

1950

Present : **Basnayake J., and Palle J.**SUPPIAH *et al.*, Appellants, and SITUNAYAKE, Respondent*S. C. 165—D. C., Kandy, 2,413*

Contract—Notarial agreement for sale and purchase of land—Provision for duration of three months only—Evidence of subsequent oral "extensions" of time limit—Inadmissible—Evidence Ordinance (Cap. 11), s. 92, proviso (4)—Prevention of Frauds Ordinance (Cap. 57), s. 2.

Where a notarially attested agreement relating to the purchase and sale of land provided that the agreement should be null and void at the expiration of three months from the date of its execution—

Held, that it was not open to a party, either under section 92 or any other provision of the Evidence Ordinance, to prove a subsequent oral agreement to keep the written agreement alive beyond the stipulated period of three months. The written agreement could be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.

A PPEAL from a judgment of the District Court, Kandy.

F. A. Hayley, K.C. with *S. J. V. Chelvanayakam, K.C.*, *N. Kumarasingham* and *T. Arulanantham*, for the plaintiffs appellants.

N. E. Weerasooria, K.C. with *E. B. Wikramanayake, K.C.*, and *A. L. Jayasuriya*, for the defendant respondent.

Cur. adv. vult.

August 25, 1950. BASNAYAKE J.—

This is an appeal by the plaintiffs-appellants (hereinafter referred to as plaintiffs) from an order dismissing their action and condemning them to pay the defendant a sum of Rs. 30,000. The facts shortly are as follows:—

The Crown having taken steps to acquire the estate known as Matale Estate belonging to the plaintiffs, they were anxious to purchase another. The defendant, who was negotiating with the Dangan Rubber Estates, Limited, of London (hereinafter referred to as the Dangan Company) through its Colombo agents, Lewis Brown & Company, Limited, for the purchase of its estates in Matale, agreed with the plaintiffs to arrange for the sale to them of an estate called Hapugahalande, in extent 749 acres, for Rs. 450,000. On July 14, 1945, they executed the agreement P1 whereby they agreed with the defendant to purchase Hapugahalande. The agreement provided that—

- (a) on its execution the plaintiffs should pay to the defendant Rs. 15,000 as earnest money ;
- (b) that the earnest money was to be refunded in case the defendant failed to fulfil the terms of the agreement ;
- (c) that the earnest money was to be appropriated by the defendant in full satisfaction of his brokerage, commission, services, &c., under the agreement if its terms were fulfilled ;
- (d) that the plaintiffs should within 30 days of being called upon by the defendant to do so pay a further Rs. 35,000 by post-dated cheque in favour of Lewis Brown & Company, Limited, realisable on the date of execution of the deed of transfer ;
- (e) that the defendant should negotiate a loan of Rs. 400,000 on a mortgage of Matale Estate and Hapugahalande ;
- (f) that the defendant should negotiate a loan of Rs. 200,000 only on a mortgage of Hapugahalande in the event of the payment by the Crown of the compensation for the acquisition of Matale Estate within the time contemplated by the agreement ;
- (g) that the agreement should be null and void at the expiration of three months from the date of its execution ;
- (h) that the defendant should in addition to refunding the earnest money pay Rs. 45,000 as damages in case he sold Hapugahalande to any other person.

At the time the plaintiffs and the defendant executed the agreement for the purchase and sale of Hapugahalande the defendant had not executed his agreement with the Dangan Company. According to him that agreement was executed ten days later on July 24, 1945.

The defendant failed to carry out the terms of his agreement with the plaintiffs within the period of three months for which it was to endure. At the defendant's request the plaintiffs agreed to purchase the estate despite the expiry of the agreement. The first plaintiff says :

“ At the expiry of the three months defendant came to me and applied for an extension of time. I gave him one month's time. Defendant could not put through the transaction within that one month. Again he asked for time and I gave another one month. Within that time too the defendant could not complete the transaction. Again I gave him another half month's time. Finally I gave him time till December, 1945. Defendant was not able to complete the transaction and then I told him that I did not want that estate any more. Then I asked for the Rs. 15,000 and defendant said that he would return the money. Defendant did not pay me the money. Therefore I filed this action. ”

The defendant states that the plaintiffs orally extended till June, 1946, the period within which they were to purchase Hapugahalande and that before that period expired they purchased another estate by name Ankumbure and were unable to purchase Hapugahalande. He claims that in consequence of the inability of the plaintiffs to carry out their undertaking he was unable to keep his contract with the Dangan Company with consequence loss to himself. He claims in reconvention a sum of Rs. 250,000.

Learned counsel for the plaintiffs submitted that the agreement P1 could in law not be extended without a writing notarially attested especially as it provided that it shall be null and void after the expiration of three months from the date of its execution. I am of opinion that that submission is sound and entitled to prevail having regard to the terms of the agreement P1. The “ extensions ” the first plaintiff says, he gave were not in law extensions of the agreement but were mere indications that the plaintiffs were willing to purchase Hapugahalande if the defendant could bring about its transfer. Even after the expiry of the agreement, the plaintiffs were free, though not bound, to purchase Hapugahalande if the defendant offered it. Once the period of three months expired the agreement was null and void and ceased to exist except for the purpose of enforcement of the defaulter's liability thereunder. An agreement in writing such as P1 can in law be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.

The oral evidence given by both sides regarding the so-called extensions has in my view been wrongly admitted for neither section 92 nor any other provision of the Evidence Ordinance permits the admission of oral evidence in the circumstances. In rejecting the contention of counsel on this point the learned District Judge does not appear to have scanned too closely proviso (4) to section 92. That proviso taken with the main section reads :

“ 92. 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.

Proviso (4). The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property may be proved, *except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.* "

The contract in the instant case is required by law to be in writing and has been registered. No oral evidence can therefore be given of the existence of a subsequent agreement to modify the contract.

In that view of the matter it is unnecessary to decide whether the "extension" given by the plaintiffs expired in December, 1945, or in June, 1946.

The defendant, having failed to carry out his contract within the duration of the agreement, is not entitled to retain the sum of Rs. 15,000 paid to him, and is liable to refund it.

I am afraid the plaintiffs cannot be made to pay the losses incurred by the defendant in his venture. The defendant has not produced his agreement with the Dangan Company and its terms cannot therefore be discussed.

The defendant is not entitled to claim his expenses from the plaintiff because he was not employed by the plaintiffs in any capacity which entitles him to remuneration for his services. The agreement having come to an end owing to his default, the defendant is not entitled to profit at the expense of the plaintiffs.

The order of the learned District Judge is therefore set aside and I direct that judgment be entered for the plaintiffs as prayed for with costs both here and below.

PULLE J.—

The agreement P1 dated July 14, 1945, provided among other things, that the appellants should pay to the respondent a sum of Rs. 400,000 to complete the purchase of Hapugahalande Estate and that they should complete the purchase when called upon to do so by the respondent. The Dangan Company was not to undertake to warrant and defend the title to the estate and that such warranty was to be expressly excluded by a clause in the proposed conveyance and that the sale was to be *ad corpus* and not *ad quantitatem*. There was also an agreement that, in certain contingencies, the appellants should mortgage Matale and Hapugahalande Estates. The parties rightly took the view that the agreement was one that had to be entered into in conformity with the provisions of section 2 of the Prevention of Frauds Ordinance (Cap. 57) and had it

registered. I agree that it was not open to the respondent to prove a subsequent oral agreement to keep the written agreement alive beyond the stipulated period of three months.

It was implicit in P1 and the evidence is perfectly clear that the Dangan Company would not have been bound to convey Hapugahalande Estate unless the respondent found purchasers for five other estates owned by the Company. Assuming for the purpose of argument that an oral agreement extending the time for the performance of the contract till the end of June, 1946, could have been proved, I am far from satisfied, in the absence of the agreement entered into by the respondent with the Dangan Company and of the agreements alleged to have been entered into between the respondent and the persons who were prepared to purchase parts or whole of each of the five estates referred to, that even if the appellants had been prepared by the end of June, 1946, to purchase Hapugahalande Estate, the Dangan Company would have been legally bound to convey it to them.

There is evidence of draft conveyances having been prepared and of notarial agreements entered into between the respondent and prospective purchasers. It was certainly not beyond the respondent's ability to have produced these documents to show that all was ready by the end of June, 1946, for the sale of the Company's estates, and that it was only the default of the appellants which wrecked the scheme.

I agree that the decree appealed from should be set aside and judgment entered for the plaintiff as prayed for with costs here and below.

Appeal allowed.

