

Privy Council Appeal No. 27 of 1967

A. P. Singh - - - - - *Appellant*

v.

Ina Mortimer - - - - - *Respondent*

FROM

THE HIGH COURT OF GUYANA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER 1968**

Present at the Hearing :

LORD UPJOHN
LORD DONOVAN
LORD DIPLOCK

[Delivered by LORD DONOVAN]

This is an appeal by A. P. Singh (hereinafter called "the appellant") from a judgment of the Court of Appeal of the Supreme Court of Judicature, Guyana. The essential facts of the case are set out in the succeeding paragraphs.

In February 1957 the said Supreme Court granted title to two plantations in Hogg Island, Essequibo, British Guiana, to Dixie Fleetwood Mortimer and his sister Hannah Beatrice de Camp on the ground that they had been in sole and undisturbed possession of the lands for upwards of 30 years. One such plantation was known as Johanna and the other as Endeavour.

In 1960 the two grantees sold Johanna to one Farouk.

On 26th July 1961 a document was drawn up, the object of which was to sell the remaining plantation, namely Endeavour. It is this document which has given rise to the present litigation, and it must be set out in full. It reads as follows:

"MEMORANDUM OF SALE made and entered into this 26th day of July, 1961, at the city of Georgetown, county of Demerara and colony of British Guiana, by and between DIXIE FLEETWOOD MORTIMER, also called Dixie Fleetwood Trotz of 57 New Road, Vreed-en-Hoop, West Bank, Demerara, and HANNAH BEATRICE DE CAMP, of the same address hereinafter referred to as the VENDORS and A. P. SINGH of 37 Brickdam, Georgetown, Demerara, hereinafter referred to as the PURCHASER:

Parties : The Vendor and the Purchaser which terms shall include the heirs, executors administrators and assigns of the parties hereto.

Property : Pln. Endeavour adjoining Pln. Johanna in Hogg Island, with the scrap iron, brass and other appurtenances thereon.

Purchase Price : The sum of \$2,500.00 (two thousand five hundred dollars) of which the sum of \$100.00 (one hundred dollars) is being paid on the signing of this agreement (receipt whereof is hereby acknowledged). The balance of purchase price to be paid on the passing of transport.

Condition : This agreement shall and is expressly made subject to the agreement of sale and purchase with D. YHAP dated 22nd June, 1957. When it becomes necessary a further sum of \$950.00 will be advanced to D. Yhap and deducted.

Transport : to be advertised and passed as soon as title is acquired by the Vendor.

Expenses : To be borne equally by the Vendor and Purchaser.

IN WITNESS WHEREOF the parties have hereunto set their hands date and year and first above written in the presence of the subscribing witnesses.

D. F. Mortimer,
.....
.....

VENDORS.

A. P. Singh
PURCHASER

WITNESSES :

1. Ina Mortimer
2. Karan Singh "

On 17th December 1961 Dixie Fleetwood Mortimer died. Up to the date of his death nothing had been done to implement the document of 26th July 1961 except that A. P. Singh had duly paid the deposit of \$100.

When that document was signed, and notwithstanding that she was named in it as one of the parties, Hannah Beatrice de Camp (hereinafter called "Hannah") had already been dead for some 17 months, having died in February of 1960.

Letters of Administration of the estate of Dixie Fleetwood Mortimer were granted to the respondent, Ina Mortimer, in British Guiana on 16th March 1963. Before this happened she was paid \$5 by the appellant in further satisfaction, so the appellant alleged, of the purchase price of Endeavour.

The system of conveyance of land in British Guiana involves, among other things, publication of the intended conveyance—in that country called a "transport"—in the Official Gazette. Any person objecting to it can enter opposition in the Office of the Registrar of Deeds to the passing of the transport, stating his reasons.

On 31st August 1963 Ina Mortimer so advertised the transport of one undivided half of Endeavour to herself (as to one undivided third thereof) and to her children George Mortimer, Paul Mortimer and Errol Mortimer (as to the remaining undivided two-thirds thereof). To this transport the appellant duly entered opposition. The grounds of this opposition were (in summary) that the document of 26th July 1961 disentitled Ina Mortimer to make any such transport, and that it should instead be made to him.

The appellant followed this up by commencing an action in the Supreme Court of British Guiana in which, founding on the document of 26th July 1961, he claimed, as against the respondent,

- (a) specific performance of "the contract of sale and purchase dated 26th July 1961";
- (b) a declaration that his opposition to the passing of the transport advertised as above by the respondent was legal and well founded;
- (c) an injunction to restrain the respondent from passing the said transport;
- (d) in the alternative damages in the sum of \$5,000.

The defence to the above was that the document of 26th July 1961 was null and void and of no effect since Hannah was already dead when it was signed. The respondent offered to repay the above sums of \$100 and \$5.

In the High Court of British Guiana the appellant's action failed. In the Court of Appeal it also failed; though Cummings J., differing from his colleagues, thought that the claim for damages should be allowed in the sum of \$500. The appellant now appeals to your Lordships.

Mr. Le Quesne rightly conceded in his argument that the crucial question in the present case is whether there was a contract for the sale of Endeavour, or some share in Endeavour, to the appellant. The only contract which is alleged in this connection is the contract said to be embodied in the document of 26th July 1961. As to this, Bollers J. in his judgment in the High Court of Guyana said:

“ On a close perusal of the document, I have come to the conclusion that it was the intention of the parties, that is to say, Dixie Fleetwood Mortimer and the plaintiff, the two signatories to the agreement, to sell and purchase, respectively, the whole of Plantation Endeavour with the scrap iron, brass and other appurtenances thereon when the other purported signatory to the agreement had been obtained. I have come to that conclusion chiefly because it is not stated in the document whether the two vendors hold the property in equal shares, or in what proportion the property is held by them, or whether the title to the land was in the name of Hannah de Camp and the title to the movable property in the name of Dixie Mortimer, or vice versa. In other words, it was the intention of the plaintiff to purchase the whole of the property stated in the agreement jointly from the two vendors.

To a lesser extent I have been influenced in this finding by the circumstances that in the body of the document the parties are described as the vendor and the purchaser, that is to say, the singular is used and not the plural, which would suggest rather that the parties contemplated a single joint sale. If, as suggested by Counsel for the plaintiff, Dixie Fleetwood Mortimer was merely selling his undivided half interest in the property and the purchaser was acquiring that interest and expected at a subsequent date to acquire the other undivided half interest in the property from Hannah de Camp and thus acquire the ownership of the whole property, there was nothing to prevent the plaintiff from purchasing Mortimer's half interest in a separate document and the undivided half interest of Hannah de Camp in another document on a subsequent date.

The strong inference to be drawn from the circumstances is that the signatories to the agreement were not aware of the death of Hannah de Camp at the time of the signing of the agreement and fully expected that she would at a subsequent date append her signature to the document which would complete the sale and purchase of the whole property. The contract, therefore, between the two signatories remained incomplete as the intention was to make a joint sale and purchase of the whole property, and indeed it is worthy of note that the plaintiff so states in his reasons for opposition.”

In the Court of Appeal the learned Chancellor dealing with the effect of the same document said this:

“ The appellant in giving evidence never said he had entered into a contract with Mortimer to purchase his interest separately. He could not say so as it was never his case. His case was he had bought the whole of Pln. Endeavour. From whom had he bought? The agreement is the answer. From Mortimer and de Camp, when de Camp signed. She never signed, so he never bought.”

Persaud J. expressed himself on this point as follows:

“ Here Mortimer was not seeking to sell his interest (whatever that was) to Singh; the arrangement was, as I have already indicated, to sell the entire estate, and if this is a true view of the facts, then the contract could not have been complete until it was executed by Hannah de Camp if alive, or by her personal representative if, as was the case, de Camp was dead, on the day of the signing of the contract.”

Their Lordships agree with the conclusion that in this case there was no concluded contract. The intention was that the appellant should buy the whole plantation together with the scrap iron etc. thereon from the owners, namely Dixie Fleetwood Mortimer and Hannah, who were named in the document of 26th July 1961 as the vendors: and since Hannah, being already dead, never signed, no contract came into existence. On this issue their Lordships might refer to two authorities very properly brought to their notice by Mr. Le Quesne, namely *Latch v. Wedlake* 11 A. & E. 959 and *Hornsby v. Bird* (1869) 38 Law J. Rep. (N.S.) Chanc. 244. In the former of these two cases it was held to be a matter for a jury to decide whether it was intended that a contract between a

plaintiff and a partnership firm should be binding although only two partners out of three signed the document; or whether the intention was that no party should be bound until all three partners signed. In the second case five persons were named in an agreement as vendors of an estate, but before execution it was discovered that one of them had no interest since she was illegitimate. The document was therefore executed by the other four named vendors only. It was held that in these circumstances there was no enforceable contract. In the course of his judgment James, V.C. said :

“The only contract which is produced . . . is a contract by which certain persons, including one Hannah Cryer, bind themselves to convey the estate. The contract sought to be enforced is a contract which persons, not including Hannah Cryer, say they have entered into with the defendants. . . . In order to the completion of a contract it is necessary that the contracting parties named therein should all of them have assented to it; and the fact that Hannah Cryer never was a party to that contract would make it as incomplete as if nobody had ever entered into the contract at all; therefore there was no contract in truth ever made between these parties.”

So also in the present case. It is plain from the document of 26th July 1961 that Hannah was intended to be a party to the contract of sale; but never having signed it, the contract did not come into existence. In the circumstances there can be no question of specific performance or of damages.

In the Court of Appeal Cummings J. took a different view of the document of 26th July 1961 which he expressed as follows :

“The facts upon which the trial Judge based his inference are before this Court and are not disputed. This Court is then in as good a position to draw its own inferences if it considers that the facts do not support the trial Judge’s inference. The inference I draw from the facts is that Mortimer intended to sell his undivided half share in the property mentioned and fully described in Transport No. 675 of 1957, and later to acquire his sister’s portion, whether she was dead or alive, and transport it to Singh.”

and again

“In arriving at the intention of the parties, we must impute to them knowledge of notorious incidents of co-ownership. So when Mortimer made up his mind to sell, his intention was to sell his interest, and since Singh wanted to buy the whole estate he undertook to acquire his sister’s interest and then convey to Singh. He thought that exhibit “A” would achieve this object.”

Exhibit “A” is the document of 26th July 1961.

Nevertheless Cummings J. refused to order specific performance as claimed by the appellant on the grounds that the rights of a third party might be prejudiced. He was here referring to the “Condition” in the document of 26th July 1961 preserving the rights of a Mr. Yhap under an agreement of sale and purchase dated 22nd June 1957. These rights were never precisely ascertained at the trial, though the appellant did say that he had been told by Dixie Fleetwood Mortimer that Yhap had lent him and Hannah money, and to get it they had to make the agreement. It may therefore be that Yhap was a mortgagee; but in the events which have now happened the matter has become immaterial. Cummings J. did, however, as above recited, award the appellant damages of \$500 (*sic*).

Their Lordships regret that they cannot share the inference that Mortimer intended to sell his half share in the property and later to acquire Hannah’s share, whether she was dead or alive and transport it to the appellant; and that he undertook to do this. Such an inference is contrary to the natural construction of the document of the 26th July 1961 and leaves entirely unexplained the inclusion of Hannah as a party thereto, and the provision of a space for her signature. It also leaves unexplained the conduct both of Mortimer and the appellant between

26th July 1961 and 17th December 1961 when Mortimer died. During these five months Mortimer took no step towards transporting his own half share to the appellant, and the appellant took no steps to get it.

The argument that Mortimer contracted to sell his own share in Endeavour or to sell the whole plantation although he had at the time only a half share, involved discussion in the Courts below of the nature of his right in the property. Bollers J. held that he was a joint tenant with Hannah. The Court of Appeal held that he was a tenant in common. Prior to 1917 Roman Dutch law applied in Guyana but was abrogated, subject to certain savings, in favour of English law by the Civil Law of British Guiana on 1st January 1917. It was provided however that the English Common Law of real property should not apply to immoveable property in the Colony, but that all questions relating to moveable and immoveable property should be adjudged and determined so far as possible according to the principles of the English Common Law applicable to personal property.

For the appellant it was argued, *inter alia*, that he was a joint tenant with Hannah of Endeavour and succeeded to her share by survivorship on her death in 1960: so that when the document of 26th July 1961 was signed he was the owner of the whole property. Hannah's share had, however, by the time the action in the present case was begun, been transported to others. Nevertheless on the ground that as joint tenant Mortimer succeeded by survivorship to the whole, the appellant argued that the document of 26th July 1961 was binding on Mortimer, and that specific performance should be decreed at least as regards Mortimer's original one half undivided share. Bollers J. in the High Court upheld the argument that Mortimer was a joint tenant with Hannah. He still refused specific performance on the ground that the document of 26th July 1961 contemplated a joint sale by both Mortimer and Hannah, and that the contract was incomplete. In the Court of Appeal all three judges held that the tenancy was a tenancy in common, and that accordingly Mortimer did not acquire Hannah's share by survivorship.

In the view which their Lordships take of this case it is unnecessary to decide between these conflicting views, though this must not be taken as implying any disagreement with the very careful reasoning by which the Court of Appeal reached its decision. It is also unnecessary to discuss the numerous authorities considered in the Courts below where Equity has intervened to compel a vendor to implement his contract of sale at least so far as he is able to do so, notwithstanding that he may have contracted to sell more than he in fact owned. In the present case, there being no contract at all, no such question can arise.

Mr. Le Quesne submitted that on a number of alternative grounds the document of 26th July 1961 could be regarded as a contract binding at least on Mortimer. Their Lordships are unable to agree. For the reasons already explained it seems to them clear that the document had no binding force on anyone.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. There was no appearance by the respondent before their Lordships' Board, but the appellant must pay to the respondent such costs of this appeal as she incurred in the Court of Appeal.

In the Privy Council

A. P. SINGH

v.

INA MORTIMER

DELIVERED BY
LORD DONOVAN