

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CvA. No. 27 of 2000

BETWEEN

JAGDEO SOOKRAJ

APPELLANT

AND

BUDDHU SAMAROO

RESPONDENT

CORAM:

R. HAMEL-SMITH, J.A.
M. WARNER, J.A.
A. LUCKY, J.A.

APPEARANCES:

DR CHARLES SEEPERSAD AND MR G. RAMDEEN
APPEARED ON BEHALF OF THE APPELLANT

MR S. MARCUS, S.C. AND MRS KAREN E. PIPER
APPEARED ON BEHALF OF THE RESPONDENT

DATE DELIVERED:

23rd January, 2002

JUDGMENT

LUCKY J.A.

On 31st October, 2001, this appeal was dismissed and the appellant ordered to pay the costs of the appeal fit for counsel. We said that the reasons for our decision would be given at a later date and these are set out hereunder.

The facts

Deolal Ramute, who was residing in England wanted to sell a two storey building at Eastern Main Road, Tacarigua, (the property). By a Power of Attorney dated 29th October 1980 and registered on 9th January 1981, Ramute appointed one Hasrath Mohammed his attorney, inter alia, to sell the property.

On 3rd November 1980, Ramute entered into a written agreement with the respondent to sell the property for \$400,000.00 (the first agreement). The respondent carried on a poultry depot on the ground floor of the building. One of the terms of this agreement was that the purchaser (the respondent) would deposit \$50,000.00 on account, the phrase “the receipt of which the vendor hereby acknowledges is set out in the agreement”. The purchaser did not deposit this amount and Ramute never exercised his right to demand same.

On 8th January 1981 Hasrath entered into an agreement to sell the property to the appellant for \$395,000.00, and accepted the sum of \$3,727.^{25/}₀₀ as a down payment.

On 23rd February 1981, Ramute entered into another agreement (“the second agreement”) to sell the property to the respondent. The terms and conditions were similar to those in the first agreement. On that occasion the deposit of \$50,000.00 was paid and acknowledged.

On 27th February 1981 the appellant lodged a caveat with respect to the property.

By Memorandum of Transfer dated 19th November 1981 Ramute conveyed his interest in the property to the respondent. On 15th January, 1982 the respondent mortgaged the property to Colonial Life Insurance Company Limited (CLICO) to secure a loan of \$250,000.00 and entered in a second mortgage of the property to Ramute to secure a loan of \$74,421.00. (The appellant submitted that the foregoing were “purported transactions” because of the existence of the caveat).

Ramute died in 1986. The property was destroyed by fire in 1988, after which the respondent began reconstruction works. The appellant then filed proceedings seeking, inter alia, a declaration that he was the equitable owner of the property, damages and an injunction.

The issues

The issues are whether the agreement dated 3rd November 1980 between Ramute and the respondent (the first agreement) for the sale of the property was valid and, if so, whether its validity continued in effect despite the execution of an agreement between the appellant and Ramute's attorney, Hasrath Mohammed, dated 8th January 1981; and, whether a second agreement dated 23rd February 1981 between Ramute and the respondent in respect of the property in question rescinded the first agreement.

The grounds of appeal are that:

- (a) the learned Judge erred in law in finding that there was a binding contract made on the 3rd November, 1980 between Ramute and the Respondent for the sale of the subject premises;
- (b) the learned judge erred in law in finding that Hasrath Mohammed must have known there was an earlier agreement i.e. that of 3rd November, 1980 (the first agreement) between Ramute and the Respondent;
- (c) Ramute and the Respondent were steadfast in their intention that the contract of 3rd November, 1980 (the first agreement) should be fulfilled; and
- (d) the learned Judge erred in law in holding that the Respondent also got the legal estate which would prevail over any interest which the appellant may have.

The agreement of 3rd November 1980 (the first agreement)

The authenticity and date of the first agreement were not disputed. The evidence discloses that Ramute and the respondent intended to complete the contractual arrangement set out therein. Money, ie the deposit of \$50,000.00, was not paid, although payment was acknowledged.

Dr Seepersad submitted that the first agreement is not valid because there was no consideration. Without payment of the deposit of \$50,000.00, no equity could have arisen in favour of the respondent.

In support of his argument counsel relied on the following passages in **Rann v Hughes** TR 350 where Lord Chief Baron Skynner said:

“All contracts are, by laws of England, distinguished into agreement by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved”. (emphasis mine).

And **Howe v Smith** 1881 – 5 All ER. P. 201 F-G at p 208 F-G:

“Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms most naturally to be implied appear to me, in the case of money paid on the signing of a contract, to be that, in the event of the contract being performed, it shall be brought into account, but that, if the contract is not performed by the payer, it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into; and creates, by the fear of its forfeiture, a motive in the payer to perform the rest of the contract. In my opinion, the time fixed for the payment of the balance of the

purchase money and the completion of the contract was, according to the law as it stood before the Judicature Act, 1873, of the essence of the contract, so that non-payment on that day, provided it was not caused by the default of the vendor, authorised the vendor at law to treat the contract as rescinded. *Wilde v. Fort* (7), *Stowell v. Robinson* (8), *Noble v. Edwardes* (9), and SUGDEN ON VENDOR AND PURCHASER, ch. 6, s. 1, are some among many authorities to which I might refer in support to these propositions.”

But, it appears to me that a more liberal approach should be given to the meaning of consideration, see *Chitty on Contracts 28th ed 23 – 034* where the learned authors write:

“The position is more difficult in the case of an agreement whereby one party undertakes an additional obligation, but the other party is merely bound to perform his existing obligations, or an agreement whereby one party undertakes an additional obligation, but for the benefit of that party alone. There is a line of authority of respectable antiquity which supports the view that in such a case the agreement will not be effective to vary the contract because no consideration is present. But a more liberal approach has been adopted in some recent cases and the courts have been prepared to find consideration and enforce the agreement where it has conferred a practical benefit upon the promisor.”

Consideration can be found in various terms of an agreement, for example where one party undertakes an additional obligation or a mere forbearance or concession afforded by one party to the other for the latter’s convenience. See *Chitty on Contracts, 28th edition (1999). Para 23 – 034.*

Mr Marcus contends that the parties never intended to rescind the agreement of 3rd November 1980 because the second agreement was a variation of the first. He argued that the first agreement was valid because the consideration was the sum of \$400,000.00, not the

payment of a deposit of \$50,000.00. He submitted that whether the deposit was paid or not, does not invalidate the agreement. The intention to complete the sale always existed and this is borne out by the subsequent arrangements between the parties. Counsel cited the following in support of his arguments. *Chitty on Contracts* 28th ed. 1999, para 23-33 (p. 156); *Morris v Baron & Co* (1918) A.C. 1; *Stead v Dawber* 1839 113 E.R. 22 and *British and Benningtons Limited v North Western Cachar Tea Company Limited* (1923) A.C. 48.

The consideration in the agreement is the purchase price of \$400,000.00 which had to be paid within ninety days. Payment is not a necessary element of consideration. Time was not of the essence of the contract. Ramute could have demanded or postponed payment if he wished.

In matters such as these, account must be taken of all the circumstances of the case. Firstly, the evidential value and significance of a letter dated 3rd November 1980 from Ramute to the respondent in which he advised the respondent that Hasrath was his agent; that he could give him the deposit upon issuance of a receipt which should be prepared by a lawyer; and that he would come to Trinidad when he was ready to make the final payment and complete the transaction.

This letter was not disputed and in my opinion clearly shows an intention to complete the transaction. Ramute sent a copy to Hasrath, who denied receiving it.

Secondly, the property was conveyed to the Respondent on 19th November 1981; and was mortgaged to Colonial Life Insurance Company and Ramute on 15th January 1982. So, there was always the intention to sell the property to the respondent.

The agreement between the Appellant and Hasrath was not disputed, but, the question is whether it was first in the order of precedence. It appears to me that on the 8th January, 1981 the date on which Hasrath agreed to sell the property to the appellant, the first agreement was still in force, so that the equitable interest in favour of the respondent was in existence. Ramute's intention to sell the property to the respondent is fortified by the letter of 3rd November 1980. The letter gave clear instructions and said that Hasrath would be sent a copy. Hasrath denied receipt of the letter and that he refused to accept the desposit. The learned judge did not accept that evidence and I accept the finding. Dr Seepersad submitted that there was no evidence that Hasrath knew of the first agreement and the learned Judge erred in law in finding that Hasrath must have known there was an earlier agreement (the first agreement). It seems to me that in arriving at that decision the learned judge made a finding of fact based upon the evidence. The judge saw and heard the testimony of the witnesses and must have considered the verbal and documentary evidence before coming to a conclusion. The judgement reads:

“Mr Mohammed was reluctant to receive the down payment and as has been made clear in his testimony he wanted the plaintiff to get the land. He entered into an agreement with the plaintiff on 8th January 1981 when he must have known that there was an earlier arrangement between the landowner Ramute and the defendant.”

The judge in the above passage succinctly and concisely stated a finding of fact. An appellate tribunal is always slow to upset a trial judge’s findings of fact unless the findings were blatantly wrong and based upon wrong inferences. See *Yuill v Yuill 1945 C.A. P. p. 15; Walt v. Thomas 1947 A.C. 484*. I find no reason to disturb the above finding.

Was the first agreement varied, repudiated or rescinded?

The learned trial judge said at p 5 of the judgement:

“Buddhu Samaroo’s anxiety to pay the down payment even in the face of Hasrath Mohammed’s recalcitrance was countered by assurances from Ramute that he would soon be in Trinidad and all will be well. Both parties were steadfast in their intention that the contract should be fulfilled.”

I agree with the judge’s finding of fact that the parties had no intention to rescind the agreement of 3rd November 1980 (the first agreement). In *Chitty on Contracts para 23 – 032* the authors state that:

“The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement.”

In paragraph 23 – 033 the authors state:

“As in the case of a rescission of a contract, the terms of a deed or written instrument may be varied by a subsequent agreement whether written or oral.” . . .

“The test suggested by Lord Ilunedin in *Morris v Baron and Co. (1918) AC.1, 5* has already been referred to”. (it will depend upon the extent to which it alters the terms of the original contract. In the instant case the wording is the same except for the date of completion which is extended and the actual receipt of the \$50,000.00 down payment).”

“Lord Haldane said that, for a rescission, “there should have been manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting.” If the changes do not go “to the root of the contract” (*British and Benningtons Ltd v N.W. Cachar Tea Co. Ltd at pp. 62, 68.*) there is merely a variation.”

The modifications in the second agreement did not go to the root of the first agreement. The intention to complete the transaction was never in doubt. The request that a lawyer should prepare and issue a proper receipt seems to be the true reason for the second agreement which in my view could not have been a new agreement. See *Chitty cit. op. 23 –028;*

“If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances.* Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it.** The change must be fundamental and “the question is whether the common intention of the parties was to ‘abrogate,’ ‘rescind,’ ‘supersede’ or ‘extinguish’ the old contract by a ‘substitution’ of a ‘completely new’ or ‘self subsisting’ agreement.”

The following cases are cited in the above passage and I refer to the relevant passages which support the views expressed by the learned authors with which I agree.

In **United Dominions Trust (Jamaica Ltd v. Showcair (1969) 1 AC. 340* which dealt with whether a moneylending contract was unenforceable by rescission or variation *Lord Devlin said at p 374 F – G and pp 348 A – C:-*

“Another way of arriving at the same result is to treat a variation of a contract as something that necessarily requires the rescission of the old contract and the substitution of a new one. On this view the old contract cannot be enforced because it has been rescinded and the new contract cannot be enforced because it is not properly evidenced. This was the conclusion reached by the Divisional Court in *Williams v. Moss’ Empires* and adopted by the Court of Appeal in *Morris v. Baron*. As Sankey J. put it in the former case: “The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract.”

The disadvantage of this view is that a minor variation may destroy the effect of the whole of the transaction between the parties. The alternative view, adopted by the House of Lords in *Morris v. Baron* and again in *British and Benningtons Ltd. V. N.W. Cachar Tea Company Ltd.* (where Lord Sumner referred to the former view as possibly correct “as a matter of formal logic”), is based on the intention of the parties. They cannot have that which presumably they wanted, that is, the old agreement as amended; so the court has to make up its mind which comes nearer to their intention—to leave them with an unamended agreement or without any agreement at all. The House answered this question by rejecting the strict view propounded by Sankey J. and distinguishing between rescission and variation. If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old remains in force and unamended.”

In ****British and Bennington's Ltd v. North West Cachar Tea Co.**

Ltd at p 62 Lord Atkinson said:-

“a written contract may be rescinded by parol either expressly or by the parties entering to a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to the extend that goes to the very root of it.”

I am of the view that the first agreement was not rescinded by the second agreement by parol or by inconsistency or that the terms went to the very root of the first agreement. The only variation effected by the second agreement is a new date of completion to which there was mutual agreement. This change did not go to the root of the first agreement. The evidence discloses that the second agreement was not inconsistent with the first agreement and that its true purpose was to satisfy a request from the Insurance Company (the lender) that the respondent should be in possession of a receipt for monies paid on deposit; and, that the agreement was signed in the presence of an attorney.

I agree with the judge's finding that the respondent should be given the legal estate which will prevail over any interest the appellant may have. This seems to be the logical conclusion because the respondent's equitable interest commenced with the execution of the first agreement and was first in the order of precedence, thereby the respondent became the beneficial owner of the property which was conveyed to him in November 1981.

For the foregoing reasons the appeal was dismissed with costs fit for counsel.

A. Lucky
Justice of Appeal

I agree with the judgment of Lucky J.A.

M. Warner
Justice of Appeal