

1971  
Mar. 26

[VASSILIADES, P.; TRIANTAFYLIDIS, JOSEPHIDES; JJ.]

KEZIBAN  
RAIF AS  
ADMINIS-  
TRATRIX  
OF THE  
ESTATE  
OF THE  
DECEASED  
SHAZIYE  
OSMAN  
*alias*  
SHAZIYE  
DJEMAL  
v.  
ENVER  
DERVISH

KEZIBAN RAIF AS ADMINISTRATRIX OF THE  
ESTATE OF THE DECEASED SHAZIYE OSMAN  
*ALIAS* SHAZIYE DJEMAL,

*Appellant-Defendant,*

v.

ENVER DERVISH,

*Respondent-Plaintiff.*

(Civil Appeal No. 4857).

*Bond—Bond in customary form within the provisions of section 78 of the Contract Law, Cap. 149—Duly executed thereunder—No cash passing from creditor to debtor—A fact immaterial and inadmissible in law against such bond—In view of the provisions of section 80 of the Contract Law whereby the contents of such bond “ shall be conclusive evidence of the facts therein stated ”.*

*Contract—Sale of a house—Parties in fact intending that the house should go to the purchaser as a gift—Sale held to be a fictitious one as the parties were never “ ad idem ” regarding its object and effect—And, therefore, not constituting a valid contract between the parties—Real transaction being a gift of the house viz. a gift not perfected by transfer and as such unenforceable.*

*Contract—Fictitious sale—See supra.*

*Contract—Consideration—Past consideration may be sufficient to support a valid contract under our Contract Law, Cap. 149.*

*Consideration—Past consideration—See supra.*

*Findings of fact made by trial Courts—No reason shown on appeal for disturbing them.*

Cases referred to :

*Ponou v. Ibrahim* (1970) 1 C.L.R. 78, at p. 82 ;

*Papastratis v. Economou* (1970) 1 C.L.R. 11, distinguished.

The facts sufficiently appear in the judgment of the Court dismissing both the appeal by the defendant, and the cross-appeal by the plaintiff.

## Appeal and Cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Nicosia (Mavrommatis and Vakis, D.JJ.) dated the 25th November, 1969, (Action No. 5201/68) whereby judgment was given in favour of the plaintiff for the sum of £2,000 due under a bond in customary form and his claim for an order transferring in his name the house and yard referred to in a contract of sale dated 12th September, 1966, was dismissed.

*K. Riza*, for the appellant.

*A. Dana*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by :—

VASSILIADES, P.: The appellant is the administratrix of the estate of the deceased Shaziye Djemal who died intestate at Nicosia on October 24, 1968, at the age of about 65. The respondent (plaintiff in the action) is a young grand-nephew of the deceased, about 32 years of age, who lived with the deceased ever since he was about 17, being treated by her like a son, as the deceased had no children of her own.

The deceased lived in her own house in the Turkish quarter of Nicosia. As far as the evidence goes, she had no other property. She had tenants in part of the house from whom she collected some rent. The value of the house, in 1965–1966, was about £2,000; and it was subject to a mortgage registered in 1963 for a debt which in 1969 was said to be in the region of £1,400. At the trial, in September, 1969, the value of the house was stated to have gradually increased to £4,500. Counsel on both sides made a declaration to that effect.

When, in the course of time, the young nephew (the plaintiff) took up employment, and was earning about £50–£55 per month, he used to give to his aunt (the deceased) part of his earnings against the household expenses. He stated that such payments were “not less than £12 per month”. She ran the house and managed her own affairs.

In 1966, when the plaintiff was about 29 years of age, the deceased found a young wife for him; and decided to give to him her house, retaining for herself its use and possession during her life. When the time of the marriage

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ceremony approached, they both, aunt and nephew, went to an advocate's clerk for the necessary documents ; and what he did for them was to prepare for signature the documents which gave rise to the litigation in the appeal before us. These were a bond in customary form for £2,000 (*exhibit 1*) ; and a contract of sale of the house to the plaintiff for the same amount (£2,000), (*exhibit 2*). Both these documents were prepared on the same occasion ; and they are both dated 12.9.1966. We shall revert to them again presently.

After the death of the deceased, about two years later, on October 24, 1968, the plaintiff continued in possession of the house ; and claimed title for it by virtue of the documents in question, as intended by the parties thereto. The heirs resisted his claim ; and on December 23, 1968, the plaintiff filed the present action against the administratrix of the estate, claiming (a) £2,000 on the bond ; and (b) title to the house, or, in the alternative, return of the sale price stated in the contract of sale (£2,000) plus damages.

The administratrix (to whom we shall hereafter refer as " the defendant " ), apparently acting as desired by the legal heirs, defended the action. She challenged, in her pleadings, the validity of the documents (*exhibits 1 and 2*) alleging that they were executed by the deceased under undue influence on the part of the plaintiff. The claim was therefore entirely denied ; and the defendant counterclaimed for possession of the house and mesne profits at the rate of £8 per month. By his reply, the plaintiff denied the counterclaim ; and contended that in any case he is entitled to set off against his claim any amount payable to the estate of the deceased for the occupation of the house after her death.

The case went to trial in September, 1969 ; and on November 25, 1969, the District Court determined the dispute by giving judgment to the plaintiff on the bond ; and dismissing his claim for the house ; with costs out of the estate. On the counterclaim, the Court awarded to the defendants £15 mesne profits for three months, at the rate of £5 per month ; with costs out of the estate.

Giving the reasons for their decision, in a careful and well considered judgment, the trial Court, accepting the evidence for the plaintiff, found the material facts leading to the signing and delivery of the documents by the deceased to the plaintiff, as stated above.

Dealing with the nature and validity of the documents, the trial Court reached the conclusion that *exhibit 1* was a bond in customary form within the provisions of section 78 of the Contract Law (Cap. 149) ; and held that it was valid and enforceable accordingly.

The deceased was no doubt entitled to benefit the plaintiff with a gift of £2,000, so long as that was her wish and intention.

Not having the cash in hand for the purpose, she acknowledged that she had received it from him, signing and delivering a bond in customary form, for the same amount, fully knowing its effect. Apart of actual knowledge in that respect, the law presumes her to have known that in case of legal proceedings on such a bond, its contents " shall be conclusive evidence of the facts therein stated ". (Section 80 ; Cap. 149).

The defence pleaded and the evidence adduced at the trial by the defendant in support of the allegations in the defence, were rejected by the trial Court. In any case, the fact that no cash passed from the plaintiff to the deceased at the time—a fact never disputed by the plaintiff in this case—is, we think, inadmissible in law (in view of the provisions in section 80) against a bond in customary form, duly signed and delivered.

The defendant challenged the decision of the trial Court regarding the bond, on the ground that the finding of the Court that the two documents in question " are genuine, is not warranted by the evidence ". It was submitted on behalf of the appellant that the requirements of section 78 (*supra*) must be strictly complied with ; and reference was made to *Papastratis v. Economou* (1970) 1 C.L.R. 11, in support of the submission.

After hearing in the course of the appeal learned counsel on this ground, we intimated that we were unanimously of the view that the bond, *exhibit 1*, is a bond in customary form within the provisions of section 78 of the Contract Law. The findings of the trial Court as to the circumstances in which the bond was prepared and executed, were certainly open to the Court on the evidence before them ; and no reason was shown on appeal, for disturbing them. (See *Ponou v. Ibrahim* (1970) 1.C.L.R. 78 at p. 82). The bond in *Papastratis v. Economou (supra)* was signed in the presence of one witness only, the second witness adding his signature later, after asking the debtor whether he had received the

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amount of the bond. It was in these circumstances—quite different to the circumstances in the instant case—that this Court held, on appeal, that the bond in the *Papastratis* case stood on a different legal footing to that of a bond in customary form under section 78 of the Contract Law.

Coming now to the document purporting to embody a contract for the sale of her house, by the deceased to the plaintiff, (*exhibit 2*), the District Court held that plaintiff's claim under that contract failed as the document in question did not give legal form or effect to the true object and intention of the parties at the time. Neither the deceased intended to sell her house to the plaintiff ; nor did the plaintiff intend to buy his aunt's house. Their intention was, admittedly and unquestionably, that the house should go to the plaintiff as a gift subject to the reservation of a right to the use and possession of the house by the aunt during her life-time ; and, presumably, subject to the mortgage existing at the time. Apart of the oral testimony on the point, the document itself (*exhibit 2*) speaks for the reservation of such a right after the transfer of title.

The trial Court took the view that recourse to a fictitious sale such as the one expressed in *exhibit 2*, was insufficient for the purposes of the gift intended by the parties. "It could not perfect the gift", as the trial Court say in their judgment ; and it could not constitute a valid contract between the parties as they were "never *ad idem*" regarding its object and effect, the Court added.

Further than that, the trial Court went into the question of consideration as a requirement for the validity of the fictitious sale in *exhibit 2* ; and held that the monthly payments made by the plaintiff to his aunt, as well as the amount which he paid for repairs of the house, constituted past consideration, insufficient to support a contract such as the one expressed in *exhibit 2*.

This gave occasion to the plaintiff (respondent) to cross-appeal under Or. 35, r. 10, of our Civil Procedure Rules, against the dismissal of his claim under *exhibit 2* ; basing his appeal mainly on the ground that the trial Court erred in holding that his past payments could not support the contract ; and contending that he was entitled to damages against the deceased for breach of the contract.

We find it unnecessary to deal at length with this matter in the present appeal, as we uphold the dismissal of plaintiff's claim on *exhibit 2* by the trial Court, on the ground that

the fictitious sale to which the parties resorted misguided by their adviser, did not constitute a valid contract between them. We wish to add, however, in this connection, that in our view, past consideration may well be good consideration sufficient to support a valid contract under our law.

The part of the trial Court's judgment in favour of the defendant for mesne profits for the use of the house of the deceased is not challenged by the respondent ; and does not arise in the present appeal.

We therefore hold that the appeal fails and must be dismissed with costs for the respondent. The cross-appeal also fails and is dismissed without costs. Judgment of the District Court affirmed.

*Appeal dismissed with costs.  
Cross-appeal dismissed without costs.*

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