sold to her land and buildings comprised in Certificate of Title No. 9077 situate at Spring Street, Suva, Fiji (hereinafter called "the land") for the price of $18,000.00 (Eighteen Thousand Dollars) and subject to mortgage Number 63056; that the Respondent was entitled to mesne profits or "Occupation Rent" in respect of the Appellant's occupation of the premises from the 31st day of December 1969, and that the Appellant do pay to the Respondent all rents and profits received from the building from the said 31st day of December 1969.

pp. 49-58

pp. 27-41

2. By her Statement of Claim dated 12th January the Respondent claimed specific performance of the Agreement. The agreement was signed on the

pp. 3-7

RECORD

Respondent's behalf by her husband, Chimanlal V. Dass (hereinafter called "Dass") who acted as the Respondent's agent at all times, and by the Appellant. It was drawn up by one Kantilal Parshotam, a Solicitor (hereinafter called "Parshotam"). The Respondent claimed that the Appellant had accepted $2,000 (Two thousand Dollars) in part payment of the purchase price.

3. The Appellant's Defence to the Respondent's Statement of Claim was delivered on 9th February 1970 but by Order dated 11th September 1973 the Appellant was given leave to amend his Defence to plead the Statute of Frauds. By his Amended Defence, dated 12th September 1973, the Appellant admitted signing the said agreement but denied that it correctly set forth the matters intended to be agreed upon and stated that the sale of the said land was to be subject to the making of a formal contract upon which the Appellant was to be independently advised. The Appellant further admitted having received payment of the sum of $2,000. (Two Thousand Dollars) but denied that this constituted part performance of the said agreement.

pp. 8-9

The Appellant also pleaded that there was no sufficient note or memorandum in writing for the purposes of Section 59 of the Indemnity Guarantee and Bailment Ordinance (Cap 208) and Section 4 of the Statute of Frauds.

4. Following the service of the Appellant's Amended Defence the Respondent amended her Reply, and by her Reply as amended, dated 19th September 1973, joined issue with the Appellant on his defence.

p. 9 l. 20 - p. 11 l.4

5. The mortgage, No. 63056, referred to in paragraph 1 above was subsequently discharged and replaced by another mortgage to the First National City Bank.

6. In the proceedings before the trial judge the Respondent called three witnesses, namely: one Jean Smith, an accountant with the firm of solicitors acting for the mortgagee in respect of Mortgage No. 63056, to establish the sum due and owing on the mortgage as to 26th September 1969 (the date of the agreement); the husband of the Respondent, Dass, and the said Parshotam. The Appellant neither called any witnesses, nor gave evidence himself, nor did he tender any documents at the trial.

p.12 l.20-p.13 l.15

p.13 l.16-p.23 l.20

RECORD

7. The facts of this matter and the evidence relating thereto, are summarised in the Judgment of Marsack, J.A. in the Court of Appeal as follows:-

"The respondent as plaintiff in the Supreme Court claimed specific performance of an agreement between the appellant and the respondent dated 26th September 1969 concerning a freehold house property situated at Spring Street, Suva. The respondent's husband acted on behalf of the Respondent throughout. The parties - that is the appellant and the respondent's husband - went together to a Suva solicitor who, on their instructions, prepared an agreement which was signed by them both. In preparing the agreement the solicitor used a typewritten form which was headed "Memorandum of Terms and Conditions of Sale". The executed document was partly written and partly typewritten. For the purpose of this judgment it does not seem necessary to set out the document in full. It describes the property as the land in Certificate of Title 9077 together with all improvements thereon; and it is specified that the property is sold subject to mortgage number 63066. The amount secured by this mortgage is not stated. The purchase price is set out at $18,000. The agreement further provides that the consent of the 1st mortgagee is to be obtained to the sale. On 8th October 1969 a deposit of $2,000 was paid to the Vendor on account of the purchase price. p. 49 l.17 - p. 50 l.38

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At the time the document was prepared and signed by Mr. Parshotam, the solicitor concerned, was acting for both parties. Two or three days later Mr. Parshotam took both parties to see the solicitor for the mortgagee, Mr. Abdul Lateef of Cromptons. It was then arranged that Messrs. Cromptons should act for the vendor on the sale. Mr. Lateef consented to the sale on the basis that $2,000 would be paid in reduction of the existing first mortgage and a fresh mortgage given for the balance $6,000. On the 10th October 1969 Mr. Parshotam wrote to Messrs. Cromptons confirming this arrangement and forwarding a draft transfer for perusal, and execution by the vendor if approved. That letter was never answered and the transfer was neither signed nor returned.

RECORD

Shortly after that date Mr. Parshotam ceased to act for the purchaser and Messrs. Ramrakhas took over. On the 23rd October 1969 this firm wrote to the vendor, the appellant, with a carbon copy to Messrs. Cromptons, calling upon him to complete in terms of the agreement. On the 3rd November 1969 the appellant wrote back to the solicitors claiming that the agreement mentioned in their letter was null and void. He did not specify any grounds for this. On the 18th December 1969 the respondent issued a writ claiming specific performance; but after considerable delay, during which amended pleadings were filed, a hearing took place on 28th and 29th September 1973. Judgment was delivered on 25th February 1974 declaring that the respondent was entitled to a decree of specific performance, with some consequential relief; but refusing an order for costs because of the delay, due in some measure to the plaintiff, and to the unsatisfactory nature of her pleadings. It is against that judgment that this appeal is brought. The respondent's cross-appeal is limited to the questions of costs and of vacant possession."

8. The learned trial judge, in his judgment dated 25th February 1974, made the following findings:

p.33 ll. 18-28 (1) That there was no agreement for the sale of chattels;

p.33 ll. 38-42 (2) That wherever the Respondent had given evidence on oath the learned trial judge accepted that evidence "in preference to allegations in the defendant's pleadings unsupported by evidence."

p.33 l.29-p.34 l.6 (3) That the said agreement was not contemplated by the parties to be subject to the making of any further agreement.

p.34 l.7 - p.37 l.14 (4) That the said agreement was not void for uncertainty.

p.37 ll.15-31 (5) That the said agreement complied with the Statute of Frauds.

p.37 ll.32-38 (6) That, in view of the foregoing, the agreement was a valid contract.

RECORD

(7) That the Respondent's delay in bringing and conducting the action was not such as to disentitle her from a decree for specific performance. — p.38 l.20-p.39 l.12

(8) That the existence of the mortgage to the First National City Bank (referred to in paragraph 5 above) was no obstacle to a decree for specific performance. — p.39 ll. 13-30

(9) That there was no want of mutuality between the parties. — p.39 ll. 31-35

9. By Order dated 25th February 1974 the Supreme Court ordered specific performance of the said agreement. — p.41 l.20-p.43 l.3

10. By Notice of Appeal dated the 18th day of April 1974, the Appellant appealed to the Fiji Court of Appeal on 21 different grounds but the said grounds of appeal were summarised by Marsack J.A. as follows:-

(a) That the evidence tendered on behalf of the respondent was inconsistent with the pleadings, and that the learned trial judge erred in fact and in law in holding that the respondent's statement of claim though confusing was simply incompetent pleadings and that she should not fail in her action on that ground. — p.50 l.46-p.51 l.25

(b) That the document in question was not a final contract between the parties but merely an Agreement to enter into an Agreement.

(c) That the agreement was void for uncertainty in that:-

(i) the total consideration was not correctly stated and the amount due under first mortgage was not shown;

(ii) no date was fixed for settlement and possession;

(iii) the respondent contended throughout until the date of hearing that the property to pass under the Agreement included unspecified chattels.

(d) That there was an insufficient memorandum

RECORD

of the agreement to comply with section 59 of the Indemnity, Guarantee and Bailment Ordinance (cap. 208) and section 4 of the Statute of Frauds.

(e) That there was no consensus ad idem between the parties to the alleged agreement.

p.47 l.20-p.48

11. By Notice of Appeal dated 5th July 1974 the Respondent cross-appealed that the Judgment of the Supreme Court be varied by:

(a) granting costs in favour of the respondent;

(b) granting an order for possession in favour of the respondent;

(c) an order postponing the mortgage of the First National City Bank to the rights of the respondent on the grounds that:

1. The learned trial Judge erred in depriving the respondent of her costs as the basic issue before the Court was the enforcability of the Agreement for Sale and Purchase, the terms whereof had been signed by the Appellant, and could have been enforced without reference to any delay by the respondent's solicitors, or any defects in their pleadings.

2. The learned trial Judge ought to have made an order for vacant possession in favour of the Respondent.

3. The mortgage of the First National City Bank ought to have been postponed to the rights of the respondent as the mortgage was subject to her caveat.

pp.49-58

12. By Judgment dated 31st July 1974, the Court of Appeal unanimously dismissed the Appellant's Appeal and allowed the Respondent's cross-appeal to the extent only of ordering the Appellant to give vacant possession of the land subject to existing tenancies.

p.51 l.26-p.52

13. With reference to the first ground of the Appellant's Appeal as summarised in paragraph 10 above, Marsack J.A. said that as the agreement

RECORD

was annexed to the pleadings, the appellant was in no way deceived or prejudiced. A further ground that the Statement of Claim alleged that chattels were included in the sale was rejected since this claim was withdrawn at the hearing, and in any event, the appellant had by his defence denied that chattels were included in the sale. Marsack J.A. after finding that the agreement was an agreement for sale and purchase, and not merely an agreement to negotiate, went on to deal with the main grounds of appeal as follows:

"The main argument tendered by counsel for the appellant concerned the third ground, namely that the agreement was void for uncertainty. He submitted that it was impossible from a study of the document to say exactly what it meant. Although the property was to be sold subject to a mortgage there was, Counsel pointed out, no indication in the document as to what amount was owing by way of arrears of interest. He argued that although the document provided for the apportionment of insurance premiums, rates, electricity and telephone accounts nothing was said with regard to interest under the mortgage. He submitted that interest could not properly be included in the term "other outgoings" provided for in the document. He further contended that no date was fixed for settlement, the provision in the agreement on the subject being in the following terms:

p.53 - p.56 l.14

POSSESSION:

(a) Possession to be given by the Vendor and taken by the Purchaser as from the date of execution of Transfer.

(b) Vacant possession to be given by the Vendor and taken by the purchaser as from 31st day of December 1969.

It may well be that the document in this case falls within the category concerning which Lord Halsbury L.C. said in Brunning v. Odhams Bros. Ltd. 75 L.T.602 at p. 603:

"I cannot forbear from saying that this case is an example of a not very infrequent course of litigation at the present time, which makes one lament that there is not some more perfect

RECORD

> system for enabling the parties on each side to know what it is that they have to meet, which, I believe, in a great many instances, would save the parties from a protracted litigation in the end by insisting on a little more precision at the beginning."

Be that as it may, the duty of the Court is to look at the document to find if upon a reasonable interpretation of its terms it can be held to be a binding contract.

Counsel for the appellant relied strongly on his argument that the document did not set out with certainty the price payable for the property in that the amount of the principal sum due under mortgage was not stated; that the arrears of interest were not known and the document did not make it clear whether the liability for the interest owing at the date of settlement fell upon vendor or purchaser. He cited the general principle stated in Stonham on Vendor and Purchaser at p.62 paragraph 89:

> "In all sales of land, the price is an essential ingredient, and where this is neither ascertained nor rendered ascertainable (without further agreement of the parties) the contract is void for incompleteness, and incapable of enforcement. More correctly stated, there is no contract as there is no consensus ad idem. The parties must be ad idem as to the price,"

The learned trial judge held that the document itself was clear on the subject of the consideration for the transfer. This in his view was $18,000 plus the amount of mortgage 63066, which amount was capable of being ascertained. Accordingly he held that the objection to the validity of the document on the ground that the price was not stated could not be sustained. Some question may well have arisen as to whether the outstanding interest was or was not an "outgoing" and accordingly was to be apportioned in terms of the agreement; but this, in my opinion, is solely a matter of the construction of the document - which the Court can decide - and not of its essential

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validity.

The argument that the agreement is void because no date is fixed for settlement must also in my view fail. The two sub-clauses of Clause 3 quoted above may appear on the face of it to be mutually inconsistent, but they at least do provide for the execution of the transfer and for settlement to be effected. If the date is not to be taken as 31st December 1969 then the document must be construed to provide that settlement will take place within a reasonable time. As is said by Beattie J in Valley Ready Mix Limited v Utah Finance (1974) 1 N.Z.L.R. 124 at p. 129:

> "It is well established that if a date for the performance of the condition is not stipulated in the contract, the condition (in this case payment of the balance of the purchase price on title being given) must be fulfilled within a reasonable time."

The last point made by counsel for the appellant on the question of uncertainty was that the document mentions chattels, without specifying what chattels; and that it had been the contention of the respondent throughout, until the time of the hearing of the appeal, that chattels were included in the agreement. In my view the learned trial Judge set out the position correctly when he said:

> "It is however clear from the agreement that there was no sale of chattels and the defendant in his defence says there was no sale of chattels."

It is probable that this mistake on the part of the respondent arose, as has been pointed out, from the mention of chattels in the heading of one paragraph of the agreement. In any event misconstruction by one party of the meaning of a document cannot in itself be sufficient ground for holding that the document is not a binding contract. If in the opinion of the Court the meaning of the document can be construed with certainty, then a misunderstanding by one of the parties cannot invalidate the document unless it can be shown that it did not express the real agreement between the parties. Accordingly I would

RECORD

hold that the appeal could not be allowed on any of the grounds set out under No.3

Ground 4 concerns the sufficiency or otherwise of the memorandum of agreement in terms of section 59 of the Indemnity, Guarantee and Bailment Ordinance (Cap 208) and Section 4 of the Statute of Frauds. In my opinion the statutory provisions can have no application. As I see it, the learned trial judge was correct when he said that every material term is included in the written contract; and I respectfully adopt the reasoning of the New Zealand Court of Appeal in Peddle v Orr 26 N.Z.L.R. 1214 at p.251 cited in the judgment.

On the fifth ground of appeal counsel argued that there was no consensus ad idem between the parties. In support of this ground he puts forward virtually the same submissions as are dealt with supra under the question of uncertainty; that the purchaser thought she was buying some unspecified chattels whereas the vendor was not selling any chattels; that though the price was specified as $18,000 the parties had not even discussed what amount was to be taken over under mortgage 63066; and that no agreement had been reached (sic)as to the date of settlement and the date upon which possession of the property was to be given. As for the reasons already given I conclude that the learned trial Judge was right in holding that every material term was included in the written contract, then it must follow in my view that there was such a consensus as was necessary to form the basis of a valid agreement."

pp.57 - 58 l.10

14. The other two Judges, Gould V.P. and Bodilly J.A., concurred with the Judgment of Marsack J.A.

p. 59 l.25- p. 60

15. On the 16th day of August 1974 an Order was made granting the Appellant Final Leave to Appeal to Her Majesty in Council.

16. The Respondent respectfully submits that the Judgments and reasons of the Supreme Court and the Court of Appeal are right and ought to be affirmed, and that this Appeal should be dismissed with costs for the following among other

REASONS

1. BECAUSE the Appellant was in no way misled or prejudiced by the Respondent's pleadings.

2. BECAUSE the said agreement was not void for uncertainty.

3. BECAUSE there was no want of mutuality between the parties to the said agreement.

4. BECAUSE neither section 59 of the Indemnity, Guarantee and Bailment Ordinance (cap.208) nor Section 4 of the Statute of Frauds have any application in relation to the said agreement.

5. BECAUSE there was uncontradicted evidence accepted by the trial judge that the agreement was final and binding and complete in all respects.

6. BECAUSE the Appellant accepted the sum of $2,000 (Two thousand dollars) on account of the purchase price.

7. BECAUSE the Appellant failed to produce any evidence that the agreement was inchoate, or subject to conditions.

8. BECAUSE every aspect of the case was carefully considered by the Trial Judge and the Fiji Court of Appeal, and the appeal is based on concurrent findings of fact which ought not to be disturbed on Appeal.

9. BECAUSE the Trial Judge correctly exercised his discretion in ordering specific performance of the agreement.

10. BECAUSE the Judgments of the Court of Appeal and the Supreme Court are right for the reasons given therein.

DINGLE FOOT

EUGENE COTRAN

K.C. RAMRAKHA

No.15 of 1975

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

AMRATLAL JAMNADAS
(S/O JAMNADAS) (Defendant) (Appellant

- and -

GULAB BEN
(D/O RATANJI) (Plaintiff) Respondent

CASE FOR THE RESPONDENT

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