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and
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MATTHES APPUHAMY v. RAYMOND *et al.*

D. C., Colombo, 5,861.

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January 11.

Specific performance—Agreement to sell land—Stipulation for damages—Alternative obligation—Conveyance of land to person other than the one to whom owner is under agreement to sell.

An agreement between plaintiff and first defendant for sale of a parcel of land by first defendant to plaintiff contained the stipulation that if first defendant failed, refused, declined, or in any manner objected to sell the land as agreed, he should pay plaintiff Rs. 500 as liquidated damages and return to him the part of the purchase money advanced by him to defendant. It also contained a covenant on the part of plaintiff not to lease, encumber, or alienate his interest in the premises until the deed of transfer was executed by first defendant, and a mortgage of the premises by first defendant to plaintiff to secure return of the part purchase money and payment of the damages aforesaid—

Held, that in the circumstances of this agreement, the penal stipulation was intended to be an alternative to the principal obligation on the part of first defendant, and not merely accessory to it, and plaintiff was not entitled to claim specific performance of defendant's agreement to sell.

First defendant, before action, had sold and conveyed the parcel of land aforesaid to second defendant, who was alleged to have, at the time, had notice of first defendant's agreement with plaintiff—*semble*, per BONSER, C.J., and WITHERS, J., that in consequence of such sale and conveyance first defendant had put it out of his power to specifically perform his agreement to sell the land to plaintiff, and plaintiff could not therefore claim specific performance of such agreement.

THE plaintiff and the first defendant entered into an agreement, dated the 14th April, 1894, whereof the following were the portions material to the issues in the case :—

“ That the vendor, in consideration of the sum of Rs. 3,500 agreed
“ to be paid to him by the vendee as hereinafter mentioned, doth
“ hereby for himself, his heirs, executors, and administrators
“ covenant and agree to and with the vendee and his heirs,
“ executors, administrators, and assigns that he, the vendor, shall
“ and will immediately at and after the expiration of fourteen
“ days from the date hereof, upon a good, valid, and marketable
“ deed of transfer, giving a good, valid, and marketable title to be
“ approved by counsel learned in the law, sell, assign, transfer, and
“ set over, free from encumbrance, unto the vendee and his afore-
“ written or to any person or persons whom he or they shall or may
“ nominate, the aforesaid land and premises in the schedule hereto
“ particularly described.

“ That in consideration of the premises the said vendee doth hereby for himself, his heirs, executors, and administrators covenant and agree to and with the vendor and his aforewritten that he, the vendee, shall and will, immediately after the expiration of fourteen days from the date hereof, purchase the said land and premises, and pay unto the said vendor the said sum of Rs. 3,500. That if the vendor shall fail, refuse, decline, or in any manner object to sell, assign, transfer, and assure the said land and premises, free from encumbrance, unto the vendor or his aforewritten immediately after the expiration of fourteen days from the date hereof, then and in any such cases the vendor shall and will pay unto the vendee or his aforewritten, as liquidated damages, and not by way of penalty, the sum of Rs. 500, in addition to other damages and expenses that may be recoverable. That if the vendee shall object to purchase immediately after the expiration of fourteen days from the date hereof the said land and premises, and fail, refuse, or decline to pay the said sum of Rs. 3,500 unto the vendor as aforesaid, then and in any such cases the vendor shall and will take and appropriate to himself as liquidated damages, but not by way of penalty, the sum of Rs. 250 that the vendee has paid to the vendor in part payment of the said price, the receipt whereof the vendor doth hereby acknowledge, and that further a sum of Rs. 250 from and out of the said sum of Rs. 3,500 shall be retained by the vendee until the vendee is put in possession of the said premises.

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“ That the vendor doth hereby covenant and promise with the vendee that he, the said vendor, shall not nor will at any time hereafter make a lease, demise, sale, mortgage, assignment, encumbrance, or alienation of his interest until the deed of transfer shall be executed in favour of the vendee as hereinbefore agreed; and such lease, demise, mortgage, sale, or gift as will be executed hereafter shall be considered as null and of no effect whatever against the interest hereby accruing or accrued to the vendee.

“ That for securing the amount hereby advanced and the liquidated damages herein agreed, the vendor doth hereby mortgage his interest in the said premises in the schedule hereto particularly described.”

On the 12th May, 1894, the first defendant sold and conveyed the premises—subject of the agreement—to the second defendant. The plaintiff thereupon instituted this action for a cancellation of the conveyance by the first defendant in favour of the second and for specific performance by the first defendant of his agreement

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aforsaid with the plaintiff. The District Judge held that as the agreement contained a stipulation that the first defendant should pay damages in default of performance of his part of the agreement the plaintiff could not compel specific performance, and dismissed the action.

The plaintiff appealed.

Dornhorst and *Sampayo*, for plaintiff, appellant.

Layard, A. G., and *Pereira*, for first defendant, respondent.

Morgan, for second defendant, respondent.

Cur. adv. vult.

11th January, 1897. BONSEE, C.J.—

I agree in dismissing this appeal. The Acting District Judge was in my opinion right in holding that the stipulation as to damages was in the circumstances of this case intended to be a substitute for specific performance.

That being so it is unnecessary to decide the question which was argued before us, whether specific performance can be granted in a case like the present, where the vendor has before action brought by an actual sale and conveyance to a third person of the thing contracted to be sold put it out of his power specifically to perform the contract. No trace, however, of any such action is to be found so far as we have been able to ascertain in the writings of any of the recognized authorities on Roman-Dutch Law or in the records of this Court. For my own part I feel some difficulty in understanding on what principle a stranger to the contract could be sued in the *actio empti*, which is the only action competent to the purchaser for enforcing his rights under the contract.

Were it necessary to decide that question, I should be prepared to answer it in the negative, for I hold a strong opinion as to the inexpediency of introducing into this Island the doctrines and practice of the English Courts of Chancery with respect to specific performance, with all the subtleties and refinements as to notice which have been evolved by the ingenuity of successive generations of Judges of that Court.

LAWRIE, J.—

I agree with my brother Withers that the Acting District Judge took a right view of this action, and that the decree dismissing it must be affirmed.

I entertain no doubt as to the competency of an action to compel specific performance of a notarial agreement to sell land in Ceylon.

I am not impressed with the difficulty of making the present second defendant a party. It is alleged that he is a privy in estate to the first defendant, that he took the conveyance from him with notice and knowledge of the contract between the plaintiff and the first defendant ; and if the contract had been such as to give the plaintiff the right to compel specific performance by the first defendant, I see no reason why the second defendant as a privy of the first should not be compelled to join in the conveyance. However, in my opinion these questions are not before us, because I agree with my brother Withers that the meaning of the contract is that if the first defendant " failed, refused, declined, or in any " manner objected to sell, &c., the land," then the only remedy competent to the plaintiff under the contract was to exact payment of Rs. 500 as liquidated damages in addition to any special damage which he might be entitled to from circumstances unforeseen at the date of the contract. On the other hand, if the plaintiff " failed or refused " to pay the balance, the contract provided that he was not to be liable in the full sum of Rs. 3,500, but he should forfeit only the Rs. 250 already paid to the defendant ; so I read the contract.

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If it had been possible to have dismissed the action against both defendants, so far as it prayed for specific performance, and to have then considered and adjudicated on the evidence whether the first defendant failed, refused, declined, or in any manner objected to sell, so as to render him liable in the payment of the Rs. 500 damages, I should have been glad to have given judgment finally disposing of the question between the parties. But it is impossible to do this in this action as it is framed, being one of specific performance only.

I agree to affirm.

WITHERS, J.—

Of the two most important questions argued before us the first was : If A, for good consideration, agrees to sell a certain land to B, and in breach of his agreement conveys the same land for value to C with knowledge of the agreement between B and A, can B compel C to transfer and deliver up the land to him ? No such case was cited to us as having occurred in our Courts, and on this point I think it sufficient to say that it would be an imprudent precedent to extend the remedy of specific performance to a case like the present. Here the intending vendor did not covenant for his assigns.

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The other question was, Can the intending buyer compel the intending seller specifically to perform an agreement to sell a particular land if that agreement contains an express stipulation to pay damages generally, or a certain sum by way of damages in the event of the seller not conveying the land in terms of the agreement. The answer to this question seems to me to depend on the wording of the agreement and the intention of the parties as indicated by their contract.

If the penal stipulation is intended to be merely accessory to the principal obligation, then it is surely open to the seller to exact specific performance.

If, on the other hand, the penal stipulation is an alternative obligation, and it is intended that the party making it may break the principal obligation, but shall pay the consequent damages, then the other party is restricted to his right of action to recover those damages. He cannot enforce specific performance. A party who breaks a binding contract is responsible in damages, whether he specially engages to pay those damages or not.

To add a stipulation to pay damages may be of advantage to the party for whose benefit it is made, especially when a definite sum is agreed to as a measure of damages, and that sum is secured by a mortgage or otherwise.

The mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator. Rather, I think, that if such a stipulation intended to be alternative and not accessory, the intention should be clearly expressed or indicated. This inartistic document, which is a disgrace to the draftsman, is a compound of type and pen, where strange expressions are used, words left out, and one word is put for another. But the fact that a penalty in addition to damages was stipulated for, that the intending vendor covenanted not to lease, encumber, or alienate his interest in the premises until the deed of transfer was executed by him, and that the intending vendor mortgaged the premises to secure the return of the part of the price already advanced and the liquidated damages (which really mean the penalty of Rs. 500), and not the damages and expenses as well, indicates to my mind that the penal stipulation was intended to be alternative and not merely accessory. If I am right in this view then the action for specific performance was rightly dismissed, and I would affirm the decree with costs.