

ERNEST BERG, PLAINTIFF AND APPELLEE, VS. MAGDALENA ESTATE, INC., DEFENDANT AND APPELLANT.

G.R. No. L-3784. October 17, 1952

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

This is an action for partition of the property known as Crystal Arcade situated in the City of Manila.

The complaint avers that plaintiff and defendant are co-owners of said property, the former being the owner of one-third interest and the latter of the remaining two-thirds. The division is asked because plaintiff and defendant are unable to agree upon the management of the property and upon the partition thereof.

Defendant answered setting up a special defense and a counterclaim. As a special defense, defendant claims that on September 22, 1943, it sold to plaintiff one-third of the property in litigation subject to the express condition that should either vendor or vendee decide to sell his or its undivided share, the party selling would grant to the other party first an irrevocable option to purchase the same at the sellers price. It avers that in January 1946, plaintiff fixed the sum of P200,000 as the price of said share and offered to sell it to defendant, which offer was accepted, and for the payment of said price plaintiff gave defendant a period of time which, including the extensions granted, would expire on May 31, 1947. Defendant claims that, in spite of its acceptance of the offer, plaintiff refused to accept the payment of the price, and for this refusal defendant suffered damages in the amount of P100,000. For these reasons, defendant asks for specific performance.

Plaintiff filed a reply setting forth therein that the transaction referred to by defendant in its special defense relative to the property in litigation is not supported by any note or memorandum subscribed by the parties, as in fact no such note or memorandum has been made evidencing the transaction, for which reason, plaintiff claims, this transaction falls under the statute of frauds and cannot form the basis of the special defense invoked by defendant.

After trial, at which the parties presented testimonial and documentary evidence, the lower court found for the plaintiff holding that no agreement has been reached between the parties relative to the purchase and sale of the property in question, and, recognizing the right of plaintiff to demand partition under the provisions of Rule 71 of the Rules of Court, it granted the relief prayed for in the complaint. Hence this appeal.

The pivotal issue to be determined is whether an agreement to sell has actually been reached between plaintiff and defendant of the share of the former in the property in litigation for the sum of P200,000, as claimed by defendant, or whether there have been merely negotiations between them which never ripened into an agreement, as claimed by plaintiff. And in the determination of this issue, the preliminary question to be threshed out is the point raised by plaintiff touching on the evidence submitted by defendant in the light of the principle underlying the statute of frauds.

It is an undisputed fact that since September 22, 1943, plaintiff and defendant were co-owners pro indiviso of the

property known as Crystal Arcade in the proportion of one-third interest belonging to the former and two-thirds to the latter. In the deed of sale executed by the parties on said date, they stipulated that, should either of them decide to sell his or its undivided share, the other party will have an irrevocable option to purchase it at the seller's price. Then a disagreement ensued between the parties as to what really occurred concerning the deal.

Thus, while Berg claims that his negotiations with Hemady ended with an offer by the latter to the former to buy his interest for the sum of P350,000, Hemady on the other hand claims that Berg offered to sell it to him for P200,000 subject to the condition that the necessary permit be obtained from the United States Treasury Department.

It should be stated that, aside from the testimony of Berg and Hemady, no document has been presented evidencing that alleged agreement to sell, and so when defendant made attempts to prove, through the testimony of Hemady, that plaintiff made an offer to sell his interest to defendant for the sum of P200,000, the attempt met the vigorous opposition of plaintiff invoking the rule that such agreement can only be established by a contract in writing, or by a note or memorandum subscribed by the party sought to be charged, as prescribed by the statute of frauds. It was then that defendant submitted in evidence exhibits "3" and "4", contending that these documents, read in connection with the option to sell embodied in exhibit "1", constitute a written proof contemplated by said statute. The crux of this case, therefore, lies in the determination of whether said exhibits partake of the nature of a note or memorandum within the purview of said statute as contended by defendant.

It appears that right after the liberation of the Philippines, both Ernest Berg and K. H. Hemady were accused of collaboration for which reason the Treasury Department of the United States ordered the freezing of their properties under the law known as Trading with the Enemy Act. Under the provisions of this Act, both Berg and Hemady could not sell or dispose of their properties without first securing the permit required by it, and so to comply with this requirement, both Berg and Hemady filed separately an application with said Department for the purchase and sale of the property in litigation. These applications are the ones marked as exhibits "3" and "4". In the application exhibit "3", Ernest Berg stated that he desires a license in order to sell his interest in the Crystal Arcade, Escolta, Manila, for P200,000 in cash to Magdalena Estate, Inc., asking at the same time for permission to place the amount in an account in his name or in the name of the company he represents and to apply the, same from time to time to the payment of the obligations of Red Star Store, Inc. In the application exhibit "4", defendant in turn stated, through its president K. H. Hemady, that it desires a license in order "to use a portion of the P 400,000 requested as a loan from the National City Bank of New York, Manila, or from any other local bank in Manila, together with funds to be collected from old and new sales of his real estate properties, for the purchase of the one-third (1/3) of the Crystal Arcade property in the Escolta, Manila, belonging to Mr. Ernest Berg."

It is now defendant's position that if the option granted in exhibit "1" (deed of sale containing the irrevocable option) is considered in relation to Berg's application exhibit "3" and defendant's application exhibit "4", these documents constitute a sufficient note or memorandum of the parties' alleged contract of purchase and sale within the purview of the statute of frauds. This claim is disputed by Ernest Berg, appellee herein. Which of these contentions is correct?

Before we proceed, it is important to state at this juncture some principles governing the meaning, extent and scope of the rule underlying the statute of frauds relative to the note or memorandum that may serve as proof to determine the existence of an oral contract or agreement contemplated by it, and for our purpose, it suffices for us to quote the following authorities:

"No particular form of language or instrument is necessary to constitute a memorandum or note in writing under the statute of frauds; any document or writing, formal or informal, written either for the purpose of furnishing evidence of the contract or for another purpose, which satisfies all the requirements of the statute as

to contents and signature, as discussed respectively infra secs. 178-200, and infra secs. 201-215, is a sufficient memorandum or note. A memorandum may be written as well with lead pencil as with pen and ink. It may also be filled in on a printed form." (37 C. J. S., 653-654.)

"The note or memorandum required by the statute of fraud need not be contained in a single document, nor, when contained in two or more papers, need each paper be sufficient as to contents and signature to satisfy the statute. Two or more writings properly connected may be considered together, matters missing or uncertain in one may be supplied or rendered certain by another, and their sufficiency will depend on whether, taken together, they meet the requirements of the statute as to contents and the requirements of the statute as to signature, as considered respectively infra secs. 179-200 and secs. 201-215.

"Papers connected.—The rule is frequently applied to two or more, or a series of, letters or telegrams, or letters and telegrams sufficiently connected to allow their consideration together; but the rule is not confined in its application to letters and telegrams; any other documents can be read together when one refers to the other. Thus, the rule has been applied so as to allow the consideration together, when properly connected, of a letter and an order of court, a letter and order for goods, a letter and a deposition, letters or telegrams and undelivered deeds, wills, correspondence and related papers, a check and a letter, a receipt and a check, deeds and a map, a memorandum of agreement and a deed, a memorandum of sale and an abstract of title, a memorandum of sale and a will, a memorandum of sale and a receipt, and a contract, deed, and instructions to a depositary in escrow. The number of papers connected to make out a memorandum is immaterial." (37 C. J. S. 656-659).

Bearing in mind the foregoing rules, we are of the opinion that the applications marked exhibits "3" and "4", whether considered separately or jointly, satisfy all the requirements of the statute as to contents and signature and, as such, they constitute sufficient proof to evidence the agreement in question. And we say so because in both applications all the requirements of a contract are present, namely, the parties, the price or consideration, and the subject-matter. In the application exhibit "3", Ernest Berg appears as the seller and the Magdalena Estate Inc., as the purchaser, the former's interest in the Crystal Arcade as the subject-matter, and the sum of P200,000 as the consideration. And the application appears signed by Ernest Berg, the party sought to be charged by the obligation. In other words, it can clearly be implied that between Ernest Berg and the Magdalena Estate Inc. there has been a clear agreement to sell said property for P200,000. From the language of the application no other logical conclusion can be drawn for if there has not been any previous agreement between the parties it is foolhardy to suppose that Ernest Berg would take the trouble of filing an application with the Treasury Department of the United States to secure a license to sell the property. The claim of Ernest Berg that the negotiations he had with Hemady ended with an offer on his part to buy his interest for P350,000 cannot be sustained, for if such is the case it is indeed hard to comprehend why he should state in his application that he was selling the property for P200,000. The fact that in the same application Berg also asked for license to place the money in an account in his name, or in the name of the company he represents, and to apply the same to the payment of the obligations of said company is of no consequence, nor does it argue against the purpose of the application, for that request only means that, should the sale be carried out, he would deposit the money in the name of the company and later would apply it to the payment of its obligations.

We do not agree with the claim that the application Exhibit "4" submitted by the Magdalena Estate Inc., does not harmonize with the terms appearing in the application Exhibit "3", for, contrary to the claim, those two applications, considered together, harmonize and complement each other. And we say so because the application Exhibit "4" states specifically that a portion of the sum of P400,000 which is desired to be raised as a loan will be used for the purchase of the one-third interest of Ernest Berg, which portion undoubtedly refers to the sum of P200,000 mentioned in the application Exhibit "3". This can be plainly seen by harmonizing together the two applications. As the rule well points out, the sufficiency of the two documents will depend on whether, taken

together, they meet the requirements of the statute as to contents and as to signature, and here both requirements are met because the two documents should be considered as a whole. Whether, therefore, we consider the two applications jointly or separately, it is safe to state that they meet the requirements of the principle underlying the statutes of frauds.

Let us now take up the terms of the agreement to sell, considering that this has been properly established, to see if defendant has complied with them and can ask now for specific performance. We have already seen that plaintiff agreed to sell to defendant his undivided one-third interest in the property for the sum of P200,000. The next question is: within what period shall this consideration be paid? Here there are two possible theories: one under application Exhibit "3" and the other application Exhibit "4". If we follow the application Exhibit "3", it is clear that payment is to be made in cash, or as soon as the license has been granted to effect the transaction. This means that it shall be effected immediately upon obtaining the license, or within a reasonable time thereafter. It is not disputed that this license was granted, but we find that defendant failed to make good its offer within a reasonable time for lack of money, it being a fact that defendant was only able to raise funds for that purpose when it succeeded in selling a portion of its real estate to a foreign corporation one year thereafter, or on March 14, 1947. It is true that, in its answer, defendant claims that plaintiff granted to defendant an extension of time up to May 31, 1947, within which to realize the transaction, but this claim is not supported by any proof. In the opinion of the Court, this delay has the effect of relieving plaintiff of his obligation under the law (Articles 1124 and 1451, of the old Civil Code).

Supposing that the term of payment is, as contended by defendant, until defendant has obtained the loan of P400,000 from the National City Bank of New York, or after it has obtained funds from other sources (considering the terms of application Exhibit "4"), what is the legal effect of this alternative clause? Can it be considered a term within the meaning of our old Civil Code? Let us analyze it. Under article 1125 of said code, obligations, for the fulfilment of which a day certain has been fixed, shall be demandable only when the day arrives. A day certain is understood to be that which must necessarily arrive, even though it is not known when. In order that an obligation may be with a term, it is, therefore, necessary that it should arrive, sooner or later; otherwise, if its arrival is uncertain, the obligation is conditional. To constitute a term the period must end on a day certain.

Viewing in this light the clause on which defendant relies for the enforcement of its right to buy the property, it would seem that it is not a term, but a condition. Considering the first alternative, that is, until defendant shall have obtained a loan from the National City Bank of New York, it is clear that the granting of such loan is not definite and cannot be held to come within the terms "day certain" provided for in the Civil Code, for it may or it may not happen. As a matter of fact, the loan did not materialize. And if we consider that the period given was until such time as defendant could raise money from other sources, we also find it to be indefinite and contingent, and so it is also a condition and not a term within the meaning of the law. In any event, it is apparent that the fulfilment of the condition contained in this second alternative is made to depend upon defendant's exclusive will, and viewed in this light, we are of the opinion that plaintiff's obligation to sell did not arise, for, under article 1115 of the old Civil Code, "when the fulfilment of the condition depends upon the exclusive will of the debtor the conditional obligation shall be void."

Having reached the foregoing conclusion, we find no legal way by which plaintiff could be compelled to carry out the terms of his agreement to sell considering the circumstances surrounding the transaction. To our mind, it is clear that there was an agreement to sell between the parties under the terms appearing in the applications Exhibits "3" and "4". But it also appears that plaintiff has decided to agree to sell his interest because of his need of money at the time. He needed it not only for his immediate needs but to pay the obligations of his own company, the Red

Star Stores, Inc. At that time the values of real estate were fast moving. They were going up in a rapid fashion. Time element was then of the essence of every transaction, and the parties knew it. When, therefore, more than a year had transpired since the negotiations started and defendant failed to come across, plaintiff changed his mind. The interest of defendant to purchase the share of plaintiff in the property is understandable, not only because of the advisability to consolidate its ownership in said property, but because it was a handsome transaction with a brighter prospect in the future. But it is to be regretted that both Berg and Hemady who were both experienced businessmen did not put the terms of their agreement clearly in writing. Had they done so perhaps this case would have been avoided.

Finding no error in the decision appealed from, the same is hereby affirmed, with costs against appellant.

Pablo, Padilla, and Montemayor, JJ., concur.

BENGZON, J.:

I concur in the result. I believe no agreement has been duly proved.

CONCURRING

LABRADOR, J.:

I concur. There might be some objection to considering Exhibit 3 (application of Ernest Berg with the United States Treasury Department to sell his interest in the Crystal Arcade Building for P200,000 cash) and Exhibit 4 (application of the Magdalena Estate, Inc., with the United States Treasury Department for a portion of the P200,000 requested as loan from the National City Bank of New York to purchase one-third of the Crystal Arcade Building belonging to Ernest Berg) as notes or memoranda of the contract entered into between the parties for the sale of the property, within the meaning of the statute of frauds. In some jurisdictions it is held that in order to comply with the requirements of the statute of frauds a letter must be sent to the contracting party or his agent (27 C. J. S., sec. 386, p. 302). Such a rule is the one adopted in the State of New Jersey. But in the Code of Civil Procedure of the State of California (sections 1973-1974), from which our original statute of frauds was taken (section 335 of Act No. 190), the rule is that a letter or telegram of the party sought to be charged to a third person may be considered as a sufficient memorandum within the meaning of the statute. *Ibid.*; *Moss vs. Atkinson*, 44 Cal. 3). This doctrine is also followed in Kansas, Missouri, New York, Iowa, North Carolina, New England, and Ontario. (See footnotes to 27 C.J.S. 302.) In a case decided in Kansas it was expressly held:

Nor is it necessary, in the case of a memorandum in the form of a letter, that it should be addressed to the vendee. Letters to a third person are sufficient memoranda. *Browne*, St. Frauds (5th Ed.) Sec. 354a. "The principle upon which these decisions are based we understand to be that the statute was not intended to apply to written contracts, out to the information of oral contracts when properly evidenced, as by the admission in writing of the party to be charged. If the party sought to be charged has in writing admitted the contract, this is sufficient, as we understand, to take the case out of the statute, no matter to whom the writing may have been addressed." *Warfield v. Cranberry Co.*, 33 Iowa, 312, 19 N.W. 224. (*Miller v. Kansas City, Ft. S. & M. K. Co.*, et al., 58 Kan. 189, 48 P. 853, 854)

As section 21 of Rule 123, Rules of Court, our statute of frauds when the communications to the United States Treasury Department were sent by the parties to this case, is a rule of evidence (as to the character of the new provision [article 1403] of the New Civil Code, *quaere*), and the written memorandum is not the contract itself, but merely evidence thereof, it is not necessary for the admission as evidence of any note or memorandum signed by a party thereto, that it be signed by, or addressed to, the other also.

Defendant-appellant's counterclaim to compel plaintiffs appellee to sell the property must, however, be denied, for the reason that the conditions under which the contract to sell were to be carried out did not materialize within a reasonable time after it was entered into, and both parties, upon failure of the contingencies relied upon, impliedly withdrew therefrom. The agreement was that the sale shall be carried out when the vendor will get the necessary permit to sell from the United States Treasury Department, and the Magdalena Estate, Inc., will get the loan from the National City Bank of New York with which to pay the price. These conditions are suspensive. The sale was to be carried out only if these should materialize.

En el segundo parrafo del articulo 1.113 y en el 1.114 inicia elCodigo la clasificacion mas importante de las eondiciones en suspensivas y resolutorias, desenvolviendola luego en los articulos 1.122 y siguientes, al determinar los efectos, consecuencia del cumplimiento de unas y otras. Su diferencia es bien clara; unas y otraa influyen en la existencia de la obligacion, pero por modos diametralmente opuestos: si la condicion suspensiva se cumple, la obligacion surge; si se cumple la resolutoria, la obligacion se extingue; si la una no se realiza, el vinculo de derecho no Hega a aparecer; si la otra no se verifica, la relacion de derecho ae consolida; mientras dura la duda, la obligaeion, en el primer caso, no aparece, pero su existeneia es una esperanza; y en el segundo, surte sus efectos, pero pesa sobre ella una amenaza de caducidad. (8 Manresa, 122.)

That they were suspensive conditions may be inferred from their conduct. The defendant-appellant's manager did not demand that the sale be carried out until after the' filing of the complaint in the month of April, 1947, or fully one year after the contract to sell had been agreed upon. Berg, the vendor, also raised the funds he needed for his business by selling a property of his in Quezon City to the vendee itself. (Deposition of Ernest Berg, Exhibit A, p. 4.) During all the time that they were in continuous correspondence regarding the administration of the property, never was a word said about carrying out the sale. All these show that they actually desisted from carrying out the terms of the contract to sell.

Paras, C. J., and Jugo, J., concur.

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