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HOLMES *v.* ALIA MARIKAR.

D. C., Colombo, C 5,507.

Action for specific performance of contract, or damages for breach thereof —intention of parties—form of decree.

Where plaintiff prayed for specific performance of a contract set forth in a deed which had been assigned to him, or in the alternative for damages, and it appeared to be the intention of the parties that the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price stipulated,—

Held, that plaintiff was entitled to a decree for specific performance, and if it be found, for any valid reason, impossible to execute the conveyance ordered, the Court below should decree the defendant to pay to the plaintiff the damages claimed.

THE plaintiff in this case sued the defendant upon a deed of assignment, whereby one Wapuchi Maricar transferred and set over unto him all sums payable upon, and all right, title, and interest in, a certain deed made by the defendant in favour of the said Wapuchi Maricar.

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By that deed, dated 6th June, 1893, the defendant agreed to sell and convey to Wapuchi Maricar, within two months of the date of its execution, a portion of a land belonging to him for the price of Rs. 150, and it was further agreed that in the event of the defendant refusing or neglecting to make the conveyance in question, he should refund to Wapuchi Maricar the sum of Rs. 50 paid to him in advance, and pay an additional sum of Rs. 50 as damages.

The plaint alleged that, on or about the 20th of June, 1893, Wapuchi Maricar tendered to the defendant, within the period of two months aforesaid, the price of Rs. 150, and requested him to execute and deliver to him a proper conveyance of the said land, but that the defendant refused and neglected to do so; that thereupon Wapuchi Maricar, by his proctor, requested him to deliver the title deeds of the said premises in order to enable his proctor to prepare the necessary deed of transfer in his favour for execution by defendant, but that the defendant failed to do so.

It was further alleged in the plaint that defendant had notice of Wapuchi Maricar's assignment of the deed of agreement to plaintiff; that on or about the 30th of October, 1893, the plaintiff tendered to the defendant Rs. 150, the price of the land, and requested him to execute and deliver to him a conveyance of the said land, or to deliver to his notary, Mr. Perera, the title deeds of the said premises for the purpose of preparing a deed of conveyance for execution by the defendant; and that the defendant refused and neglected to do so.

The plaintiff prayed that the defendant be ordered to convey to the plaintiff the said land upon a proper deed of conveyance, receiving from the plaintiff the said sum of Rs. 150; and in the alternative that defendant be decreed to pay to the plaintiff the sum of Rs. 50 paid by Wapuchi Maricar to him, and a further sum of Rs. 50 as damages.

The defendant pleaded, *inter alia*, that the plaintiff could not claim specific performance of the agreement set forth in the deed of agreement between Wapuchi Maricar and the defendant.

The question of law thus raised was discussed on the trial day. The District Judge ruled in favour of the plaintiff and ordered the case to be listed for trial on the merits. On a subsequent day he dismissed plaintiff's action, on the ground that he was not satisfied with the evidence laid before him of the tender of the price to the defendant.

Plaintiff appealed.

Dornhorst and *Sampayo* appeared for appellant, and *Bawa* for respondent, on the 17th January, 1896.

Cur. adv. vult.

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WITHERS, J.

21st January, 1896. WITHERS, J.—

This is an action to compel specific performance of an agreement to sell a certain piece of land, more particularly described in the schedule at the foot of the plaint, or in the alternative for damages. The parties to the agreement containing the promise to sell this land were one Wapuchi Marikar and the defendant. The agreement bears date the 6th of June, 1893. By that agreement the defendant, in consideration of the sum of Rs. 50 paid in advance, and admittedly received, covenanted with the said Marikar, the plaintiff's assignor, that within two months from the date of the agreement he would sell, convey, and transfer to the said Marikar the piece of land in question on a valid and marketable notarial document for the sum of Rs. 150. The said Marikar for his part covenanted with the defendant, that within the said period of time he would purchase this piece of land for the sum of Rs. 150 upon a valid and marketable notarial document. It was further agreed between the parties that, in the event of the defendant refusing or neglecting to sell and transfer this piece of land on a valid and marketable notarial document within the time given, for the said sum of Rs. 150, he would refund to the said Marikar the Rs. 50 paid and received in advance, together with an additional sum of Rs. 50 by way of damages ; and in the event of the said Marikar refusing or neglecting to purchase the said land for the sum of Rs. 150, he was to forfeit to the defendant the sum of Rs. 50 paid in advance. Lastly, it was agreed that the said Marikar should bear the expense of preparing the conveyance.

On the 12th October, 1893, the said Marikar assigned to the plaintiff all his right and interest in the said agreement.

The intention of the parties to be gathered from their act was, I think, that within the time stipulated, if either required it of the other, the defendant should be ready to hand the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to hand over the price of Rs. 150. In short, the fulfilment of the respective promises was to be simultaneous. Not that the obligations were conditional.

As to the payment of the expense of preparing the document, I think the utmost which defendant could do would be to detain the document as a lien, he having of course the right to recover the amount as money paid at the other party's request.

Before going into the merits of the case it is necessary to determine the point of law raised in the Court below and pressed upon us in appeal by Mr. Bawa, and that is, whether the doctrine of specific performance is known to our law ; not that this point,

even if determined in defendant's favour, would conclude the case, for the plaintiff claimed alternative relief: specific performance in the first place, and if that relief was not open to him, damages for the alleged breach by defendant of his agreement.

The District Judge, as regards the merits of the case, has found against the plaintiff on both grounds of relief, and has dismissed his action altogether.

To this judgment I shall revert after dealing with the question of law.

If this was a case of first impression, I should pay more regard to the passages in the books relied on by Mr. Bawa, but really I think it is too late to call in question the law as it has been administered in our Courts.

The right specifically to compel a person to give something which he has promised to give, or to do something which he has promised to do, has been frequently recognized and given effect to in our Courts. If the thing cannot be given or done, then its equivalent, *id quod creditoris interest præstationem fieri*, is exacted. The present is a common case in our Courts. It has been before the Supreme Court since 1837. Take the cases reported in *Morgan and Beling, p. 145 (1837); 43/55, Rámanáthan's Reports, p. 152 (1851); Grenier, D. C., p. 39 (1873)*. No doubt the point on those cases was not taken, but had there been any doubt about the law it surely would have been taken ; but the case cited by Mr. Dornhorst shows that in later times the right has been distinctly recognized of compelling the specific performance of a covenant to sell a piece of land—*e.g., S. C. M., 19th November, 1886, D. C., Negombo, 14,007*.

Let me add the authority of Van der Linden and Grotius. As to Van der Linden, see Juta's translation, 2nd edition, p. 107, sections 6 and 7, chapter XIV.: "If the obligation consists in "doing something, the creditor can compel the defendant to "perform the act or to pay damages and interest." As for Grotius, see Herbert's translation, p. 300, chapter XLI.

Further, our Civil Procedure Code, section 331 *et seq.*, takes this law for granted.

So much for the question of law.

Mr. Bawa, however, urged that plaintiff's assignor was bound to tender to the defendant within the stipulated time the price of Rs. 150 before he could exact the document of transfer ; that this was a condition precedent to his right to demand, and defendant's obligation to execute a transfer. In any event, he argued that plaintiff was precluded from calling for the transfer, inasmuch as he had not brought the Rs. 150 into Court. In the view I have

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taken of the agreement which the parties entered into, I am of opinion that the plaintiff's assignor was not bound to tender this sum of money, or even bound to bring it into Court. The plaintiff is no doubt bound to hand the money to the defendant as soon as the defendant has executed the document of transfer.

The question remaining for decision is, has the plaintiff shown himself entitled to demand specific performance or damages? The District Judge has dismissed the action because, in his opinion, the plaintiff failed to establish a legal tender of the Rs. 150 within the stipulated time. I am not disposed to say that that finding of fact is wrong, but, as I have said before, the plaintiff was not required to tender the price as a condition precedent. I think all that the plaintiff was bound to establish was that he required the defendant to execute the promised transfer, and that he was ready and able, on that being done, to pay the Rs. 150 to the defendant. So much I think he has established, and in my opinion he is entitled to relief.

To which form of relief then is he entitled? It seems to me he is entitled, in the first instance, to an order directing the defendant to execute a transfer. He will not have the conveyance delivered to him till he has paid into Court Rs. 150 for the defendant's benefit and secured the payment of the expenses, if any, agreed or found to be due for the preparation of the transfer.

Before framing the decree, I would like to say one word about an encumbrance which was mentioned to us as affecting the premises. The argument on this part of the case left me under the impression that the nature and amount of the mortgage over the premises was known to the plaintiff to exist when he entered into the agreement to buy the land, and that what he engaged to pay for the land was the price of it with that particular encumbrance subsisting.

I set aside the judgment, and order the defendant to execute a conveyance of the land in favour of the plaintiff, and to produce it to the Court on a day to be fixed by the District Judge. If the defendant refuse to obey the order, the Court below will deal with the case in the manner required by the 331st and subsequent sections of the Civil Procedure Code.

If a draft conveyance, whether settled by the parties or the Court, is eventually prepared, the Court will require the plaintiff to pay into Court the sum of Rs. 150, and pay or secure the payment of the amount (if any) found to be due for the expense of preparing the draft.

That done, the conveyance will be delivered to the plaintiff and the money to the defendant.

If it is found impossible for any valid reason to execute the conveyance, the Court will decree the defendant to pay the plaintiff a sum of Rs. 100.

The appellant should have his costs in both Courts.

LAWRIE, J.—

I agree. Our Courts in Ceylon are Courts of Equity, and I do not doubt that they have power to interfere and decree a specific performance of agreement. For myself, I may say that for many years I have regarded the chapter on specific performance in Story's Equity Jurisprudence as applicable and as of authority in Ceylon.

This contract was not performed within the time originally fixed. For that both parties are (I think) to blame; but the defendant is more to be blamed than the plaintiff's assignor, because (as I read the contract) it lay on the defendant (who had received an instalment of the price) to prepare and to offer a conveyance. It was not until that was done that the plaintiff's assignor was bound to pay the money. Within the time fixed it was the assignor's duty (if he wished to purchase) to give the defendant notice that he had the money ready, and desired the conveyance to be prepared and signed, but he was not, I think, bound to tender the money absolutely and unconditionally. The defendant has not shown that subsequent events have made it impossible for him to perform his contract, and I therefore agree in the judgment of my brother Withers.

The decree entered was as follows :—

" It is ordered and decreed that the decree made in this action by the District Court of Colombo, and dated the 17th October, 1894, be and the same is hereby set aside, and in lieu thereof it is ordered and decreed that the defendant do execute a conveyance of the land in question in favour of the plaintiff, and produce it in Court on a day to be fixed by the District Judge. If the defendant refuse to obey this order, then the said Court will deal with the case pursuant to section 331 and subsequent sections of the Civil Procedure Code, but if a draft conveyance, whether settled by the parties or by the Court, is eventually prepared, then it is ordered that the said Court do require the plaintiff to pay into Court the sum of Rs. 150, and further pay or secure the payment of costs (if any) incurred in the preparation of the draft conveyance. On these conditions being fulfilled, it is ordered that the said Court do deliver the conveyance to the plaintiff and the money to the defendant.

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"And it is further ordered, that if it be found, for any valid reason, impossible to execute the said conveyance, the said Court do then decree the defendant to pay to the plaintiff the sum of Rs. 100.

"And it is also further ordered and decreed that the defendant do pay to the plaintiff his taxed costs of this action, both in the said District Court and in this Court."