

John Vs. Chandy Philip and anr.

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Court : Kerala

Decided On : Sep-26-1987

Reported in : AIR1988Ker122

Judge : T. Kochu Thommen and; K.P. Radhakrishna Menon, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 14

Appeal No. : A.S. No. 330 of 1981

Appellant : John

Respondent : Chandy Philip and anr.

Advocate for Def. : T.P.K. Nambiar,; P.G. Rajagopalan,; P. Devakikutty a

Advocate for Pet/Ap. : T.S. Venkiteswara Iyer,; P.K. Balasubramayan,; S.V. Bala

Disposition : Appeal dismissed

Judgement :

Kochu Thommen, J.

1. This appeal by the plaintiff is against the judgment in O. S. No. 131 of 1979 which is a suit for specific performance of a contract. Dismissing the suit, the Court below found that Ext. A3 which is alleged to evidence a contract for sale of the suit property did not evidence a concluded contract so as to bind the first defendant.

2. The case of the plaintiff is that the first defendant who lived in Africa engaged the second defendant to negotiate the sale of his property in Alwaye and enter into a binding contract for sale. Pursuant to such authorisation, the second defendant negotiated with the plaintiff for the sale of the suit property and concluded a contract for sale for a total consideration of Rs. 45,000/- out of which a sum of Rs. 2,000/- was received by him as advance on behalf of the first defendant as evidenced by Ext. A3. The first defendant contended that no authority had been given to the second defendant to enter into a contract on his behalf; no contract was evidenced by Ext. A3; the second defendant was authorised by him only to negotiate as a broker or an estate agent and not to enter into a binding contract for sale; the consideration for which the second defendant is alleged to have entered into the contract for sale was far below the market value of the property; and, the first defendant was not bound by any promise that the second defendant might have made to the plaintiff in regard to the property in question. The court below rejected the plaintiff's contention that Ext. A3, which is in the form of a receipt for Rs. 2,000/- received by the second defendant from the plaintiff, evidenced a concluded contract for the sale of the property. The court found that the second defendant had no authority to enter into a contract on behalf of the first defendant.

3. Counsel for the appellant. Shri T. S. Venkiteswara Iyer, submits that apart from Ext. A3, which, according to him, evidences a concluded contract, the facts and circumstances surrounding the document, as evidenced by the letters exchanged between the first and second defendants, and the further fact that the plaintiff was well aware of the contents of these letters, particularly. Exts. B1, B3. A1 and A2, showed that the second defendant was clothed with authority by the first defendant to enter into a binding contract for the sale of the land and that such contract was binding on the first defendant and specifically enforceable against him at the instance of the plaintiff. He relies on the decision of the Supreme Court in *Prakash Chandra v. Angadlal*, AIR 1974 SC 1241 and the decision of the Madras High Court in *Sankaralinga v. Ratnaswami*. AIR 1952 Mad 389 where it was stated that when there was a binding contract, such contract, in the absence of special circumstances, ought to be specifically enforced. Counsel further contends that the correspondence between the defendants left no doubt that the second defendant acted as an agent with sufficient powers to negotiate and enter

into contract on behalf of the first defendant for the sale of the property.

4. Shri T. P. Kela Nambiar, appearing for the first defendant, submits that Ext. A3 contains a misstatement of a fundamental fact so as to vitiate the contract itself, assuming there was a contract, and the contract alleged to be evidenced by that document is unenforceable in law. He submits that the second defendant represented himself as the power of attorney holder to sell the property and enter into the alleged contract with the plaintiff when to the knowledge of both the parties, as seen from the correspondence between the defendants which the plaintiff was well aware of there was no such power of attorney empowering the second defendant to sell the property. Counsel further submits that neither Ext. A3 nor any other document relied on by the plaintiff would indicate that the second defendant had any authority to bind the first defendant to a contract for the Sale of land.

5. It is no doubt true, as contended by Shri Venkiteswara Iyer, that if there was a binding contract the parties would be bound by it and such contract, in the absence of special circumstances, is specifically enforceable. In that event the decisions cited by Shri Iyer would be squarely applicable. The question, therefore, is whether the second defendant at the relevant time was clothed with the necessary authority to enter into a binding contract on behalf of the first defendant, and, if so, did he enter into such a contract

6. We shall now read the letters preceding Ext. A3, Ext. B3 is dt. 10-10-1978 addressed by the first defendant from Africa to the second defendant in Kerala telling him that the first defendant had no desire to settle down in Kerala and that he would like to sell his property in Alwaye for the best available price. We also requested him to inform him of the market value for such property. Ext. B3 was apparently followed by the second defendant's reply which is not produced here. Ext. B1 dt. 29-3-1979 was written by the first defendant to the second defendant requesting him to look after the property by repairing the fences, etc. Ext. A1 dt. 8-6-1979 was written by the first defendant to the second defendant apparently in response to the information conveyed to him by the second defendant regarding the market value of the property. This letter shows that the second defendant had

told the first defendant of the difficulties of selling the property on account of its poor location and other reasons. Disheartened by this information, the first defendant told him that he was prepared to sell the property for Rs. 45,000/- and no less. He said that he would visit Kerala in the immediate future and requested the second defendant to solicit offer from any person interested in the property. He further stated that in case it was not possible for the second defendant to find a buyer, the first defendant himself would, on his arrival in Kerala, advertise the proposed sale in the newspapers. He also told the second defendant that he was no longer interested in discussing the defects of the property, but would sell it only for the price indicated. He stated that he intended to reach Alwaye on 29th or 30th July, 1979 and that the second defendant could make arrangements to sell the property. The exact words used in the letter are :

Matter in vernacular omitted-- Ed.

This letter was followed by Ext. A2 dt. 11-7-1979 where he stated that he was prepared to sell the property to the person suggested by the second defendant and that he had no objection to receiving an advance. This is what he said :

(Editor: The vernacular matter printed hereunder has been omitted).

He further stated that he would meet the second defendant with the document of title on the 2nd Aug. when the second defendant should make arrangements for drafting the deed. These letters are followed by Ext. A3 dt. 22-7-1979 which was about a week before the first defendant arrived in Kerala. That document is in the form of a receipt issued to the plaintiff by the second defendant for Rs. 2,000/- said to have been received by him in part payment of the agreed total sale consideration of Rs. 45,000/-. Since this is the very document relied on by the plaintiff as a binding contract for sale, we shall read the whole of it:

'Received a sum of Rs. 2000/- (Two thousand only) as advance sale consideration for the sale of property extending Forty Cents and above in Survey No. 190A/2 and 190D/2 in Alwaye Taluk. Thottunughan, Keeshnadu Panchayat of Mr. C. C. Philip, Charukara House, Thadiycor P.O., Ayroor, Thiruvalla, who empowered me to sell the above property for a sum of Rs. 45000 (Forty five thousand only). On

payment of the balance amount the sale deed will be executed on his arrival from abroad.'

7. The question for consideration is whether or not Ext. A3, considered independently or in the light of the circumstances disclosed by the letters sent by the first defendant to the second defendant, evidenced a concluded contract binding on the first defendant for the sale of the land in question. Speaking about concluded contracts, Fry in his Treatise on the Specific Performance of Contracts, 6th Edn., says :

'No proceedings in specific performance can, of course, be had unless a contract has actually been concluded, i.e., unless two persons have agreed on the same terms, and mutually signified to one another their assent to them. If what passed between them was but treaty or negotiation, or an expectation of contract, or an arrangement between them of an honorary nature, no specific performance can be had.

The burden of proving this concluded contract is, of course, on the plaintiff; and where the law requires some peculiar mode of evidencing the contract, as, e.g., a writing, or a signature, or a seal, the question of the existence of the contract in fact and of the existence of the required evidence should over be kept distinct in thought. There may be a contract in fact, though the required evidence of it may be wanting; or there may be a writing, or signature, or seal, and yet no contract in fact. Parol evidence is admissible to show that, although there is what purports to be a signed agreement, the parties in truth never came to an agreement at all. The admission of evidence to show that does not contravene the rule of law that evidence is not admissible to vary the terms of an agreement in writing.'

(p. 129, paras 277, 278)

8. The burden to prove that there was such a contract is indeed on the plaintiff. Certain facts must now be appreciated. The first defendant lived far away from India and was apparently totally unaware of the prevailing market value of property in Kerala, particularly in Alwaye, This is clear from the queries made by him about the market value. The second defendant rightly or wrongly told him of the low price

that his property would fetch, although to all those living in Kerala it was common knowledge, of which judicial notice should be taken, that since prior to 1979 the price of land was ascending fast. The first defendant, placed as he was and ignorant as he probably was, was induced to believe that the maximum price that his property could fetch was only Rs. 45,000/-. This, as stated by him in his written statement, was an underestimate of the value at the relevant time. He was about to reach Kerala and was anxious to conclude the contract of sale with any person who was willing to offer him the suggested price. He was anxious to find such a buyer. The second defendant at all material times noted as a person who went about looking for a buyer. If he was only a broker or an estate agent or the like, clothed with the limited authority to find out a buyer and bring the parties together or even to negotiate the terms of the contract, or if what passed between him and the plaintiff was but treaty or negotiation, or an expectation of contract or an honorary arrangement, or if he acted without authority, the result of such negotiation is not a concluded contract and his principal is not bound by any such arrangement. But if the second defendant had the full authority of an agent to negotiate and conclude a contract, such contract for sale of land is binding on the principal and the principal is bound to execute the necessary document of sale. Such contract is, as stated in the decisions cited on the point by Shri Iyer, in the absence of special circumstances, liable to be specifically enforced. In *Bowstead on Agency*, 15th Edn., page 113, the learned author refers to the position of an estate agent. This is what he says:

'An estate agent in England has normally no authority to sell land; even though he is instructed as to the price at which the vendor will sell, his function is to solicit offers and transmit them to his principal. But he may be authorised expressly or impliedly to sell though in such circumstances he normally has no authority to sign anything but an open contract. In any case he is *prima facie* authorised to describe the property and state to an intending purchaser circumstances which may affect its value; but not to accept a deposit on such terms as will make the prospective vendor liable in respect of it, nor to receive payment, nor to warrant that the property may legally be used for a particular purpose.'

(para 6)

That the position as regards the estate agent in India is the same as in England is clear from the observation of the Supreme Court in *Abdulla Ahmed v. Animandra Kissen*, AIR 1950 SC 15, where the Court says :

'As pointed out by Kekowich, J. in *Chadburn v. Moore*, (1892) 67 LT257 :61 LJ Ch 674, a house or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal which does not pass by a short instrument as stocks and shares do but has to be transferred after investigation of title as to which various special stipulations, which might be of particular concern to the owner, may have to be inserted in a concluded contract relating to such property. The parties, therefore, do not ordinarily contemplate that the agent should have the authority to complete the transaction in purchases. That is why it has been held, both in England and here, that authority given to a broker to negotiate a sale and find a purchaser, without furnishing him with all the terms, means 'to find a man willing to become a purchaser and not to find him and make him a purchaser : see *Rosenbaun v. Belson*, (1900) 2 Ch 267 : 69 LJ Ch 569 and *Durga Charan v. Rajendra Narayan*, 36 Cal LJ 467 : AIR 1923 Cal 57.'

(para 8)

This obervation shows that unlike in the case of a broker at the stock exchange, the estate agent ordinarily is one who is merely authorised to negotiate a sale and find a person willing to become a purchaser. He cannot make him a purchaser. In other words he cannot, on behalf of his principal, enter into a binding obligation with the intending purchaser. That is not the function of the estate agent, but that of the principal himself. The position, however, would be different where it is proved that a person who acted as an agent functioned not only as an agent in the limited sease, but was clothed with a larger authority so as to bind his principal.

9. The question in the present case is whether, as Shri Venkiteswara Iyer would contend for, the documents evidenced such larger authority. The second defendant who was examined as PW1 fully supported the plaintiff's case. The first defendant who had returned to Africa before the trial commenced was not personally present in Court, but DW2 testified as his power of attorney-holder. The

second defendant who held no power of attorney described himself in Ext. A3 as a duly authorised person to sell the property. The plaintiff who paid Rs. 2,000/- as advance to the second defendant did so without seeing the document of title. Ext. A3 was issued to the plaintiff by the second defendant about a week before the first defendant arrived in Kerala from Africa. Immediately on his arrival, the first defendant declared his intention not to sell the property and stated that he was not bound by the alleged arrangement between the plaintiff and the second defendant. There is no evidence that the second defendant tendered the advance received by him to the first defendant. The first defendant disclaimed any liability or responsibility under Ext. A3.

10. The correspondence which preceded Ext. A3 gives no indication that the second defendant was authorised by the first defendant either to sell the property or to enter into a binding contract for the sale of the property. The letters exchanged between them, as is apparent from the documents produced, only showed that the first defendant wanted the second defendant to find him an intending buyer for the best price available. No doubt in Ext. A2 the first defendant says that there was no objection to an advance being received and that he was willing to sell the property to the person suggested by DW1. The power of attorney-holder of the first defendant testifying as DW1 stated in his cross-examination by the plaintiff's counsel that it was not intended by Ext. A2 that the advance should be received by anybody other than the first defendant himself. The second defendant was not authorised to receive the advance. All this is clearly brought out in cross-examination. The tenor and the nature of the letters would, therefore, suggest that what was intended by the first defendant was that the second defendant should not act as a broker or an estate agent and secure him the best possible offer from the intending buyer. The document of title was at no stage seen by the second defendant. He was not authorised to show the title deed to the intending buyer. He had no knowledge of the title. He was in no capacity to act other than as a broker. If the second defendant had been authorised to act as an agent having the capacity to enter into a contract, the first defendant would have given him the necessary documents to satisfy the intending buyer, and the plaintiff would not in the normal circumstances have reasonably entered into any transaction with the second defendant or paid him the alleged advance without

satisfying himself as to the title of the first defendant.

11. The question really is not whether Ext. A3, which is in the form of a receipt, evidences a binding contract between the plaintiff and the second defendant. The question is whether the first defendant is bound by Ext. A3. The second defendant had no authority to commit the first defendant to any obligation. He had no authority other than to solicit the best available offer from a person willing to become a buyer. But he had no power to bind the first defendant to a contract for sale. If the second defendant was an agent authorised either expressly or impliedly to commit his principal to a contract for sale of land, he would not be expected in the ordinary circumstances to sign anything but an 'open contract'. See Bowstead, 15th Edn., page 113. If the plaintiff and the second defendant acted bona fide and reasonably, they would have entered into a proper contract evidenced by a proper document for the sale of the land and not be satisfied with a mere receipt. The plaintiff would then have, acting bona fide and reasonably, asked for the documents of title before binding himself to a contract. But he chose to act recklessly and carelessly. There is no evidence whatever that he was satisfied as regards the title of the first defendant. The second defendant in Ext. A3 describes himself as a person empowered to sell the property. If the parties acted bona fide and reasonably, the plaintiff would have satisfied himself that the second defendant had such authority to so describe himself. The evidence is that the plaintiff had seen the letters exchanged between the defendants. If that is the case, we fail to see how the plaintiff accepted Ext. A3 as a document representing the correct facts. It is true that, as Shri Iyer points out, there was no need for him to have such power to enter into a contract for sale. But the fact that he made such a misrepresentation of a fundamental character, although it did not deceive the plaintiff, who was well aware of the limited capacity of the second defendant, and the plaintiff was willing to act on such a document clearly showed that the plaintiff and the second defendant did not act bona fide or reasonably. The circumstances surrounding Ext. A3 and the manner in which the second defendant went about negotiating with the plaintiff would indicate that the plaintiff has not come to court with clean hands. The attempt of the plaintiff, with the support of the second defendant, would appear to be to gain an unfair advantage over an absentee owner. The absentee owner, apparently unaware of the fast rising value of land in

Kerala, appears not to have foreseen the danger of engaging a person like the second defendant to solicit offers for the sale of his property.

12. This is a case where the second defendant acted in excess of and without authority. This is a case where the parties to Ext. A3 did not act either bona fide or reasonably. This is a case where Ext. A3 does not evidence a binding contract or a contract which binds the first defendant. We see no bona fide in the plaintiffs case. The appeal is dismissed with costs throughout.

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