

1987 March 11

[A LOIZOU, DEMETRIADES, LORIS, JJ]

GEORGHIOS THEODOULOU

Appellant-Defendant,

v

CHRYSTALLA G THEODOULOU,

Respondent-Plaintiff

(Civil Appeal No 6421)

5 *Contract – Relation resembling to those created by contract – The Contract Law, Cap 149, section 70 – Husband and wife – Payment by latter of £2,200 for the purchase of a site, which was registered in the husband’s name and on which a house was built – Property donated by husband to his two daughters from a previous marriage – Marriage between the litigants broke down – Said sum can be recovered on the ground that the consideration has wholly failed – Principle of resulting trust could not be invoked*

10 *Husband and wife – Immovable property – Both contributing to purchase and building of a house thereon – Resulting trust – Dicta of Lord Denning in Falconer v Falconer [1970] 3 All E R 449 at 453 relating to the nature of such contribution cited with approval – The matter, however, did not arise in the context of this appeal*

Equity – Trust – Resulting trust – See Contract, ante and, also, Husband and Wife, ante

15 – – – The litigants were husband and wife prior to the institution of the action. They were married in 1976. The marriage broke down in 1979. The trial Court accepted that after the celebration of the marriage the wife (respondent) paid to her husband (appellant) £2,200 for the purchase of a building site, that the site was registered in appellant’s name, that a house was built thereon and
20 that the appellant transferred the whole property in the names of his two daughters from his previous marriage. As a result the trial Court concluded that a trust was created in favour of the plaintiff/respondent and entered judgment for her for the said amount of £2,200. Hence the present appeal by the defendant in the action.

25 It should be noted that the plaintiff/respondent’s claim was for £4,460, equivalent to the 1/2 share of the value of the said property and that there was an allegation in the statement of claim that the respondent was working in

appellant's shop during what is substantially the period of the marriage and, thus, she was entitled to £2,160 wages at £60 per month

As regards this allegation the trial Court did not make any finding, but disposed of the issue summarily, by stating that a relationship of master and servant was not established and that when the wife was assisting her husband for the purpose of earning their living by their joint efforts and, consequently, she was not entitled to succeed in this claim 5

Held, *dismissing the appeal* (1) The amount of £2,160 referred to in the statement of claim was not the subject of a separate claim but it was meant to be added to the sum of £2,200 paid for the purchase of the site. The relevant statement of the trial Court is in direct conflict with the dicta of Lord Denning in *Falconer v Falconer* [1970] 3 All E R 449 at 452. In view, however, of the dismissal of the claim and the absence of a cross-appeal the matter does not arise in this appeal 10

(2) There is no reason to interfere with the findings of the trial Court in respect of the credibility of the witnesses 15

(3) In the circumstances the principle of resulting trust could not be invoked in this case. This is really a simple case of payment of monies for a consideration that has wholly failed. The relationship is squarely within the ambit of s 70 of the Contract Law, Cap 149 20

Appeal dismissed with costs

Cases referred to

Falconer v Falconer [1970] 3 All E R 449

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Kourmis, P.D C and G Nicolou, D J.) dated the 27th February, 1982 (Action No 50/81) whereby the defendant was adjudged to pay to the plaintiff the sum of £2,200 as her share for the purchase of a building site and the erection of a house thereon before the breakdown of their marriage. 25
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C. Hadjiloannou, for the appellant

Ch. Kitromilides, for the respondent

Cur adv. vult.

A. LOIZOU J: The judgment of the Court will be delivered by
Loris J.

LORIS J.: The present appeal is directed against the judgment
of the Full District Court of Nicosia in Action No.50/81 whereby
5 the appellant-defendant was adjudged to pay to the respondent-
plaintiff the sum of £2,200 with legal interest thereon plus costs.

The litigants were husband and wife prior to the institution of the
present action; they were married in July 1976 and the marriage
broke down in September 1979 without an issue.

10 The facts pleaded in the statement of claim may be thus
summed up:

After the celebration of their marriage on 31.7.76 the
respondent paid £2,200. - to the appellant for the purchase of a
building site at Yeri village which the latter ultimately registered in
15 his name under Regn. No. K698 with a view to securing a loan
from the Refugee Funds, as he was a refugee, in order to build a
house thereon destined for both; thereafter at the joint expense of
the couple a house was erected thereon which did cost £5,000.
Ultimately on or around the breaking down of the marriage, the
20 appellant transferred the whole property aforesaid in the names of
his two daughters from his previous marriage.

The respondent claimed £4,460. - equivalent to the 1/2 share of
the value of the aforesaid house.

~~There is a further allegation in the statement of claim to the~~
25 ~~effect that the respondent was working in the tailor-shop of the~~
~~appellant for the period of 31.7.76 up to 26.7.79 (which is~~
~~substantially the period of the duration of the marriage) and that~~
~~she is entitled to the amount of £2,160 wages for the aforesaid~~
~~period calculated at the rate of £60 per month.~~

30 The appellant in his defence denies the allegations set out in the
statement of claim; he maintains that the respondent received as
dowry from her father and brother upon her marriage the
amount of £1,700 an amount which was spent for travelling
expenses, stay in U.K. and medical expenses of the respondent.
35 The appellant goes on to say in his defence that the house in

question was built out of money provided exclusively by him and further denies that the respondent had ever worked or earned any income whatever during the marriage

In the alternative the appellant maintains that «whatever made between the litigants» was made «gratuitously» obviously meaning that any transaction between the litigants was «gratuitous» 5

The trial Court after hearing the respondent and another witness called by her, as well as the appellant who called no other witnesses, accepted the version of the respondent rejected in toto the evidence of the appellant who did not impress the court «of being a truthful witness» 10

After elaborating at length in their judgment on the legal aspect of the case viewed from the angle of resulting trust – as presented by counsel on both sides at the hearing – held that (i) «in the light of the circumstances under which the building plot was acquired and the house erected thereon, a trust was created, 15

(ii) the wife is entitled to a beneficial share as near as possible proportionate to her contribution and concluded that «on the evidence before us the wife contributed for the purchase of the land and by inference for the construction of the house the sum of £2,200 - and we can safely say that her beneficial share is for that amount and we enter judgment for the plaintiff for £2,200 -» 20

It may as well be noted at this stage that the court of first instance failed to make a finding on the alleged services of the respondent in the tailor - shop of the appellant for the period of 31 7 76 up to 26 7 79 entitling her to the amount of £2,160 - 25

Instead they proceeded in disposing of this issue summarily by stating the following.

«We do not think that in the circumstances of this case a relationship of master and servant was created to enable her to claim wages during the period she was working with her husband. She has not alleged any express agreement regarding payment of wages and we have no doubt in our minds that when she was assisting her husband in his work, this was for the purpose of contributing in earning their living 30 35

by their joint efforts and consequently she cannot succeed in this claim.»

With respect the aforesaid statement is in direct conflict with the dicta of Lord Denning in *Falconer v. Falconer* [1970] 3 All E.R. 449 at p. 452 (referred to verbatim in the judgment of the Court below) as follows:

«... It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does by way of an inference from their conduct and the surrounding circumstances. even though the parties themselves made no agreement on it. This inference of a trust, the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contribution may be direct, as where it is actually stated to be a contribution towards the price of the instalments. It may be indirect, as where both go out to work, and one pays the housekeeping and the other the mortgage instalments. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust.»

It is significant to note here that the amount of £2,160 referred to in paragraph 8 of the statement of claim is not the subject of any prayer in the claim; it was obviously meant to be added to the amount of £2,200 money paid by the respondent to the appellant constituting thus the amount claimed in virtue of prayers A and B. If a positive finding on the issue of £2,160 were recorded it might have rendered necessary the examination of the case under appeal from the view-point of the trial court, notably that of resulting trust, which cannot arise as the matter now stands in view of the dismissal by the trial court of the claim in respect of the amount of £2,160.- as aforesaid and the absence of cross-appeal on this point. Thus there remained alone the amount of £2,200, money paid by the respondent to the appellant forming the sole substratum of prayers A and B. For this amount of £2,200 only,

judgment was entered in favour of the respondent and against the appellant.

The court of first instance who had before them the witnesses heard their evidence and accepted the evidence of the respondent. The credibility of witnesses is always within the province of the trial court. They relied on the evidence as they have accepted it and they made a finding of primary fact notably that the wife (the respondent) gave to her husband (the appellant) the amount of £2,200.- We have not been persuaded that the court below went wrong reaching at such a finding; and we are in agreement with them that the wife gave to her husband the sum of £2,200.- to be used for the purchase of the building plot and subsequent building expenses. 5 10

It was established that the building site was bought and that same was registered in the name of the appellant who transferred same after a building was erected on it to his daughters from another marriage, some time prior to the institution of the action under the present appeal. The marriage of the litigants broke down and the amount of £2,200 was never returned to the respondent. 15 20

In the circumstances we hold the view that the principle of resulting trust cannot be invoked in the present case. This is really a simple case of the respondent paying to the appellant monies for a consideration which has wholly failed.

It is a relation resembling to those created by contract and it is squarely within the ambit of s. 70 of our Contract Law, Cap. 149. 25

In the result the present appeal fails as the amount of £2,200 was properly adjudged in favour of the respondent albeit through a process of different reasoning.

Appeal dismissed with costs. 30