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1955 *Present :* Gratiaen J., Pulle J. and Sansoni J.

THAHEER *et al.*, Appellants, *and* ABDEEN, Respondent

*S. C. 389—D. C. Colombo, 19,175*

*Contract—Agreement to sell immovable property—Specific performance—Principles applicable—Covenant to pay liquidated damages.*

Specific performance cannot be claimed in a contract which provides for the substituted obligation of payment of an agreed sum by way of liquidated damages.

In a contract for the sale of certain residential premises, clause 8 provided as follows :—

" 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees twelve thousand five hundred (Rs. 12,500) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of rupees fifteen thousand (Rs. 15,000) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of rupees twelve thousand five hundred (Rs. 12,500). "

Clause 9 provided further that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit.

*Held*, that the purchaser was not entitled to claim specific performance of the contract in the event of the vendors failing, refusing or neglecting to execute and cause to be executed a conveyance of the premises.

APPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *E. J. Cooray* and *N. C. J. Rustomjee*, for the defendants appellants.

*S. Nadesan, Q.C.*, with *G. T. Samarawickreme* and *J. Senathiraja*, for the plaintiff respondent.

*Cur. adv. vult.*



2——J. N, B 45135—1,593 (9/55)

June 10, 1955. GRATIAEN J.—

This appeal came before the present Bench in view of a difference of opinion between the Judges before whom it was originally argued.

The plaintiff claimed a decree against the 1st and 2nd appellants and against the other appellants (as subsequent transferees of the 1st appellant's interests) for specific performance of a contract No. 4080 dated 3rd October, 1947, for the sale of residential premises called " Barnes House " in Barnes Place, Colombo.

The contract sought to be enforced had been entered into between the plaintiff (as " purchaser ") and seven out of eleven co-owners of the premises including the 1st and 2nd appellants (described as the "vendors") whereby the purchaser agreed to buy, and the " vendors " undertook to sell *"and cause to be sold"* the entire premises on or before 31st December, 1947, for an aggregate sum of Rs. 92,000 out of which Rs. 12,500 had already been paid to the " vendors " by way of deposit. Vacant possession of the entire premises by an agreed date was also stipulated. In my opinion, the obligation of the " vendors " was single and indivisible and no individual vendor could be said to have fulfilled his part of the contract if he merely conveyed his share of the property together with the limited rights of occupation which a co-owner enjoys. I would therefore reject the argument that the contract was severable in any respect.

The remaining four co-owners were not parties to the contract, and, as they were minors at the time, their interests could not be sold without the authority of the District Court of Colombo. In the result, the " vendors ", in binding themselves to secure for the purchaser a single conveyance passing title to the entire premises in exchange for a composite consideration, had undertaken to produce a result which it was not wholly within their power to achieve.

Clause 8 of the contract provides as follows :—

> " 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees twelve thousand five hundred (Rs. 12,500) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of rupees fifteen thousand (Rs. 15,000) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of rupees twelve thousand five hundred (Rs. 12,500)."

The learned District Judge held in favour of the purchaser that clause 8 merely fixed the amount of compensation which would be payable by the " vendors " in the event of the purchaser electing to enforce one

of the alternative remedies available to him upon a breach of their contractual obligation ; and that the purchaser was not precluded from enforcing instead the other remedy of specific performance.

The only question which was argued before us was whether, upon a proper interpretation of the document read as a whole, the plaintiff could claim specific performance of the contract (or, if he so chose, of a part of the contract) in the event of all or any of the " vendors " failing, refusing or neglecting to execute and cause to be executed a conveyance of the entire premises within the stipulated period. Mr. H. V. Perera very properly conceded that, if clause 8 must not be construed as providing the only legal remedy available to the purchaser upon a breach by the " vendors " for whatsoever reason, this was an appropriate case for ordering specific performance having regard to the events which had occurred between 3rd October, 1947, and 31st December, 1947. During this interval the District Court had in fact sanctioned a sale of the minors' shares at a proportionate price, and their curators as well as the other vendors (except the 1st and 2nd appellants) were willing to execute, and ultimately signed, the draft conveyance tendered by the purchaser. The refusal of the 1st and 2nd appellants to join in the conveyance alone prevented the completion of the transaction. No valid grounds therefore exist for denying specific performance unless it was not available to the purchaser upon a proper interpretation of the contract. Accordingly, the appellants can only succeed if we adopt their submission as to the legal effect of clause 8.

In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a Court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party ; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases. *Farmers' Co-operative Society v. Barry* [1] ; *Woods v. Walters* [2] ; *Lee's Roman-Dutch Law (5th ed.) 265.*

So much for the distinction between English law and Roman-Dutch law on this topic. But in either system, the terms of a particular contract may expressly or by necessary implication exclude the remedy. For instance, the equitable remedy would not be available in England if the seller had bound himself either to convey the property or, *at his election*, to pay a sum of money by way of substituted performance.

[1] *(1912) S. A. A. D. 343.* [2] *(1921) A. D. 303.*

*Fry on Specific Performance* (6th ed.) chapter 3. Similarly, *Wessels on Contract para 1460* explains that under the Roman-Dutch law, " if one of (two) alternative promises is the performance of an act and the other the payment of money, we must gather from the contract and the circumstances whether the payment of money is intended merely as a penal clause *or whether it is to operate as a liquidated debt* . . . . If the payment of the money is not to be construed to be a penal clause, but as an alternative prestation, then directly the performance of the act becomes impossible or the promisor refuses to carry it out or cannot do so, *the money is due* ". A distinction is drawn in paragraphs 1453 and 1454 of the text-book between conjunctive, alternative and facultative obligations. " In the facultative obligation, there is a promise to deliver some definite thing or to perform some definite act, but at the same time the debtor reserves to himself the right of performing his contract by some other prestation e.g. I promise to deliver A, but I reserve to myself the right of delivering B instead. The primary object of the obligation is A, but I have the power (*facultas*) of substituting B ". The author also observes (para 1478) that " if the contract is silent as to whether the choice belongs to the debtor or the creditor, the law presumes that it lies with the debtor. It is the person that has to make the payment who is entitled to the choice ".

So much for the general principles ; but it is their application to particular cases which often presents enormous difficulties. The question always is, of course, *What is the contract ?* " The Courts must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation ",—*Ranger v. G. W. R.*[1]. I would also repeat what I had occasion to observe recently in a similar context, namely, that the interpretation of any particular words appearing in one written instrument is seldom of much assistance as a precedent for deciding the true meaning of some other written instrument. *Sivasambu v. Kathiresar Ambagar*[2].

I now proceed to consider whether clause 8 (as Mr. Nadesan contends) entitles the purchaser to elect at his option to enforce his legal remedy of damages against the defaulting " vendors " but leaves it open to him to enforce the alternative remedy of specific performance if he so prefers ; *or* whether (as Mr. H. V. Perera argued) clause 8 imposes a substituted obligation in the event of failure or refusal by the " vendors " to perform the primary obligation, namely, the conveyance by the " vendors " and certain others of the entire property for Rs. 92,000.

The conclusion which I have reached is that the language of clause 8 is not open to the construction contended for on behalf of the purchaser. The parties must clearly have appreciated on 3rd October, 1947, that failure on the part of the " vendors " to secure a conveyance of the entire

[1] *(1854) 5 H. L. C. 73.*

[2] *(1952) 55 N. L. R. 176 at 178.*

property to the purchaser on or before 31st December, 1947, in terms of the contract could result from a variety of causes. For example,

(1) the sanction of the District Court to the proposed sale might not be obtained or not be obtained in time ;

(2) the title of the premises might not be " deduced to the satisfaction of Mr. John Wilson "—Clause 5 ;

(3) one or more of the " vendors " might back out of the transaction during the interval between the date of the contract and the date fixed for completion.

In the first of these contingencies, specific performance of the indivisible obligation to secure the sale of the entire property would in the very nature of things have been impossible, because the " vendors " could not be compelled to achieve a result which it was beyond their power to bring about. Clause 8 certainly provides the purchaser's only remedy in that particular contingency, namely, that the vendors "*shall forthwith* " (the words are imperative, and exclude the notion of an option being granted to either of the parties) refund the part consideration previously deposited with them, and also pay an agreed sum by way of liquidated damages.

What then if the vendors should, for some other reason equally within the contemplation of the parties, default in the performance of their primary obligation ? Clause 8 equally provides that in any such contingency the deposit must " forthwith " be refunded and a like sum paid to the purchaser by way of compensation.

It follows from this analysis that what was clearly intended to constitute a substituted obligation upon the first contingency referred to must equally have been intended to constitute the sole obligation arising upon a default in any other contemplated contingency. Had it been the intention of the parties that the substituted obligation provided by clause 8 should represent the purchaser's sole remedy in one situation, but that the alternative legal remedy of specific performance (i.e., under the general law) should nevertheless be reserved to him at his option in another, it would have been a simple matter to insert in the contract express terms making separate provision for each separate contingency.

It is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to elect one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance *or* damages. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily implies that the primary obligation to sell is then to be regarded as having come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance. It is also significant that, if one considers the relevant issue of mutuality, clause 9 provides that, should the purchaser himself default for any reason, he would, though liable to pay an agreed sum

to the vendors as liquidated damages, be entitled to a refund of his earlier deposit. Clause 9 therefore denies to the " vendors " by necessary implication the alternative legal remedy of specific performance.

Mr. Nadesan strongly relied on *Long v. Bowring*[1] and other English decisions to the effect that in England, notwithstanding an express covenant to pay liquidated damages, the jurisdiction of a Court of equity to order specific performance had not been ousted. I certainly agree that a provision for the payment of liquidated damages may, in particular contracts, legitimately be construed as having been inserted to secure the performance by the defaulter of his primary obligation. But in my opinion this is not such a case. Moreover, the historical development of the remedy of specific performance in England explains why the Courts of Chancery in the country have always assumed that their equitable jurisdiction to act upon the conscience of a defaulting party could not be ousted unless the contract clearly so indicated. Accordingly, it may well be that the insertion of a clause providing for liquidated damages in an English contract would *prima facie* be regarded as applying only to a situation where the innocent party is content to enforce his common law remedy against the defaulter. Be that as it may, I think that in a system of law which recognises that two alternative legal remedies are *prima facie* available to the innocent party as of right, an agreement providing that, in the event of a breach, the defaulter shall forthwith be obliged to pay an agreed sum by way of compensation, raises, in my opinion, a presumption that the parties intended to rule out recourse to the other legal remedy.

For these reasons I have come to the conclusion that the plaintiff has misconceived his remedy. I would allow the appeal and dismiss the plaintiff's action against the appellants with costs in both Courts. In the absence of an alternative prayer in the plaint, we are not required to consider whether the plaintiff is entitled to any other form of relief against all or any of the " vendors ".

I should mention that Mr. Nadesan had raised a preliminary objection to the constitution of the 2nd appellant's appeal on two grounds, namely, that the petition of appeal had been signed by a proctor before his appointment had been filed in Court as required by Section 24 (1) of the Code, and that the revocation of an earlier proxy in favour of another proctor had not yet been sanctioned in terms of Section 24 (2). I would reject this objection. The revocation of the first proctor's authority, and the appointment of the second proctor had both preceded the filing of the petition of appeal, and the further formalities required by Section 24 had also been complied with before the expiry of the time limit for preferring an appeal to this Court. Apart from that, even if the 1st appellant alone had appealed, Section 760 of the Code would in this case have operated to the benefit of the 2nd appellant.

PULLE J.—I agree.

SANSONI J.—I agree.

*Appeal allowed.*

[1] *(1863) 33 Beavan 585.*