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PREM PRABHA AZAM

v.

MOHAMMED AZAM

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[SUPREME COURT, 1967 (Hammett J.), 5th, 6th, 20th June]

Civil Jurisdiction

Contract—sale of land—consideration—wife's agreement to husband's departure from Fiji without other financial provision—adequacy of consideration—Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962, s.8.

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Husband and wife—matrimonial home—agreement by husband to transfer to wife—only consideration wife's consent to husband's departure from Fiji without other financial provision—adequacy—Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962, s.8.

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The plaintiff and her husband, the defendant, were each beneficially entitled to an equal share in their matrimonial home, the value of a half share in which exceeded £2,000. Shortly before departing for New Zealand in order to join his mistress there, the defendant gave the plaintiff a written acknowledgment that he had sold to her all his interest in the property for £100. The plaintiff's version of the matter was that the defendant informed her that he was determined to go to New Zealand, but had no money; he did not know how long he would be away but offered to transfer the property to her name if she gave him £100 and would look after their children. The defendant's version was that he was worried about his mistress, who was pregnant, and that the plaintiff told him that, unless he transferred the property to her name she would stop him from leaving Fiji: this she had power to do under the Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962. He signed the acknowledgement but denied receiving any money.

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Held: 1. That the plaintiff's version of the facts was to be accepted and she was entitled to a transfer of the property.

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2. The defendant's version merely amounted to an assertion that the consideration for the acknowledgment was, not £100, but the plaintiff's agreement to his leaving Fiji without making any financial provision for her other than the agreement to transfer the property. The plaintiff's attitude in the matter was not unreasonable and there was sufficient consideration to support the contract. On this version also, therefore, the plaintiff was entitled to a transfer of the property.

Action for specific performance of an agreement for sale of land.

K. C. Ramrakha for the plaintiff.

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Defendant in person.

The facts sufficiently appear from the judgment.

HAMMETT J. : [20th June 1967]—

The plaintiff is the wife of the defendant. They are the registered joint owners as tenants in common in equal undivided shares of the property in Cakobau Road, Suva comprised in Certificate of Title No. 7612. It is the plaintiff's case that in October 1966, shortly before the defendant was about to leave Fiji for New Zealand to join his mistress there, he agreed in writing to sell to his wife, the plaintiff, his undivided half share in this property, which was their matrimonial home, for £100 cash which she thereupon paid him. This was not its market value. The market value of the defendant's half share in the property was well in excess of £2,000.

In the action the plaintiff claims specific performance of this agreement and an injunction restraining the defendant from entering upon or remaining on the premises or interfering with the plaintiff's use thereof.

The plaintiff and defendant were married in 1951 and they have four children. At that time the defendant was a policeman and the plaintiff a school teacher. The plaintiff has worked as a teacher throughout their married life, apart from periods when she was pregnant and through their joint efforts they purchased a matrimonial home at each place in which they lived over the years. The defendant later left the police force and began business on his own account as a travel agent.

In 1964 they bought the Cakobau Road property (CT 7612) in their joint names as their matrimonial home and it is not disputed that they both contributed to its purchase price. I hold that in fact, law and equity they were each beneficially entitled to an equal share in the property.

In the middle of 1966 the defendant, who travelled overseas in the course of his business, formed an attachment to a Miss Singh in New Zealand. As a result Miss Singh became pregnant.

In October 1966 the defendant was anxious to go to New Zealand to be with his mistress who was then heavy with child. His own business had not prospered and he had no money with which to make the journey.

The defendant had earlier denied to his wife that there was any truth in the rumour that he was associating with another woman. On this assurance the plaintiff had agreed to the defendant visiting New Zealand in July 1966.

According to the plaintiff the defendant had been trying for a week to raise money to make another trip to New Zealand in October 1966. On the night of Saturday 15th October, 1966 she says he informed her that he could not raise the money for this further visit to New Zealand. He told her he did not know how long he would be away or when he would return and he wanted her to look after their children but that if she gave him £100 he would transfer the Cakobau Road property into her name.

She did not want him to go away but since she saw he was determined to do so she agreed to his proposal and gave him £100 in £10 notes which she had been keeping in the house.

According to the plaintiff, her husband, the defendant, thereupon wrote out on paper what he had agreed to do. After signing it he handed it to her. He then told her he would be leaving for New Zealand the next day.

This document which has been admitted in evidence as "Exhibit B" reads as follows:—

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" TO WHOM IT MAY CONCERN

This will service to confirm that I the undersigned Mohammed Azam f/n Intaj Ali Khan has this 15th day of October, 1966 sold all my interest with regards to property at Cakabou Rd, Suva C.T. No. 7612 to Mrs. Prem Prabha Azam for £100.

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Mrs. P. P. Azam is to have the same transferred to her name at any time she desires.

Mohammed Azam

15/10/66

9.25 p.m. "

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The document was later stamped with £16 Stamp Duty.

On the next day, Sunday 16th October 1966, the defendant left the matrimonial home and flew to New Zealand where he joined his mistress.

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On 11th November 1966, the defendant returned to Fiji bringing his mistress with him. On 9th December 1966 the defendant and his mistress moved into the plaintiff's home at Cakobau Road and took up residence there. The plaintiff, not unnaturally, said she could not put up with this and so she moved out with her children and has since been accommodated by relatives.

She thereupon took legal advice to have the property transferred into her name and as a result this action was instituted.

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The defendant freely admits that he wrote and signed this document, "Exhibit B", but has given evidence that the circumstances in which he did so were entirely different from those related by the plaintiff.

It is the case for the defendant that in October 1966 he was desperately worried and concerned about the position of his pregnant mistress, Miss Singh, in New Zealand. He felt he must go to New Zealand to be with her and to do all he could to assist her in her predicament.

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He said his wife, the plaintiff, could, and would, have prevented him from leaving Fiji if he had let her know his intentions in advance and so it was not until late at night on the 15th October 1966 that he told her he was leaving for New Zealand the next day.

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He has given evidence how at about 8.00 a.m. on the morning of Sunday 16th October, 1966 his wife told him that unless he transferred their house into her name she would see to it that he was stopped at Nadi from leaving Fiji.

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There is no doubt that under the provisions of the Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962 it is open to a wife to complain to either the Police or the Immigration Authority, that her husband is about to leave her in circumstances amounting to an offence under Section 8 of the Ordinance. The defendant has given evidence that earlier in 1966, as a result of representations made by his wife he was told by the authorities that unless his wife consented he would not be allowed by the authorities to enter New Zealand.

The defendant says he believed his wife would prevent him from leaving Fiji as he had planned to do unless he agreed to her demands. She produced a draft document to him and at her request and under her direction he thereupon wrote out this document "Exhibit B" by which he agreed to sell her his half share interest in their matrimonial home for £100. He denies that she ever paid him the £100 or any money.

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In these proceedings the defendant has not counter-claimed for the £100. On the contrary he has maintained that the "agreement" he wrote out was not valid and is unenforceable. I assume he does so on the ground that according to him it was obtained from him under duress. He has refused to execute a transfer of the property and he asks that no effect should be given to his agreement to do so.

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It appears to me that if the plaintiff's version of the facts is correct she is entitled to have full effect given to her agreement with the defendant and to have the property transferred into her own name as the sole beneficial owner of Certificate of Title No. C.T. 7612. I see no reason to disbelieve the plaintiff who appeared to me to be a witness of truth and I accept her version of the facts of this case. I have however asked myself whether the position would in fact be any different if the defendant's version of the facts were the truth of the matter, especially as the relief sought is an equitable remedy.

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According to the defendant he told the plaintiff that he was not prepared to sign that he had received £1,000 from her, as was stated in the draft document which he asserts, (but which she denies), she produced to him.

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He then went on to say in his evidence-in-chief:—

"She replied "if you want to go you must make this agreement or I won't let you leave Nadi."

Knowing my wife's previous conduct I knew that if I did not sign the document my wife would stop me from going away.

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I made out the agreement and signed it and gave it to her."

The defendant has pointed out that this document is dated 15th October 1966 and bears the time "9.25 p.m." — whereas he says he did in fact sign it on 16th October 1966 at about 8.30 a.m. No question of fraud on either party or any third party arises out of this alleged deliberate misstatement by the defendant of the date and time of execution and I do not consider it to be material.

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The defendant, a very intelligent person with business experience, who speaks English fluently, was a married man about to leave Fiji without making any financial provision for his wife and children and with no definite arrangements about the date of his return. Even if the defendant's version of the facts were the truth it does not appear to me that the plaintiff was, in those circumstances, entirely unreasonable in insisting that he should vest their matrimonial home in her name before he left Fiji, as a form of financial provision for her and their four young children.

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The provisions of Section 8 of the Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962 read as follows:—

"Every person who is the husband of any women or a parent of any child, and who leaves or attempts to leave the Colony with the intention of failing without reasonable cause to make adequate pro-

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vision for the maintenance of that wife or child during his absence, shall be guilty of an offence and shall be liable to imprisonment for any period not exceeding two years."

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The plaintiff was the wife of a husband about to leave Fiji for an indefinite length of time. It would appear that she was not acting unreasonably in the interests of herself and her children in refusing to consent to her husband's departure without some provision being made for them by him before he left. The defendant did not suggest to her any other form of provision than that which, he says, she insisted he should make.

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The defendant's subsequent conduct, in returning to the matrimonial home with his pregnant mistress and flaunting his infidelity not only before his wife but also before their friends and neighbours, cannot, I think, be properly termed as anything less than outrageous.

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In these circumstances if the plaintiff had in fact adopted the attitude the defendant says she did and she is now insisting on his carrying out his initial bargain can it be said that she was then or is now being unreasonable or acting unconscionably? If the defendant considered she was being unreasonable in October 1966, he could have refused to sign any such document as "Exhibit B." There was no absolute necessity for him to go to New Zealand at all. It was merely his desire to do so that motivated his action. It was in order to gratify this desire that he agreed to do as he says the plaintiff insisted he should do.

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The fact is that the case for the defendant is no more than this. He concedes he agreed at his wife's insistence to sign this document fully knowing its contents and purport by which he agreed to transfer the matrimonial home to his wife for the sum of £100. He asserts however, that he did so, not really for the stated consideration of £100 but for an altogether different consideration namely that she would agree to him leaving Fiji without asking any other financial provision for her than this.

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To put it in other words the plaintiff was entitled to try to prevent the defendant from leaving Fiji without making some financial provision for her and their children. She said she would do so unless he made this particular provision. The defendant did not make any other provision but agreed to make the provision the plaintiff required and on this basis secured her consent to him leaving.

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The defendant clearly now feels that the plaintiff drove too hard a bargain with him. Having had the somewhat ephemeral benefit of his side of their agreement he seeks to avoid having to discharge the burden he then agreed to of giving to his wife the benefit of her far more substantial side of their bargain.

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In effect in addition to his complaint of duress the defendant appears to be seeking to be released from this agreement because of what he submits is the inadequacy of the consideration moving to him from the plaintiff. It is well established that the courts will not inquire into the adequacy of consideration. In my view there was sufficient consideration in law to support the contract the parties made in this case.

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The present position is that the defendant is in occupation of the premises in dispute, with his mistress. The wife not only has not had the property transferred to her own name but she has also been deprived of the use and benefit of her own original half share in the property.

After giving the matter careful consideration I can see no reason in law or equity why the defendant, even on his own version of the facts, should not be required to carry out his part of the agreement he made with his wife in October 1966. **A**

In my opinion the plaintiff is entitled to Judgment for the reliefs claimed in this action.

I order that the defendant do within 7 days sign and deliver to the plaintiff or her Solicitor an effective transfer to the plaintiff of the defendant's undivided half share of the property C.T. 7612. **B**

I also grant the plaintiff the injunction sought restraining the defendant from entering upon the said property and also restraining him by himself, by his servants, by his agents or by any person claiming by through or under him from interfering in any way with the plaintiff's use thereof.

I reserve the plaintiff liberty to apply for such further orders as may be necessary to give effect to this Judgment. **C**

The defendant must pay the plaintiff's costs in these proceedings which are to be taxed on solicitor and client basis.

Judgment for the plaintiff.