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Court : Chennai

Decided On : Dec-12-1899

Reported in : (1900)10MLJ69

Appellant : Singaracharlu

Respondent : Upendraiya

Judgement :

ORDER

O'Farrell, J.

1. This is a singular suit. It would appear that the plaintiff executed a sale-deed of lands to which he was not entitled, in favour of the defendant, and the latter, being well aware that the plaintiff had no title, accepted the sale-deed and gave the plaintiff a receipt acknowledging that the possession of the lands had passed to him and also a promissory note for the purchase-money. The suit is laid on the 'pro-note and the defence was failure of consideration because, as the defendant alleged, at the time of the execution of the sale-deed, the plaintiff expressly covenanted to put the defendant in possession of the lands and had not done so. The defendant desired to produce evidence of this oral agreement but the District Judge declined to allow him to do so, on the ground that it was inadmissible, I presume, in reference to Sections 91 and 92, Indian Evidence Act. Proviso (2) to the latter section, however, enacts that 'existence of any separate oral agreement

as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not the proviso applies, the Court shall have regard to the degree of formality of the document. (The document in this connection is the promissory note and not the registered sale-deed.) Proviso (1) also enacts that any fact may be proved which would invalidate a document such as want of failure of consideration. It is claimed by the appellant that evidence regarding the oral contract may be given under these provisos, I have come to the conclusion, though not without hesitation, that this contention is correct. It is no doubt very difficult to believe, under the circumstances, and seeing that both parties knew of the defect of title, that if any such contract had taken place, it would not have been embodied in the sale-deed. This is especially the case when the defendant's knowledge would in all probability, effect a waiver of any implied covenant for title which would otherwise arise on the execution of the sale deed, (see *Ghousiah Begum v. Eustumjah* I.L.R(1888) . M. 158 . The execution of Exhibit C. a document by which the defendant acknowledged having received possession of the lands from the plaintiff, is also much against him.

2. These are, however, all considerations that go to the weight and not to the admissibility of evidence. Imagine that all these damaging admissions had not been made by the defendant, that it was an ordinary case of the execution of a sale deed and the taking of a pro-note in lieu of the purchase-money; would not the defendant be entitled to prove, if he could, that the execution of the sale deed was only part of the consideration for the pro-note, and that there was also a contemporaneous oral agreement which formed the remainder of the consideration? I cannot doubt that he would. It is always open to a party to prove that the actual consideration for a document was other than that recited therein. The circumstances to which I have alluded would only go to render proof of the oral contract difficult and not to shut it out altogether,

3. I think, therefore, that, the learned District Judge was wrong in refusing to admit the evidence. It was contended at the hearing that if the right to delivery of possession' formed part of the consideration, the defendant must be held to have waived such right. Exhibit C. is referred to in this connection. This is a matter which has not been determined. I would call upon the learned District Judge to

submit findings on the following issues:

(1) Was the promissory note sued upon executed partly in consideration of the plaintiff having orally agreed to cause delivery of the possession of the lands mentioned in Exhibit A to the defendant?

(2) Did the defendant waive? his right to such delivery?

(3) If he did not do so, was the plaintiff's agreement performed or broken?

(4) If the latter was the case, to what extent did the consideration for the pro-note fail?

4. The findings will be submitted on the evidence on record and any evidence which the parties may produce, within one month from the date of receipt of this order. Seven days will be allowed for filing objections after the findings have been posted up in. this Court.

5. The Officiating Chief Justice: If the appellant executed the promissory note sued upon, in consideration wholly or in part of the respondent's alleged oral agreement to cause possession of the lands specified in the sale deed Exhibit A to be transferred to the appellant, the latter was doubtless entitled to adduce evidence to prove the agreement in support of the plea set up by him that consideration for the promissory note failed in consequence of the non-performance of the agreement. I concur, therefore, that the evidence which the appellant wished to call was wrongly excluded. It was, however, argued on behalf of the respondent, if I followed the argument correctly, that supposing that an agreement as alleged was in fact entered into and that it was not performed, the appellant ought to be held to have dispensed with the performance thereof and waived his right thereunder. Exhibit C. which was executed by the appellant to the respondent nearly three months after the date of the alleged agreement and in which he acknowledges to have received possession of the lands, would seem strongly to support the above contention, since, in the circumstances supposed, such acknowledgment should, in the absence of evidence to the contrary, be taken to release the respondent from any liability to cause possession to be given under the agreement. This

question of waiver, however, is not alluded to in the District Judge's judgment and considering the view taken by the learned Judge in regard to the admissibility of evidence as to the agreement, it is not improbable that the question of waiver was not gone into fully in the Lower Court. I agree, therefore, in the order proposed lay my learned colleague.

6. In compliance, with this order, the District: Judge returned the answer (1) that there was no express agreement to give possession of the properties, apart from the covenant implied bylaw, (2) that the question of waiver did not arise (3) that the plaintiff gave such possession of the properties as was possible under the circumstances and the defendant accepted the same as all that the plaintiff could do and gave the receipt, and (4,) that the question of the amount of consideration did not arise on the findings now returned. On receipt of the finding, the Court disposed of the case with these words 1 'The defendant has failed to make out the alleged failure of consideration. It is proved that the plaintiff gave defendant such possession as he could, a fact acknowledged by the defendant himself. The appeal, therefore, fails and is dismissed with costs.'

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