Kalianna Gounder vs Palani Gounder & Anr on 17 September, 1969

Equivalent citations: 1970 AIR 1942, 1970 SCR (2) 455, AIR 1970 SUPREME COURT 1942, 1970 2 SCR 455 1970 2 SCJ 18, 1970 2 SCJ 18

Author: J.C. Shah

Bench: J.C. Shah, V. Ramaswami, A.N. Grover

PETITIONER:
KALIANNA GOUNDER

Vs.

RESPONDENT:
PALANI GOUNDER & ANR.

DATE OF JUDGMENT:
17/09/1969

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
RAMASWAMI, V.
GROVER, A.N.

CITATION:
1970 AIR 1942 1970 SCR (2) 455
1970 SCC (1) 56

ACT:
Deed--Construction of--Allegation of subsequent alteration to incorporate sellers obligation to clear land encumbrances--If a material alteration vitiating agreement.

HEADNOTE:
The appellant agreed on July 4, 1956 to purchase certain lands from the respondents for Rs. 12,000. A memorandum reciting that Rs. 2,000 were paid as advance by the appellant to the respondents was executed by both parties. Three days later the respondents informed the plaintiff by a letter that only a sum of Rs. 350 was paid by the appellant and not Rs. 2,000 as 'recited in the memorandum and since the balance of Rs. 1,650 which was promised to be paid

within three days was not paid, the agreement stood cancelled. The appellant thereafter immediately instituted a suit for a decree for specific performance of the agreement and deposited in court a sum of Rs. 10,000 on account of the balance purchase price due from him. In their written statement the respondents claimed that Rs. 1,650 out of Rs. 2,000 not having been so paid, the agreement was cancelled; and that in any event the agreement having been altered in material particulars after its. execution by the addition of the words; "clear the debts and execute the sale deed free from encumbrances", the suit was not maintainable.

The Trial Court upheld the: appellant's claim and decreed the suit. The High Court in appeal, reversed the decree. On appeal to this Court,

HELD : Allowing the appeal: (i) On the evidence and in view of the express recital in the agreement that a sum of Rs. 2,000 was paid by the appellant and received by the respondents, the respondents" story that only Rs. 350 was in fact paid was untrue and had been put up as an excuse for resigning from the agreement.

(ii) Even assuming that the words in question were introduced in the memorandum after its execution since the respondents were liable to clear any encumbrances subsisting on the land before executing the sale deed,

cannot be regarded as a material alteration for, it did not alter the rights or liabilities of the parties or the legal effect of the instrument [463 A]

Nathu Lal and Ors. v. Mussamat Gomti Kuar and Others, L.R. 67 I.A. 318; referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1360 1966. Appeal from the judgment and decree dated January 19, 1962 of the Madras High Court in Appeal No. 351 of 1958. M.C. Chagla, M.K. Ramamurthi, S. Sethuratnam, J. Ramamurthy and Vineet Kumar, for the appellant. V.V. Nair, for the respondent.

The Judgment of the Court was delivered by Shah, J. Palani Gounder 'and his son T.P. Sengottaiah--hereinafter collectively called "the defendants"--own Survey No. 765-B in Kugallur village. Kalianna Gounder--hereinafter called "the plaintiff"--agreed on July 4, 1956 to purchase from the defendants that land for Rs. 12,000. A memorandum reciting that Rs. 2,000 were paid as advance by the plaintiff to the defendants was executed by t,he plaintiff and the defendants. The memorandum was written by one Ramamurthy Iyer and the signatures thereon were attested by one Kaliyanna Gounder. On July 7, 1956, the defendants informed the plaintiff by a letter that, only a sum of Rs. 350 was paid by the plaintiff to the defendants and not Rs. 2,000 as recited in the memorandum, and since 'the balance of Rs. 1,650 which was promised to be paid within three days was not paid, the agreed stood cancelled. The plaintiff on receipt of the letter instituted an action in

the Civil Court for a decree for specific performance of the agreement, and deposited in Court Rs. 10,000 which according to him was the balance of the purchase price due by him. The defendants filed their written statement contending, inter alia, that they were in urgent need of money, and they had agreed to sell the land to the plaintiff, but the plaintiff paid only Rs. 350 on July 4, 1956, and obtained possession of the memorandum on a representation that he will pay the balance of Rs. 1,650 within three days and since the amount was not paid the agreement was cancelled, and that in any event the agreement having been altered in material particulars, after it was executed, by adding the words: "Clear the debt. s and execute the sale deed free from encumbrance", the suit was not maintainable.

The Court of First Instance upheld the plaintiff's claim and decreed the suit for specific performance of the agreement. In appeal to the High Court of Madras the decree was reversed. The High Court, held that the plaintiff paid Rs. 350 only on July 4 1956, and on a representation that he will pay the balance of Rs. 1,650 payable as advance obtained possession of the agreement of sale, and the plaintiff not having paid the amount payable by him the suit for specific performance of the agreement was maintainable. The High Court also held that the agreement was altered in material particulars by adding the covenant relating to "clearance of encumbrance" after the memorandam was executed With certificate granted by the High Court this appeal is preferred by the plaintiff.

Two questions fall to be determined in this appeal; (1) whether the plaintiff paid Rs. 350 only as contended by the defendants on July 4, 1956, and obtained possession of the agreement on a false representation: and (2) whether the memorandum was altered in material paticulars after execution, and was on that account discharged ?

The plaintiff in his statement before the Court asserted that he paid the full amount of Rs. 2,000 on July 4, 1956 to the defendants. He-was supported by his witness Ramamurthy Iyef--the writer of the document. On the side of the defendants there is the evidence of T.P. Sengottaiah who asserted that only Rs. 350 were paid at the time of the execution of the memorandum and when the balance was demanded the plaintiff promised to pay the same within three days. He also stated that the amount was not paid within three days as promised and on that account the agreement was cancelled. His testimony was supported by the attesting witness.

The learned Trial Judge accepted the testimony of the plaintiff and his witness Ramamurthy Iyer. The High Court was of the view that the testimony of T.P. Sengottiah and the attesting witness should be preferred. In our judgment the dispute may be resolved by considering the conflicting testimony of the witnesses in the light of broad probabilities.

The memorandum expressly recites that the defendants "have received Rs. 2,000 as advance" and "within sixty days from today" the plaintiff "should pay the balance of the sale price and execute the sale deed. Failing that, besides losing the advance amount, nothing is binding as per the agreement". The memorandum containing a recital that Rs. 2,000 were received by the defendants as advance was delivered to the plaintiff. The plaintiff is an illiterate agriculturist, whereas the defendants are educated people, and the second defendant was at the material time President of the Local Panchayat. The case of the defendants that they relied upon the bare word of the plaintiff that he

will pay the balance of Rs. 1,650 within three days and on that representation they parted with the memorandum is, in our judgment, unreliable. There was no relation between the plaintiff and the defendants which placed the former in a position of trust or confidence. If the defendants were willing to execute an agreement with the recital that the amount of Rs. 2,000 was received, though in fact it was not so received, they would have insisted upon making an endorsement at the foot of the agreement that only Rs. 350 were paid and the plaintiff had obtained extension of time for payment of the balance within three days. In any event they would have, when they parted with the memorandum, insisted upon some writing from the plaintiff that he had paid only Rs. 350 and not Rs. 2,000 as recited in the memorandum.

The High Court was of the view that the plaintiff was unable to show that he could procure a sum of Rs. 2,000 for payment as advance to the defendants and that there was no independent evidence regarding the actual payment of Rs. 2,000. But the burden of proving in the circumstances of the case, that Rs. 2,000 were not paid lay heavily upon the defendants. Again, there is strong evidence to indicate that the plaintiff had at his disposal a substantial amount on which he could have drawn. On July 14, 1956, exactly ten days after t, he date on which the agreement was entered into, the plaintiff deposited in Court a sum of Rs. 10,000 in the action for specific performance commenced by him. If the case of the plaintiff depended merely upon his oral testimony for payment of Rs. 2,000, absence of independent evidence evidencing payment may have some value as supporting the case of the defendants. But when there was an express recital in the agreement that a sum of Rs. 2,000 was paid by the plaintiff and it was received by the defendants, it was not necessary for the plaintiff to lead evidence as to the source from which he obtained the money. The High Court observed that the plaintiff did not reply to the notice dated July 7, 1956. But it was the plaintiff's case that he received the notice on July 14, 1956, and on the same day he instituted the suit. Failure to reply to the notice cannot therefore be a circumstance of any value in the present case.

It was also observed by the High Court that there was no particular reason for the defendants to resile from the terms of the agreement within three days of its execution, and set up a false plea, and that in "such cases evidence is given to prove that it was a temptation of a better offer that induced the party to resile from the agreement". The plaintiff did state in his evidence that his pangalis who were inimical to him had made an offer of Rs. 16,000 for the property, and because of that offer the defendants resiled from the agreement. In the view of the High Court this part of the case of the plaintiff could not be believed because it was not expressly pleaded in the plaint. But the plaintiff did plead in paragraph-6 of the plaint the defendants had "with the-evil influence and instigation of Karuppa Gounden, Pongia Goundar and Appachi Gounder of the place who are now planning to have the suit properties for themselves are now evading to rescind the contract". This, in our judgment, is a sufficient plea, if it was necessary to plead it, in support of the case which the plaintiff sought to make out.

The High Court discarded the testimony of Ramamurthy Iyer on the view that he was inimical to the defendants. We have been taken through his evidence and we see no justification for hold-

ing that his testimony could not be believed. If Ramamurthy Iyer was an enemy of the defendants, it is very unlikely that they would permit him to write out an important document at their residence.

The broad probabilities of the case strongly support his testimony.

Having carefully considered the evidence we are of the view that the story of the defendants that only Rs. 350 were paid to them on July 4, 1956, and not Rs. 2,000 as recited in the memorandum is untrue and has been put up as an excuse for resiling from the agreement.

The second plea that there was an alteration in the memorandum in material particulars cannot also be sustained. The original document is not before us, but from the cross- examination of the writer and the plaintiff's witnesses and also from the testimony of T.P. Sengottiah and his witnesses it does not appear that the words "Clear the debts and execute the sale deed free from encumbrance" were written in a cramped style. This sentence occurs immediately before the Schedule of property sold and after the first three paragraphs of the convenants of the memorandum. There was no reason for the writer to leave any space which could be availed of to add this sentence after the document was executed. There is no denial that the sentence has been written by Ramamurthy. It is true that the High Court has observed that the ink in which the sentence was written appeared to be slightly different in shade from the rest of the document. But Ramamurthy Iyer has deposed that it was not true that the portion in the, agreement relating to the encumbrance was written subsequent to the agreement in collusion with the plaintiff. He explained that the ink in his fountain-pen was exhausted when he wrote with one pen, and he wrote the portion after reading the document with another fountain-pen, and since the portion was written in a hurry the ink may have differed. According to him he did not notice any difference in ink. There is no reason to disbelieve the testimony of Ramamurthy Iyer. Even if it be assumed that the sentence regarding encumbrance was written after the deed was executed it will not invalidate the deed. The second defendant and his witnesses have admitted that there was no discussion at the time of the writing and execution of the agreement about the encumbrances upon the land. There is not even evidence that there were any encumbrances subsisting on the land. Ordinarily when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all the encumbrances before executing the sale deed. The alteration, if any, cannot therefore be regarded as material. As observed in Halsbury's Laws of England, Vol. 11, 3rd Edn., Art. 599 at 368:

> "A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed,or reduces to certainty some provision which was origInally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.
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> The effect of making such an alteration, without the consent of the party bound, is exactly the same as that of canceling the deed."

It is also stated in Art. 604 at pp. 370 and 371:

> "An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed;

> an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable thereunder."

This rule has been applied by the Privy Council in Nathu Lal and Ors. v. Mussamat Gomti Kuar and Others(1). The Judicial Committee observed in that case at p. 331:

> "A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." The Judicial Committee observed at p. 333:
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> "A material alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc.", and after applying that test they held that the alteration in that case was not material in the sense of altering the rights, liabilities or legal position of the parties or the legal effect of the document.
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> (1) L.R. 67 I.A.318.

Since the defendants were liable to clear the encumbrances, if any, subsisting on the land before executing the sale deed, assuming that the covenant was incorporated after the execution of the deed, it cannot be regarded as a material alteration on that account, for it does not alter the rights or liabilities of the parties or the legal effect of the instrument.

The appeal is therefore allowed and the decree passed by the High Court is set aside and the decree of the Trial Court is restored with costs in this Court and in the High Court.

R.K.P.S. Appeal allowed.