MENDIS
v.
ABEYSINGHE AND ANOTHER

SUPREME COURT.
FERNANDO, J., AMERASINGHE, J. AND
GOONEWARDENA, J.
S.C. APPEAL NO. 49/88; C.A. NO. 329/79(F);
D.C. COLOMBO NO. A/33/M
SEPTEMBER 15 AND 20, 1994.

Agreements to sell land – Renunciation of right to obtain valid transfer in favour of two others – Failure to complete transaction – Possession – Prescription Ordinance s. 7 – "Encumbrance."

Abeysinghe (defendant-respondent) by a notarial deed, agreed on 02.08.1967 to sell 18A OR 20P out of Galla Estate to one Wickremaratne. On the same day by another notarial deed Wickremaratne renounced his rights and privileges including the right to obtain a valid transfer in favour of Mendis (1st plaintiff-appellant) and one Speldewinde in consideration of Mendis and Speldewinde paying –

i. Wickremaratne Rs. 25,000/- in equal shares at execution of deed
ii. Wickremaratne Rs. 30,000/- on or before 02.02.1968.
iii. Abeysinghe Rs. 170,000/- on or before 02.02.1968.

On failure to fulfil (ii) and (iii), the Rs. 25,000/- paid to Wickramaratne at execution was to be forfeited.

On 04.04.1968 by notarial agreement P1/X50, Abeysinghe agreed to sell the same land for Rs. 350,000/- to Mendis and Speldewinde. A sum of Rs. 30,000/- had been paid as an advance and a further sum of Rs. 10,000/- was paid at the time of the execution of P1. The purchase was to be completed on or before 31 July, 1968 and on failure, Mendis and Speldewinde would pay damages at the rate of Rs. 150/- a day to Abeysinghe till possession which had been given to Mendis and Speldewinde from about 02 August 1967, was handed back to Abeysinghe. The date for completion of purchase was extended by three months on payment of Rs. 25,000/- on 02 August 1968 to Abeysinghe. The transaction was not completed within that time or thereafter but Mendis and Speldewinde continued to be in possession till August 1972 when, in terms of the Land Reform Law, they were compelled to vacate the land. Speldewinde died in 1972. On 29.07.1974 Mendis filed plaint praying for judgment in the aggregate sum of Rs. 163,296/- with legal interest based on four alleged causes of action against Abeysinghe. Speldewinde's sister Pearl Grace Anesthesia Abeyratne, was made a party-defendant to give her notice of the action but later she was added as the 2nd plaintiff. The basis of the action was breach of the written agreement P1 but on 16 June 1975 the plaint was amended to include an alternative cause of action based on an alleged oral agreement made on 09 March 1970 as described in a letter P22/X43 addressed by Proctor N. Balasundaram to Abeysinghe. By this oral agreement Abeysinghe was alleged to have agreed to –

(1) pay Mendis (a) Rs. 52,500/- being the amount paid by him on 02.08.1967 on the two agreements entered into on that day.

(b) Rs. 6,686.50 being stamp fees and legal expenses incurred by Mendis.

(c) Rs. 9,109.50 being expenditure incurred by Mendis in the preparation of the property for auction sale.

(2) allow Mendis to continue in possession as his licencee, free of rent until the aforesaid sums aggregating to Rs. 68,296/- were paid as follows:

i. Rs. 15,000/- on or before 31.12.1970.
ii. Rs. 25,000/- on or before 31.12.1971.
iii. Rs. 28,296/- on or before 31.12.1972.

Abeysinghe denied liability and pleaded that on the basis of P1, Mendis and Speldewinde had to make payment on or before 31.7.1968. They had failed to do so and therefore the agreement was to be cancelled and of no effect and the deposits were forfeited. The plaintiffs' claims were prescribed.

Mendis took up the position that Abeysinghe had to sell the land free of encumbrances but this land being part of Abeysinghe's deceased father's estate, Estate Duty was outstanding during the whole of the relevant period and therefore Abeysinghe was not in a position to transfer the land free of encumbrances. Hence, the blame for the failure of the transaction was on Abeysinghe. Further the plaintiff claimed compensation in respect of the sums expended by them in the preparation of the land for resale

The District Judge held with the plaintiff including the alternative cause of action and awarded Rs. 163,296/- to the 1st plaintiff and Rs. 107,000/- with costs to the 2nd plaintiff. The Court of Appeal entered judgment for the 1st plaintiff (Mendis) in a sum of Rs. 28,296 with legal interest from date of action and dismissed the action of the 2nd plaintiff. Both were awarded costs below but no costs in appeal.

Held:

(1) The vendor (Abeysinghe) was the sole heir of his deceased father who was the owner of Galla Estate. *Ex facie*, there was no defect in title. And there was no evidence to the contrary.

(2) The vendor had not deliberately concealed the fact that the property was the subject-matter of testamentary proceedings. The purchaser's notaries, in terms of Clause 11 of P1 had the custody of the deeds. From a perusal of the documents, it should have been evident that Abeysinghe's title was derived as the sole heir of his father. They ought to have found out the position with regard to the testamentary proceedings and if letters of administration were granted, whether it was conditional. However, this had not been done.

(3) The intending purchasers were negotiating a sale to Ceylon Paints Ltd., but this fell through; however this was not on account of the absence of the permission of the Court to sell the property. The signing of an agreement as far as the purchasers were concerned, ceased to be relevant. Admittedly, the permission of the Court to sell the property had not been obtained on 31st July or 31st October. However, that was not a reason for the purchasers' failure to tender the deeds and the purchase price. It was not even an acceptable excuse, for, as the purchasers themselves later suggested, an appropriately worded condition in the draft deed could have eliminated any difficulties in that regard.

(4) If estate duty was an "encumbrance", it was one which, as the purchasers demonstrated, could have been removed by an appropriate clause embodied in the deed which should have been tendered on or before 31st July. The fact that estate duty was payable was no impediment to the transaction at any time. Nor was it a cause for the failure of the deal with Colombo Paints Ltd.

(5) Reference the alternative cause of action, the purchasers enjoyed the fruits of the property until dispossession by the Land Reform Commission in August 1972. However prescription did not begin to run from the date of dispossession. The enjoyment of the fruits of the land was not based on any enforceable obligation on the vendor's part to permit it for there was no notarially executed document in that regard. There was no usufructuary mortgage as the appellant suggests. There was no lien as the District Judge had supposed. Possession and the enjoyment of the produce was not in lieu of interest. Possession was merely security for the payment of the amount promised. The debt was payable in 3 instalments - the first on or before 31.12.1970, the second on or before 31.12.1971 and the third on or before 31.12.1972. The first and second

instalment fell outside the 3 year period of limitation in respect of oral agreements and were therefore barred by s. 7 of the Prescription Ordinance.

Cases referred to:

1. *Silva v. Silva* 10 NLR 234.
2. *Misso v. Hadjear* (1916) 19 NLR 277 at 280.
3. *Mudianse v. Mudianse* (1875) 2 NLR 86.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekera P.C. with *Saumya Amarasekera* for Appellant.
H. L. De Silva P.C. with *Harsha Amarasekera* for the 1st Respondent.

Cur. adv. vult.

November 7, 1994.
AMERASINGHE, J.

AN OUTLINE OF THE CASE

On 2 August 1967, Alexander Edmund Rajapaksa Abeysinghe, by a notarially executed document, 2P2X49, agreed to sell a portion of Galla Estate in extent eighteen acres and twenty perches described in schedule B" to Joseph de Wansa Wickremaratna.

On the same day on which 2 P 2, X49 was entered into, another notarial agreement, 2 P 3, X99A, was also executed. After referring to the transaction in X49, Wickremaratne renounced "all the rights and privileges accruing and deriving from" the agreement X49 including the right to obtain a valid transfer of the land, in favour of Denzil Mendis and Germaine Speldewinde in consideration of (1) Mendis and Speldewinde paying Wickremaratne a sum of Rs. 25,000 in equal shares upon the execution of 2 P 3, X99A; (2) Mendis and Speldewinde paying Wickremaratne a sum of Rs. 30,000 on or before 2nd February 1968; and (3) Mendis and Speldewinde paying Abeysinghe a sum of Rs.170,000 on or before 2nd February 1968. If Mendis and Speldewinde failed to honour their obligations, the sum of Rs. 25,000 was to be forfeited to Wickremaratne. With regard to these two transactions, the learned District Judge observed that "Wickremaratna was merely a broker and he was paid off his fee on those two deeds."

On 4th April 1968, by a notarially executed agreement, P1, X50, Alexander Edmund Rajapaksa Abeysinghe agreed to sell the same land referred to in X49 and X49A for a sum of Rs. 350,000 to Denzil Mendis and Germaine Harris Speldewinde.

A sum of Rs. 30,000 had been paid as an advance and a further sum of Rs. 10,000 was paid at the time of the execution of P1. It was agreed that the purchase was to be completed on or before 31st July 1968 and that if the sale was not concluded by that date, Mendis and Speldewinde would pay damages at the rate of Rs. 150 a day to Abeysinghe till possession, which Mendis and Speldewinde had enjoyed from or about the time of the execution of X99A, was restored to him.

In consideration of a sum of Rs. 25,000 being paid to Abeysinghe on 2nd August 1968, the date for the completion of the transaction was extended by three months. However, the transaction was not completed within that time or thereafter. The plaintiffs continued to be in possession of the land till August 1972 when, in terms of the Land Reform Law, they were compelled to vacate the land.

THE ACTION IN THE DISTRICT COURT

On 29th July 1974, Denzil Mendis filed plaint in the District Court of Colombo praying for judgment in the aggregate sum of Rs. 163,296 with legal interest based on four alleged causes of action. Speldewinde had died in 1972 and therefore his sister, Pearl Grace Anesthesia Abeyratne, was made a Party-Defendant in the case to give her notice of the action, and later, on her application, she was made the 2nd plaintiff as she made claims on a basis similar to that of Denzil Mendis, the Plaintiff.

Although the basis of the plaintiffs' cause of action was an alleged breach of the written agreement P1, the plaint was amended on 16th June 1975 to include an alternative cause of action based on an alleged oral agreement made on 9th March 1970, as described in a letter, P 22, X 43, addressed by Mr. N. Balasunderam, Proctor S.C., to Abeysinghe.

In terms of the oral agreement, as set out in Proctor Balasunderam's letter, P22, X43, Abeysinghe had agreed to pay Denzil Mendis the sums of Rs. 52,500/-, being the amount paid by him on 2nd August 1967 on the basis of two agreements entered upon on that day; Rs. 6,686/50 being stamp fees and legal expenses incurred by Mendis; and a sum of Rs. 9,109/50 expended by Mendis in the preparation of the property for auction sale. In terms of the oral agreement, it was further agreed that Denzil Mendis would continue to be in possession of the property with Abeysinghe's leave and licence, free of rent, until the aforesaid sums aggregating to Rs. 68,296 were paid as follows: Rs. 15,000 on or before 31st December 1970; Rs. 25,000 on or before 31st December 1971 and Rs. 28,296 on or before 31st December 1972.

In his answer, Abeysinghe denied liability on the basis that, in terms of the agreement P1, Mendis and Speldewinde were obliged to tender the purchase price on or before 31 July 1968. They had failed to do so, and consequently, in terms of the agreement, it was deemed to be cancelled and of no effect, the deposits paid to him being forfeited. The position of the plaintiffs was that, in terms of the agreement, P1, the defendant had agreed to sell the land "free of encumbrances," and since the property in question was a part of the Estate of Abeysinghe's deceased father, A. N. D. R. Abeysinghe, in respect of which Estate Duty remained payable not only as at 31 July 1968 and within the extended time of three months from 31 July 1968, but even during a reasonable time thereafter, the Defendant was therefore not in a position to honour his obligation of transferring the property free of encumbrances and the blame for the failure of the transaction lay on the defendant. The plaintiffs maintained that in addition to the deposits made, stamp fees paid and legal expenses incurred, they had also expended sums of money in the preparation of the land for purposes of resale for which they should be compensated.

The learned District Judge in his judgment said:

> "Agreement P1 was executed on the basis that the vendor had perfect title to the property and had the capacity to make a valid transfer free of all encumbrances. Therefore ... the purchasers accepted the title of the vendor to the land and premises. It would appear that on the date on which the agreement was signed the vendor had failed to disclose that this was his father's property and that there was a Testamentary case pending in respect of it and that Estate Duty was payable. However, he had the capacity to make the transfer whenever he pleased, but the sale would be subject to Estate Duty . . .
>
> Mr. Eric Amerasinghe for the defendant put the blame of the failure of this transaction on the plaintiffs. He stated that the purchasers had refused to complete the contract although the vendor had been ready and willing to sell as agreed upon. The breach therefore, says counsel, is on the part of the plaintiffs. There could be nothing further from the truth. The evidence and

all the documents clearly indicate the anxiety of the Plaintiffs to conclude what they considered was a profitable deal. The Defendant on the other hand is shown to be deceptive and lackadaisical. Therefore, I cannot accept this argument. Mr. Navaratnarajah has rightly pointed out that the Defendant had in his written submissions ignored the vital terms in the agreement P1 namely that "the sale of the said land and premises was to be free of encumbrances." At the time the Agreement P1 was entered into the Defendant conveniently hid from the plaintiff the fact that this property was still the subject of a Testamentary action (D.C. Negombo 4214) and that Estate Duty was still payable. If so the land and premises were subject to an encumbrance in favour of the Commissioner of Estate Duty who has the right to have the property sold for payments of Estate Duty. The Defendant therefore is guilty of the cardinal sin of having hid this all important fact from the purchasers and having dishonestly pocketed their monies. It is hardly likely that the Plaintiffs whose business was dealing in Real Estate, would have entered into this transaction if they knew the true state of affairs. These same encumbrances, however, could have been removed by obtaining a certificate to release under section 53 of the Estate Duty Ordinance. Sale should have been completed before 31 July, 1968, and it is clear on the evidence that the Defendant was not in a position to sell the property "free of all encumbrances." The fact that this property was subject to administration proceedings became known to the Plaintiffs only much later. The Defendant by hiding this fact has cheated the Plaintiffs in to parting with their money and thereafter being very tardy in resolving the difficulty created by his deception. One cannot imagine any buyer purchasing property subject to an encumbrance on the said property in favour of the Commissioner of Estate Duty, which will attach to the property in spite of the sale. This is particularly true regarding persons dealing in Real Estate. It was the duty of the Defendant to see that the difficulty created by him was removed before the 31 July, 1968 which the Defendant had neglected to do. As the transaction had already commenced the Plaintiffs offered their good offices and an additional sum of Rs. 25,000/- for an extension of P1 by a further three months. The Defendant

shamelessly pocketed this money also, but obviously did not make any determined move in that direction or obtain permission from Court till 12.10.1968 (Vide P9). Whatever steps he took were taken so tardily that they were of absolutely no help whatsoever to the purchasers. (Vide P9B dated 9.1.1969). In the meantime, according to the Plaintiff there had been several offers for this land: He has proved one of them ... an offer by Colombo Paints Limited ... In letter P13 Colombo Paints Ltd. ... said that they are prepared to buy the property at Rs. 540,000/- subject to the title being passed by their lawyers. By P15 dated 6 December 1968, the Plaintiff has been informed that the lawyers for Colombo Paints have rejected the sale as "they find it difficult to recommend title." What this "difficulty" is, is evident. It is therefore clear as to who was responsible for the failure of this transaction. If the Defendant had been open and frank with the Plaintiffs in the first instance and stated at the very beginning that the property was subject to a Testamentary case and that Estate Duty in a large sum was payable, shrewd businessmen like Mr. Mendis and Mr. Speldewinde would not have touched it with a barge pole ..."

The following issues, among others, had been raised by the Defendant:

26. By Agreement No. 692 marked 'A' did the parties agree to the terms and conditions pleaded in paragraph (A) column 1 in 1st Defendant's answer?

27. Did the Plaintiff and the said Speldewinde observe the obligations and/or complete purchase as pleaded in paragraph (E) column 1 in the 1st Defendant's answer or within 3 months from 31 July 1968 or within a reasonable time?

The learned District Judge answered those issues as follows:

26. Yes, but the Defendant did not disclose that there was a Testamentary case regarding his father's estate in which this land was inventorized (sic.), regards which Estate Duty was payable. The failure of this Agreement was due solely to the failure of the Defendant to take quick and appropriate action to

release the land for sale, after his non-disclosure was brought to his notice by the Plaintiffs.

27. The agreement could not be implemented nor the purchase finalized, solely due to the lethargy of the Defendant.

After answering these and the several other issues in the case, the learned District Judge stated as follows in his judgment:

> To my mind agreement P1 was a perfectly clear, straightforward transaction, which if not for the land being liable to Estate Duty, would have been an extremely profitable venture from which both Plaintiffs and Defendant would have derived immense profit. Unfortunately for some unknown and inexplicable reason, Defendant decided not to disclose the pendency of the Testamentary Action in D.C. Negombo. If this fact had not been discovered in time by the purchasers, they would have found themselves in an awful soup. If the Defendant had been frank and explained his difficulties, the combined agile brains of both Mendis and Speldewinde would have perhaps found an easy solution for him. The blame for the breakdown of the Agreement must be placed squarely on the shoulders of the Defendant. However, he was able to survive so long mainly due to the brilliance of Counsel ... who appeared on his behalf. They have used every legal objection and legal tactic known to the law on behalf of the Defendant, but were countered successfully by the legal luminary who spoke on behalf of the 1st Plaintiff."

With regard to the alternative cause of action, the learned District Judge held that the arrangements in the oral agreement as set out in Proctor Balasunderam's letter P22, X43, had been established, the Defendant having failed to give evidence in that regard. The learned District Judge states that the Defendant failed to

> "pay the amounts he had undertaken to pay on the dates specified. Therefore the Plaintiff would be entitled to continue in possession and the amounts agreed upon would still be due. In August 1972, the Land Reform Law came into force, and the Plaintiff was deprived of the possession. Prescription ... would

commence to run therefore only from August 1972, when the Plaintiff's possession came to an abrupt end and his lien on the property was lost ... Period of prescription would be three years from August 1972. Plaint was filed on 29 July 1974, well within the prescriptive period. Therefore I hold that the Plaintiff succeeds on the amounts prayed for in the alternative cause of action also."

On 30 November 1979, the learned District Judge gave judgment for the first Plaintiff in a sum of Rs. 163,296/- and for the second plaintiff in a sum of Rs. 107,500 with costs.

THE ACTION IN THE COURT OF APPEAL

The defendant appealed from the decision of the learned District Judge and the matter was argued before the Court of Appeal on 25, 26 and 27 May and 6 and 8 June 1988. Judgment was delivered on 5 August 1988.

With regard to the question of who was to blame for the failure of the transaction contemplated by the agreement (P1), the Court of Appeal observed that, although the learned District Judge had taken the view that, the "failure of agreement P1 was solely due to the Defendant's non-disclosure of the fact that a Testamentary action was pending in respect of his father's estate in which the land in dispute was inventorized (sic.) and which land was liable for estate duty," yet, "The title deeds of the land were right through with the Plaintiffs' lawyers from sometime prior to the execution of P1, and those deeds would have certainly revealed that the ownership of the land had been with the Defendant's deceased father. It is probably on the basis that the Defendant is the sole heir of his father that the Plaintiffs had accepted the title of the Defendant to the land."

After referring to the offer made on 29 August 1968 (P13) on behalf of Colombo Paints to purchase the land for Rs. 540,000, subject to title being passed by their lawyers, the Court of Appeal observed as follows:

"The offer being Rs. 190,000 in excess of what the purchasers had agreed to pay the vendor, naturally, the purchasers were

anxious to get the agreement P1 expeditiously extended by another notarial agreement and their anxiety is reflected in a series of letters exchanged between the purchasers and their Lawyers.

It is only at this stage of attempting to get the agreement P1 extended, that for the first time in the voluminous correspondence produced in this case that any reference is made to the testamentary proceedings of R. N. D. A. Abeysinghe's estate. By letter dated 23.09.1968 (P2) sent by M/s D. L. & F. de Saram (the purchasers' lawyers) to D. F. de Silva (the vendor's lawyer) with copies to the purchasers, it is impressed (upon them), that a specific application must be made by the vendor in his father's testamentary action seeking sanction of Court to sell the land and a release be obtained from the Commissioner of Inland Revenue regarding estate duty. On 25.09.1968, by P3 the first purchaser, Denzil Mèndis wrote to M/s D. L. & F. de Saram on the contents of P2. From the contents of P3 it would appear that the existence of the testamentary action, the advisability to get the Court's sanction for the sale and the necessity to obtain a release from the Department of Inland Revenue, do not appear to have come as sudden revelations to Denzil Mendis. He wrote to say that on 31.01.1968 the Department of Inland Revenue has issued the final assessment in the testamentary case and he proceeded to give the charge number and the amount of estate duty payable. He added that as soon as the dues are paid from the proceeds of the sale, the release will be granted and he requested M/s D. L. & F. de Saram to draft a specific application to obtain the sanction of the District Court, Negombo, to sell the property. On 26.09.1968 by P4 Denzil Mendis wrote again to M/s D. L. & F. de Saram to say that he had contacted the vendor and that the matter could now be finalized.

Steps were being taken to get the sanction of the District Court of Negombo to sell the land. On 7.10.1968 the purchasers wrote letter P6 to M/s D. L. & F. de Saram indicating their anxiety to get the period of P1 extended till 31.12.1968, as prospective

purchasers from them 'cannot be held in suspense any longer.' The purchasers insisted that the proposed agreement extending the validity of P1 should embody conditions stipulating the vendor to obtain Court's permission and ensuring the payment of dues to the Inland Revenue Department, to which the purchasers stated, that the vendor was agreeable. The statement in the letter P6 "We exonerate you from any responsibility which may arise as a result of our prevailing on you to go ahead with the agreement," reveals that M/s D. L. & F. de Saram had expressed their cautious disapproval in executing any fresh agreement **before** obtaining the sanction of court to sell the land and the payment of dues to the Inland Revenue Department. On the same date i.e. 7.10.1968, the first purchaser sent another letter to M/s D. L. & F. de Saram (X33) expressing the view that since obtaining the sanction of Court for the sale of land would take time, an agreement should be drafted immediately "making provision for such contingencies."

On 8.10.1968 by letter X20 De Sarams wrote to the purchasers in which the following passages appear.

"Mr. D. F. de Silva subsequently sent us certain papers filed in the testamentary case and it becomes apparent that Mr. Abeysinghe as administrator of the estate did not have authority of Court to sell you the land."

"We have pointed out to you that you have in an earlier agreement accepted title. Ordinarily the sale agreement should have been conditioned on Mr. Abeysinghe obtaining the sanction of Court to sell the land and also obtaining an undertaking from the Commissioner of Inland Revenue to release the land from liability to estate duty upon payment to him, such a sum as may be fixed by him. It is no longer possible to make the sale conditional upon the happening of these events." The letter added:–

"We would point out that if Mr. Abeysinghe fails for any reason to obtain the sanction of Court to sell the land, you might find yourself in difficulties."

On 17.10.1968, the first purchaser wrote to the Commissioner Inland Revenue inquiring whether on payment of Rs. 91,264, the property will be released and a reply was received by him in the affirmative. Whereupon on 25.10.1968 by letter P19, the first purchaser wrote to M/s D. L. & F. de Saram urging that an agreement extending the validity of P1 be immediately drawn up, as the District Court had now sanctioned the sale and that the Department of Inland Revenue has confirmed that on payment of Rs. 91,264 with interest, the property could be released.

However, since it was discovered that the Court's permission had been obtained for the sale of 18 acres of land and not for an extent of 18 Acres 0 Roods 20 Perches as mentioned in P1, on 29.10.1968, by X23, M/s D. L. & F. de Saram requested D. F. de Silva to get the order of Court rectified and to ascertain whether the estate duty should be paid out of the amount payable to the estate of the deceased. On 6.12.1968 de Sarams wrote to the vendor's Proctor handling the testamentary case, to get the order of Court amended showing the extent of land as given in P1. On the same day, de Sarams by letter P15 informed the purchasers that M/s Murugesu and Kularatne had informed them of their inability to recommend title of the land to their clients M/s Colombo Paints Limited. A copy of the letter sent by them to the vendor's Proctor handling the testamentary case, was also sent along with P15. All sanguine expectations of the purchasers in making a handsome profit appear to have been dashed to the ground.

On 7.12.1968, the first purchaser wrote to the vendor letter P20 through his new lawyer, Proctor N. Balasundaram, stating that he is no longer interested in the purchase of the land "due to various encumbrances affecting the land which the vendor has taken the least trouble to remedy." Among other allegations levelled against the vendor in that letter were, that at the time P1 was executed the vendor had failed to disclose that the property was being administered in the testamentary case No. 4214 of District Court Negombo, that he accepted deposits

> fraudulently when he could not have transferred the property without getting it released from the Court and the Department of Inland Revenue, that the application to Court seeking release was made as late as 12.10.1968 only after this was revealed on 11.09.1968, the day the fresh agreement was to have been signed; that on 18.10.1968 the District Court Negombo had agreed to release only 18 Acres and up to that date no application had been made to get it rectified; that the sale of the land to M/s Ceylon Paint Company Ltd., fell through because their lawyers found it difficult to recommend title, "probably due to various encumbrances affecting the land;" and that no attempt has been made by the vendor to get the property released on payment of estate duty, which fact was concealed when agreement P1 was written and deposits obtained. The letter proceeded to demand the payment of a sum of Rs. 52,500 paid as deposits; a sum of Rs. 6,686.50 incurred as legal expenses; a sum of Rs. 9,109.50 as expenses incurred on development of land, and a sum of Rs. 95,000 as half share of the amount of damages suffered by both purchasers. No reply was received from the vendor to this letter.

With regard to the contention of the purchasers that the vendor had no authority to sell the land, the Court of Appeal observed as follows:

> In terms of section 55 of the Estate Duty Ordinance, no letters of administration shall be granted by Court in respect of the estate of a deceased person until the Commissioner of Estate Duty has issued a certificate that the Estate Duty has been paid or secured and that certificate is filed in Court. Section 539 B of the Civil Procedure Code, permits the Court to grant letters of administration upon the production of a provisional certificate issued by the Commissioner of Estate Duty. Apparently no letters of administration had been issued to the defendant as at 31.07.1968, but an application had been made to Court seeking sanction for the sale of the land in dispute prior to obtaining letters of administration, in terms of section 539 B of the Civil Procedure Code. As this application had been made and

> granted only after 31.07.1968, Mr. Samarasekera contends that the defendant had no authority to sell the land as at 31.07.1968.

However, it would appear to us that incapacity to sell the land would be attached to the defendant, as Dr. Jayewardene points out, *qua* administrator. The defendant had title to the land as the sole heir of A. N. D. A. Abeysinghe, and he could have lawfully conveyed his title to the property. This position appears to be covered by judicial authority, vide *Silva v. Silva* [1].

On the question whether the vendor could not have transferred the land 'free of encumbrances', the Court of Appeal observed as follows:

> It is submitted that unless a certificate of payment in terms of section 52(1) of the Estate Duty Ordinance or a certificate of release in terms of section 53(1) was issued by the Commissioner of Estate Duty, the property would be burdened with Estate Duty. It appears to me that the defendant could have secured for the plaintiffs either of these certificates by paying part of the consideration on P1, to the Commissioner of Estate Duty. The correspondence produced in this case although referring to a period subsequent to 31.07.1968, amply demonstrates that this course available to the defendant, was well within the contemplation of the plaintiffs who were experienced 'developers.' Therefore, I am of the view, that the defendant could have lawfully transferred the land as at 31.07.1968, free from any encumbrances.

With regard to the obligations under the oral agreement, after agreeing with the learned District Judge's finding that they had been established, the Court of Appeal considered the question whether the claims were prescribed and observed as follows:

> In terms of section 7 of the Prescription Ordinance, no action shall be maintainable for the recovery of money due on any unwritten promise, unless such action shall be commenced

within three years from the time after the cause of action shall have arisen. This cause of action was brought in by the amended plaint filed on 15.06.1975, but, it would relate back to the date of original plaint dated 29.07.1974.

The oral promise stipulated that the first plaintiff should continue in possession of the land till such time that the sum of Rs. 68,296 is paid to him. The first plaintiff was in possession of the land till August 1972 when the Land Reform Commission dispossessed him. Therefore, it is submitted that the cause of action arose on 31.12.1970 on the defendant defaulting in the payment of the first instalment and therefore the cause of action is prescribed. The learned trial judge has held that prescription runs from August 1972 when the 1st plaintiff's possession came to an abrupt end "and his lien on the property was lost." It is manifest that the 1st plaintiff could not have had a lien on the property. Besides, by an oral agreement no interest in the immovable property could have been created in violation of section 2 of the Prevention of Frauds Ordinance.

According to the parol agreement, it has not been agreed that the whole debt is to become due upon failure to pay any instalments. In these circumstances when does the cause of action commence? Wessels – The Law of Contracts in South Africa – Roberts, Second Edition, at page 754 states:– "If a debt is payable in instalments, action can as a rule only be brought for the amount of each instalments as it becomes due, and therefore prescription of the first instalment begins to run from the date it became payable, of the second from its due date and similarly in the case of others (Pothier, Obligations section 645.)".

Applying the above principle, recovery of the first two instalments is clearly prescribed and the defendant will be liable to pay the first plaintiff a sum of Rs. 28,296 due on the last instalment.

On 5 August 1988, the Court of Appeal set aside the judgment of the learned District Judge and entered judgment in favour of the first

plaintiff in a sum of Rs. 28,296 with legal interest from the date of the action and costs of the action below. The action of the second plaintiff was declared to stand dismissed with costs below. No order was made with regard to costs in the Court of Appeal.

THE ACTION IN THE SUPREME COURT

On 7 October 1988 the Court of Appeal granted leave to appeal to the Supreme Court, and the matter was argued on the 15 and 20th of September, 1994.

ALLEGED DEFECT IN THE VENDOR'S TITLE

The purchasers had maintained that the transaction could not be completed because the vendor had no title. However, the purchasers were not troubled by the title of the vendor until the failure, in December 1968, of their attempt to clinch the deal they were negotiating with Colombo Paints Ltd. The transaction in question really commenced with the execution of documents 2P 2, X 49 and 2P 3, X 99A on 2 August 1967. It would appear from the cross-examination of Denzil Mendis in the District Court (see p. 212 (247) and p. 213 (248) C. A. Brief) that an attempt to sell the property by auction on the strength of rights derived from 2P 3, X 99A had failed. He attributed the failure to the fact that the lawyers of persons from whom money had been collected had "refused to accept title. He had no title to sell."

Q. He had no title because your lawyers told you so, is that what your lawyers told you?
A. Yes.
Q. You said that because the title was not acceptable to the purchasers that attempted sale in 1967 failed?
A. Yes.
Q. And yet in February (sic.) 1968 you entered into the agreement P1?
A We did. He said if you have accepted title for the first you have to accept title for the second.
Q. And you did pay for eminent counsel for legal opinion, Mr. H. V. Perera?
A. Yes.

Q. It was after that you asked for an extension?
A. We met Mr. H. V. Perera in order to find out that the particular agreement was in order.
Q. And he approved it and you signed?
A. Yes.

It might be observed that Mendis and Speldewinde were not acting blindly without a sufficient understanding of their rights and duties. They had not only before the signing of P1, but afterwards consulted Mr. H. V. Perera, Q.C. and Mr. H. Wanigatunga, Advocate. (See P10).

It would appear that Union Carbide Ltd. evinced an interest, but by their letter of December 11th 1967, X3, (page 391 (446) C. A. Brief) indicated that they did not wish to proceed with the matter pending instructions from their Hong Kong and U.S.A. associates. No question of title was raised. As for others, there is nothing I can find in the record which supports Mendis' assertion that the lawyers of purchasers had rejected title.

Although in clause 2 of agreement P1 it is stated that "The purchasers accept the title of the vendor to the said land and premises", no such clause appears in 2P 2, X 49 entered into between Abeysinghe, the vendor and Wickramaratne. The "owner" having been said in the recital to be "seized and possessed of or otherwise well and sufficiently entitled to all that land called Ekala Estate, now called Galla Estate", it is merely declared in clause 9 that the land "is free from all encumbrances" and that the owner "agrees to warrant and defend title at the request of the purchaser or his nominee or nominees" In agreement 2P 3, X 99A between Abeysinghe and Mendis and Speldewinde, the recital declares Abeysinghe to be the "owner" who was "seized and possessed of or otherwise well and sufficiently entitled to the land called Ekala, now called Galla Estate." There is no clause corresponding to clause 2 of P1 nor any clause corresponding to clause 9 of 2P 2, X49. And so, Mendis' explanation during cross-examination: "He said if you have accepted title for the first you have to accept title for the second" makes, no sense. Despite the failure of the previous efforts to sell attributed to a lack of title, the purchasers entered into yet another agreement, P1, on 4th April 1968, in which they, in a draft approved

by Mr. H. V. Perera, Q.C., who no doubt would have been instructed, *inter alia*, with regard to the alleged reasons for the previous failures, expressly accepted the title of the vendors. Moreover, in clause 5 of the agreement P1, it is stated as follows: "The sale of the land and premises shall be free of all encumbrances and the vendor will warrant and defend the title to the said land and premises or portions thereof **but the vendor will not give any express warranties of title."** (The emphasis is mine). If title had been a problem, why was such a provision introduced and approved?

In terms of clause II of P1, the title deeds and documents of the land were to be with the purchasers' notaries, Messrs, D. L. & F. De Saram. They did not advise the purchasers of any defect in title, for there was none and would not have said so. However, the day after information was received of the failure of the Colombo Paints deal, on 7 December 1968 the purchasers, through another Proctor and Notary, Mr. Balasunderam, for the first time suggested in letter P20, X 41, that they were unable to complete the transaction because of a defect in title.

The vendor was the sole heir of his deceased father who was the owner of Galla Estate. *Ex facie*, there was no defect in title. And there was no evidence to the contrary. When Messrs. Murugesu and Kularatne on behalf of Colombo Paints Ltd. had called for the documents relating to title, in his letter dated 2 November 1968 to his notaries (X 36) Mendis himself confidently, and quite honestly and correctly, asserts that "in view of the fact that the title to the land is **flawless,** it will not be possible for Messrs. Murugesu and Kularatne to report adverse (sic.) on the title without assigning sufficient reasons, therefor." In the letter dated 6 December 1968 (page 365 (417) C.A. Brief), the purchasers' notaries said: "We confirm our telephone conversation with you today when we informed you that Messrs. Murugesu and Kularatne had informed us that their clients are now no longer interested in the purchase of the property, as they find it difficult to recommend title." Proctor Balasunderam in X 41 says that Murugesu & Kularatne had "difficulty to recommend title **probably due to various encumbrances affecting the property."** (The emphasis is mine). His position was not that the transaction had

fallen through because the vendor was not the owner and, therefore, had no **title.** There was no problem ever raised by Messrs. Murugesu & Kularatne with regard to Abeysinghe's **ownership.**

They had other difficulties which were contorted and misinterpreted to mean that there was a defect in title: Murugesu & Kularatne had initially, but erroneously, assumed that **Mendis and Speldewinde,** owned the land. (See the letter of Messrs. Murugesu & Kularatne to the purchasers' notaries, P13, dated 29 August 1968). By that date, P1 having expired on 31 July 1968, Mendis and Speldewinde had no right to convey title to the property in question. Later, however, Murugesu and Kularatne raised the question in their letter X 31 dated 29th October 1968 seeking an extension of time from the purchasers' notaries. They said: "Meanwhile we shall be glad if you will consider the practical point we raised with you over the telephone as to how the deed is to be executed when all that your clients now have is a sale agreement." Indeed, an informal sale agreement is all that Mendis and Speldewinde had after the expiration of P1. It was a problem which the purchasers' notaries themselves had referred to in their letter X 35 dated 2 November 1968 addressed to Mendis. They stated: "You and Mr. Speldwinde have no title at the moment to enter into a sale agreement. You can enter into a sale agreement only after the agreement with Mr. Abeysinghe has been signed". Responding to that, Mendis in his letter to his notaries, X 37, said: "Actually speaking, we have an agreement, but all that we require is an extension of time to complete the sale." And in his letter to his notaries dated 25 October 1968, P19, X 22, Mendis states that since "the implied extension expires on 31.10.68 and in order to avoid any misunderstanding with Mr. Abeysinghe after the date it is imperative that the agreement granting us extension of time be signed forthwith." There was much more to the fresh agreement than the avoidance of misunderstanding. Even the so-called "implied extension" of P1 had lapsed by 31 October, and Mendis was well aware that unless he was empowered by a fresh notarial agreement, he would not benefit from the sale to Colombo Paints Ltd. Naturally, as the owner, Abeysinghe could have conveyed the land to Colombo Paints Ltd. But that was something Mendis wanted to prevent in his ow interests. When on August 13 1968 Murugesu and Kularatne by their letter P13

called for the title deeds, stressing that their clients wished to enter into a sale agreement "without delay", Murugesu and Kularatne calling for the deeds through a messenger to "avoid delay", Mendis wrote a letter on 28 August 1968, P16, to his notaries requiring that the agreement between Abeysinghe, Mendis and Speldewinde be signed "within the next three days", and adding as follows: "Please make arrangements to forward the title deeds to Mr. Velupillai Murugesu ... only after the agreement referred to above has been duly signed. Mr. Murugesu we understand will be calling for the title deeds today." On the following day, Mendis and Speldewinde wrote the following letter, X 9, to their notaries:

> Further to our visit to you this morning, we write to request you to please withhold forwarding title deeds to Mr. Murugesu, Proctor & Notary, until such time we sign the agreement embodying the extension of time which we trust you will please expedite. Forwarding of title deeds prior to signing of the aforesaid agreement, is in our opinion suicidal to the transaction and hence this request.

Why it was deemed to be "suicidal" was no doubt the plain possibility that Abeysinghe might directly transfer the property to Colombo Paints Ltd. And so, in letter X 36 of 2nd November 1968, Mendis instructs his notaries as follows:

> In view of the difference in the purchase price and the selling price, it is advisable that the transfer of the property should be executed in our favour in the first instance, and immediately thereafter any transfer [of] the land to the clients of Messrs. Murugesu and Kularatne. Although the expenditure of such a move is enormous, yet in the interest of the transaction it is inevitable.

The title deeds and documents were forwarded to Murugesu & Kularatne on 22 October 1968 (see X 32), although the proposed agreement between Abeysinghe, Mendis and Speldewinde had not been concluded.

From the point of view of Murugesu and Kularatne, there was a more important problem than the absence of an agreement – the

question of the extent of the land. In response to an advertisement of 20 acres of land in close proximity to the Industrial Estate of Ekala announced by an advertiser whose address was stated to be c/o The Dental Chamber, 292, Havelock Road, Colombo 5, the General Manager of Colombo Paints Ltd., on 7 March 1968, wrote a letter, P11, requesting "full particulars" and for arrangements for the Director/General Manager to inspect the land at the advertiser's "earliest convenience". There being no response, a reminder, P12, was sent by the Director/General Manager on 15 March 1968. On 29 August 1968 in their letter, P13, Messrs. Murugesu & Kularatne wrote to the notaries of Mendis and Speldewinde stating that their clients, Colombo Paints Ltd., were willing to buy the property "belonging to your clients Messrs. Denzil Mendis and Speldewinde". They were willing to purchase "the property covered by Plan No. 1303 dated 3 December 1967 ... in extent 18 acres 2 roods and 38.5 perches at Rs. 540,000/- subject to the title being passed by us." The purchasers' notaries in their letter X28, dated 31st October 1968 referred to the terms of the offer in the letter of 29th August from Murugesu & Kularatne and advised their clients as follows:

> By their letter to us of 29 August 1968, Messrs, Murugesu & Kularatne informed us that their clients offered you a sum of Rs. 540,000 for a land in extent 18A – 2R – 38.5P according to plan No. 1303 dated 13 December 1967 made by D. J. Nanayakkara. According to the Sale Agreement the extent of the land you have [purchased] is 18A 0R 20P according to Plan No. 532 dated 19th September 1910 made by H. M. Fernando, Licensed Surveyor. A problem might well arise in regard to the differences in extent between the two plans ... The purchasers might well seek to have the price reduced in view of the lesser extent ... You might consider reducing the purchase price ... Kindly negotiate this with the intending purchasers.

Admittedly, all that P1 had conveyed to Mendis and Speldewinde was 18 acres and 20 perches, and all that was informally agreed later to be sold to them was the same extent of land. The land advertised for sale by them had been 20 acres. In terms of the survey plan submitted by the purchasers to Murugesu & Kularatne, namely the

plan made in December 1967, showed an area of 18 acres 2 roods and 38.5 perches. Mendis, writing to his notaries on 2 November 1968, X 36, took up the position that the offer of Rs. 540,000 was on the basis of Rs. 30,000 per acre and that "Any difference in extent over 18 acres is not our responsibility."

It is clear from the letter of the purchasers' notaries to Mendis, P8, dated 22 November 1968 that they had been informed by Murugesu & Kularatne of the difficulties they were having in reporting on title on account of the absence of two plans of 1892 and 1931 and the need to have the block of 18 acres and 20 perches referred to in P1 superimposed on a plan of 29 September 1943 and the reconciliation of the discrepancy between the plan made in 1967 and submitted to Murugesu & Kularatne which gave an extent of 18 acres 2 roods and 38.5 perches when P1 referred to 18 acres and 20 perches. The purchasers' notaries advised their clients that a fresh application should be made to court for permission to sell setting out the exact extent. They reported that that was also the view of Murugesu & Kularatne. However, there was no response to that, the purchasers probably holding on to the view that the discrepancy was not their responsibility.

And so, the deal with Colombo Paints Ltd., fell through and the purchasers' notaries informed their clients by their letter P15, X 30, dated 6 December 1968 that Murugesu & Kularatne had informed them that their clients "were now no longer interested in the purchase of the property as they find it difficult to recommend title." The difficulty, however, as we have seen, had nothing to do with Abeysinghe's ownership and right to sell the property.

But once the Colombo Paints deal fell through, the purchasers were no longer interested in getting an agreement. They had one deal in mind and when that did not materialize that was the end of the matter. They had very plainly said in their letter dated 7 October 1968 to their notaries (P6, X 18): "In fact it would be of no use signing this agreement in the event of our buyers changing their minds." Although the purchasers' notaries in their letter P7 A dated 29 October 1968 to the vendor's notaries suggested an extension of three months from

the date of the signing of the agreement, which would have extended the date well beyond the 6 of December, they were no longer interested. The purchasers had suggested an extension up to the end of December 31 (See P6, X 18). But when the one transaction they were interested in failed on 6 December, the agreement did not matter to them. What they became immediately interested in after the 6 of December was a search for ways and means of drawing back from their obligations. Just a day after being informed of the fact that Colombo Paints Ltd., were no longer interested, the purchasers abandoned Messrs. D. L. & F. De Saram who had acted for them from the time of the execution of P1 and knew all about what had transpired. They engaged the services of a new lawyer, Proctor Balasunderam, and instructed him to write a letter, P20, X 41, *inter alia,* attributing the failure of the transaction in P1 to fraud and deception and negligence on the part of the vendor.

On the question of the failure of the Colombo Paints deal, Mr. Balasunderam said that Murugesu and Kularatne had "difficulty to recommend title probably due to various encumbrances affecting the property ... which you have not taken the least trouble to remedy." Admittedly, Murugesu & Kularatne had raised the question of estate duty: but they did not confuse that matter with the question of title. In fact, Murugesu, Kularatne were well aware of what could be done in that connection, for they had informed the purchasers' notaries, and this in turn was conveyed to Mendis, that they would advise their clients "to pay a portion of the purchase consideration in full settlement of the claim on estate duty." (See P8 dated 22nd November 1968).

THE SUPPOSED ABSENCE OF LETTERS OF ADMINISTRATION

Learned counsel for the appellant submitted that the view of the Court of Appeal that the defendant could have lawfully conveyed his title on the basis of the decision in *Silva v. Silva* [1], and that any incapacity to sell the property imposed by the provisions of the Civil Procedure Code relating to testamentary actions applied only to administrators as such, was erroneous, being "in the teeth of section 547 and section 539 B of the Code."

SECTION 539B PROVIDES AS FOLLOWS:

(1) Notwithstanding the provisions of section 33 of the Estate Duty Ordinance or of section 42 of the Estate Duty Act, as the case may be, where for the purpose of paying estate duty or for any other sufficient cause it becomes necessary to sell any property of the estate of a deceased person prior to the issue of probate or letters of administration the court may grant letters limited for the purpose of selling such property.

(2) Such property shall be specified in the grant and such grant shall expressly state that the letters are issued subject to the following conditions:-

(a) that the sale shall be, if by private treaty, at the price fixed by court, or if by public auction, either at an upset price or otherwise;

(b) that the net proceeds of sale shall be deposited in court within such time as the court may prescribe;

(c) that the administrator to whom the letters are issued is not empowered to execute any deed of conveyance of immovable property prior to the confirmation of sale by the court; and

(d) any other stipulation the court may in the circumstances deem fit to impose.

(3) Before making an order for grant of letters under this section the Commissioner-General of Inland Revenue and the respondents to the original petition for probate or letters of administration shall be given notice of the application and they or any other person interested in the estate shall be heard in opposition unless they or any of them shall have signified their assent to such sale.

In terms of section 547, among other things, where the estate or effects of a deceased person amounted to or exceeded the specified amount, and property forming a part of that estate is transferred without probate or letters of administration being first

taken out, "every transferor and transferee of such property shall be guilty of an offence and liable to a fine not exceeding one thousand rupees; and in addition to any fine imposed under the provisions of this section it shall be lawful for the Crown to recover from such transferor and transferee, or either of them, such sum as would by law have been necessary to be affixed to any such probate or letters of administration. And the amount so recoverable shall be a first charge on the estate or effects of such testator or intestate in Ceylon, or any part of such estate or effects, and may be recovered by action accordingly."

Both the Court of Appeal, and learned counsel who based his submissions on the finding of the Court of Appeal, were mistaken in supposing that no letters of administration had been taken out: Paragraph 1 of the Petition to the District Court of Negombo in case No. 4214/T dated 12 October 1968 (page 454 (536) of the C. A. Brief) states that the petitioner was "the administrator" of the intestate estate of the late Mr. Abeysinghe. In paragraph 1 of the supporting affidavit of the petitioner (page 455 (538) of the C. A. Brief) he describes himself as "the administrator ... as well as the sole heir of the deceased." Letters of Administration had been granted by the District Court in case No. 4214/T on 16 September 1965. The nett value of the estate had been determined as Rs. 231,292 and the Provisional Estate Duty payable had, on the basis of a certificate granted by the Commissioner of Stamps (sic.) dated 7 June 1965, been determined as Rs. 23,956/-. (See pp. 619-620 of the C. A. Brief).

THE SUPPOSED INABILITY TO PROCURE A DRAFT DEED FOR TENDER

Learned counsel for the appellant submitted that the purchasers were unable to comply with the requirement in clause 7 (a) of tendering a deed or deeds of conveyance on or before 31 July 1968 or 31 October 1968, because, "as the Court of Appeal had found," the property in question was a part of the estate of the deceased father of the vendor and no Probate or Letters of Administration had

been issued to the vendor or to anyone else at the relevant date. It would, he said, have been a difficult matter to persuade a notary to prepare a deed of conveyance which if executed might expose the parties to penalties for the commission of an offence. However, X 49, X99A, drawn by Ivor Herat, and P1 drawn by D. F. de Silva were all notarially executed documents prepared by experienced notaries. P1 was drawn by the purchasers' notaries, Messrs D. L. & F. De Saram, one of the oldest firms of Proctor-Notaries in the country. Moreover, according to Denzil Mendis, P1 was approved by Mr. H. V. Perera, Q.C., and understandably so, for there was no difficulty either with regard to title or with regard to the question whether letters of administration had been taken out. The excuse for the evasion of the purchasers' responsibilities to tender a draft deed in compliance with clause 7(a) of the agreement P1, is, in the circumstances, unacceptable.

THE ABSENCE OF THE DISTRICT COURT'S PERMISSION TO SELL

It was not that the purchasers' notaries were unwilling to prepare a deed. They were quite willing to do so, but in doing so they were anxious to protect their clients by making future agreements conditional, *inter alia*, upon the vendor obtaining the permission of court. In a letter dated 8th October 1968, X 20, the purchasers' notaries state, *inter alia*, as follows:

> We have pointed out to you that you have in an earlier sale agreement accepted title. Ordinarily, the sale agreement should have been conditional on Mr. Abeysinghe obtaining the sanction of Court to sell the land and also obtaining an undertaking from the Commissioner of Inland Revenue to release the land from liability to estate duty upon payment to him of such sum as may be fixed by him. It is no longer possible to make the sale conditional upon the happening of these events ... We would point out that if Mr. Abeysinghe fails for any reason to obtain the sanction of Court to sell the land, you might find yourselves in difficulties ... We shall draft another agreement in which Mr. Abeysinghe will undertake to apply to court and to

> obtain the necessary undertaking from the Commissioner of Inland Revenue. We shall send you a copy of the draft in due course.

The vendor had not, as it was supposed by the learned District Judge, deliberately concealed the fact that the property was the subject matter of testamentary proceedings. The purchasers' notaries, in terms of clause 11 of P1, had the custody of the deeds. From a perusal of the documents, it should have been evident that Abeysinghe's title was derived as the sole heir of his father. They ought to have found out the position with regard to the testamentary proceedings and if letters of administration were granted, whether it was conditional. However, this had not been done. It would seem from the letter of the purchasers' notaries to their clients dated 8th October 1968, X 20 that they realized that the permission of the court to sell had become "apparent" only when they had received some additional papers from the vendor's notary. When a draft agreement extending the date of sale had been prepared by the purchasers and submitted, it had not been signed because the *vendor's notary* had asked him not to do so without the incorporation of certain terms. The purchasers' notaries writing to the vendor's notary on 29th October 1968, X 23, states:

> You will recollect that when we met you at your office on 11th September 1968 to sign the agreement extending the date for three months you advised your client that this agreement should not be signed because: (a) He had not obtained the sanction of the Court to sell the property, and (b) the Commissioner of Inland Revenue has not undertaken to release the property ...

The learned District Judge's assumption that had the purchasers known of these things, they would not have touched the transaction "with a barge pole," is not supported by the evidence. Having learnt of the two problems, they did not abandon the transaction as being violative of the terms of the agreement. On the contrary, they wanted the terms of P I extended with the inclusion of safeguards with regard to the permission of the court to sell and with regard to the payment of estate duty. As far as Mendis and Speldewinde were concerned, they saw no insurmountable difficulty, although they appear in their

impatience to get the agreement extended to have regarded the obtaining of the permission of the court proposed by the notaries on both sides as an irksome and irritating formality. Their anxiety was to have a new notarial agreement which would empower them to transfer the land to Colombo Paints Ltd. The absence of permission was not in the way of the transaction, for a conditional agreement providing for the approval of the court, as far as they were concerned, would have satisfactorily solved the problem. In a letter dated 7th October 1968, X 33 (page 423 (484) C.A. Brief) Mendis wrote to his notaries stating that he had ascertained that it might take six weeks to two months to obtain court approval. He concludes as follows:

> "As we are unable to wait till the order is made by court *which is only ancillary to this agreement,*" (the emphasis is mine) we request you to draft the said agreement immediately making provision for such contingencies."

Following the failure to have the draft agreement signed on 11 September, the purchasers' notaries wrote to the vendor's notary on 23 September with regard to the arrangements to be made for obtaining court approval and for having the property released in respect of estate duty. (P3). A copy of the letter was sent to Mendis. (P2). In response, in their letter dated 7th October 1968 (P6, X18), the purchasers state as follows to their notaries:

> As you would appreciate that our prospective purchasers cannot be held in suspense any longer, we have decided to go ahead with the agreement making provision for the two months set out in our letter of the 5th instant addressed to Mr. Abeysinghe and approved by Mr. De Silva (the vendor's notary) which was handed over to you that day ... We suggest that the agreement should be extended till 31 December 1968 ... We trust you will embody the two matters set out in our letters of the 5th instant and have the agreement ready for signature on the 10th instant.

The letter of 5 October from Mendis to Abeysinghe (P5) sought approval of a draft of two clauses for inclusion in the proposed

agreement, one on the question of court approval and the other on the matter of estate duty.

The position taken by Mr. Navaratnarajah, Q.C. in his address in the District Court on behalf of the purchasers on 26th March 1979 was that "whatever may have been the application that was made in 1965, whatever may have been the order on that application, yet that application and the order made thereon did not authorize the defendant to convey his title to the property to the plaintiff." (See p. 238 (274) of the C.A. Brief).

Learned counsel for the appellant, assuming that there were no letters of administration, submitted that, if and when the letters were issued, it would, in terms of Form 87 of the First Schedule of the Civil Procedure Code, prohibit a sale without the permission of the court. Indeed, in terms of the grant of letters of administration in this case (see p. 619 of the C.A. Brief), the administrator was, in terms of Form 87 of the First Schedule to the Civil Procedure Code "prohibited from selling any immovable property of the estate unless" he was "specially authorized by the Court so to do."

Admittedly on 31st July, 1968, the date specified in P1, or on October 31st, the extended date, the permission of the Court had not been obtained. An application by way of Petition (pages 516 (614) – 517 (615) C.A. Brief) and Affidavit (pages 518 (616) – 519 (617) C.A. Brief) dated 12th October 1968 to the District Court to sell the property had been allowed by the Court on 18th October 1968, the vendor being required to furnish draft deed on 8th November 1968. (See Journal Entry (83) at page 348 (401) C.A. Brief; Journal Entry (84) page 348 (402) C.A. Brief; and the submissions of counsel and the Order of the District Court at page (618) C.A. Brief). It was then discovered that the extent of land had been erroneously stated in the vendor's Petition dated 12th October 1968 as being 18 acres when it should have been 18 acres and 20 perches. This was rectified by the Court on 23rd January 1969. (Journal Entries (88) and (89) at page 453 (534) C.A. Brief).

In the meantime, on 7th December 1968, the purchasers, through their Proctor, had notified the vendor of the fact that they were no

longer interested in a transaction which, the Proctor explained, could not be completed on account of the incapacity of the vendor to sell the property. Understandably, as the Journal Entry on 23rd January 1969 (page 453 (534) C.A. Brief) shows, the draft deed had not been submitted on that date, for the Colombo Paints deal had failed by 6th December. The failure of the transaction was due to the sudden and unexpected failure of the Colombo Paints deal, and not on account of the absence of the permission of the court to sell the property. The signing of an agreement, as far as the purchasers were concerned, ceased to be relevant. Admittedly, the permission of the court to sell the property had not been obtained on 31st July or 31st October. However, that was not a reason for the purchasers' failure to tender the deeds and purchase price. It was not even an acceptable excuse, for, as the purchasers themselves later suggested, an appropriately worded condition in the draft deed could have eliminated any difficulties in that regard.

THE QUESTION OF ESTATE DUTY

Learned President's Counsel for the Appellant submitted that the completion of the transaction on the relevant date in terms of agreement P1, namely, 31st July 1968, could not have taken place because at that date the property was encumbered and the vendor could not have sold the property "free of encumbrances," as agreed in clause 5 of the agreement P1. The property was 'encumbered' because it was at that date a part of the estate of the vendor's deceased father and no estate duty had been paid as at the relevant date. Section 27 of the Estate Duty Ordinance (Cap. 241) provides, *inter alia*, that,

> (a) the estate duty payable by an executor shall be a first charge on all the property of which the deceased was competent to dispose at his death and such charge may be enforced against any such property for the recovery of the whole or any part of such estate duty; (b) the estate duty payable by any person other than the executor in respect of any property shall be a first charge on that property.

Learned Counsel for the appellant observed that, not only had the vendor failed to make himself capable of fulfilling his obligations by

paying the estate duty before the agreed date, namely, 31st July 1968, he had not done so even within the three months of extended time he had been given, or even within a reasonable time thereafter. The failure of the transaction was, he submitted, therefore, solely attributable to the vendor.

Referring to the view of the Court of Appeal that the vendor could have taken steps to sell the property free of estate duty, learned counsel for the appellant said, the vendor might indeed have empowered himself to make the transfer free of the encumbrance of estate duty by paying or securing the payment of the estate duty for which he was liable and obtaining a certificate of payment in terms of section 52 of the Estate Duty Ordinance or by obtaining a certificate of release in terms of section 53; yet if the vendor failed to do so in time, the blame for the failure of the transaction should be attributable to him and not to the purchasers.

Learned counsel for the appellant submitted that the view taken by the Court of Appeal that, since the vendor could have had the property released meant that he 'could have lawfully transferred the land as at 31.07.1968 free from any encumbrance' was erroneous, for the question was: Did he *in fact*, and not merely whether he *could*, have the property released from the encumbrance? He had not done so and therefore he was not in a position to transfer the property free from encumbrances as he was obliged to do. Although the Court of Appeal seems to have been of the view that since the deeds were in the custody of the purchasers' notaries, they might have been aware of the existence of the encumbrance. The fact that the plaintiffs were aware of the existence of an encumbrance, he argued, did not relieve the defendant of the obligation of transferring the property free of that encumbrance: *Misso v. Hadjear*[2].

Learned Counsel for the respondents submitted that estate duty was a "charge" and not an "encumbrance." In any event, in the circumstances of the case, the paramount consideration was the intention and understanding of the parties.

I agree that this is not just a matter of the interpretation of a notarially executed deed or of some other written contract. It

concerns the different and somewhat more complex task of the interpretation of a course of conduct and the ascertainment of liabilities and rights in the circumstances of an agreement which was an outcome of what the parties said and did. I cannot fairly accept the underlying assumption of the learned District Judge and the learned counsel for the appellant that while the vendor was strictly bound by the terms of clause 5 of P1 to convey the property free of encumbrances, the purchasers were not likewise bound by clause 7 of the same agreement to tender the deed and purchase price on or before 31st July. Admittedly, the agreement P1 entered into on 4th April 1968 is very important. However that document, if I might borrow a phrase from a letter written by the notaries of the purchasers to their clients (X 20), "in the peculiar circumstances of this case," was one in a course of proceedings commencing earlier with the execution of 2 P 2, X 49 A and 2 P 3, X 99 A on 2nd August 1967, when the broker had brought the parties together, and ending on 7th December 1968, when Proctor Balasunderam in his letter P 20, X 41, repudiated the agreement.

The purchasers failed to honour their obligations in terms of clause 7 of tendering a draft deed and paying the stipulated purchase price on or before 31st July 1968. The agreement P 1, therefore, ceased to exist on 31st July 1968, for clause 8 provided that "if the purchasers shall fail or neglect to observe and comply with any of the obligations herein on their part to be observed and complied with or fail to comply with the purchase as herein provided then and in that event this agreement shall forthwith be deemed to be cancelled and will be of no effect ..." However, it continued to be important as an instrument of reference because, in terms of the informal understanding after that date, the basic and vital terms contained in that document relating to the empowerment of Mendis and Speldewinde to sell were to be embodied in another notarially executed document.

Although the learned District Judge seemed convinced that the defendant had concealed the fact that the property formed a part of the estate of his deceased father and was liable to estate duty and that "shrewd businessmen like Mr. Mendis and Mr. Speldewinde

would not have touched it with a barge pole" had they known of it, there is no evidence to support either the conclusion that the vendor had deliberately concealed the fact that estate duty had not been paid or that the purchasers would not have entered into the agreement. What comes as a surprise is that two astute men in the real estate business, who might have been reasonably expected to inquire whether estate duty had been paid, had, it seems, recklessly parted with Rs. 40,000 and entered into a notarially executed agreement 2 P 2, X 49 on 2nd August 1967 and into yet another notarially executed agreement, P1, on the 4th of April 1968. Or was it something that did not trouble them?

In terms of clause 11 of P1, it was agreed that the purchasers' notaries, Messrs. D. L. & F. de Saram would hold the title deeds and title documents of the said land. Surprisingly, the purchasers' notaries too had failed to ascertain whether estate duty had been paid. As they said in their letter X 20 to their clients on 8th October 1968, the inclusion of a condition with regard to the payment of estate duty was something that ought to have been "ordinarily" done. However, the purchasers' notaries did not include any provision in that regard either in P1 or in the draft deed they submitted for signature on 11th September 1968. The purchasers and their notaries certainly became aware of the failure to pay estate duty at least on 11th September 1968 when the *vendor's notary* requested his client not to sign the deed without including a clause relating to estate duty. However, the matter of estate duty was not something the purchasers and their notaries had overlooked until their attention was drawn to it on the 11th of September. The purchasers' notaries in their letter, X 20, to their clients stated as follows: "We had earlier explained to you that it was quite possible that Mr. Abeysinghe had not paid all estate duty payable on the estate of his father, and on the 11th September 1968 it transpired that he had not paid estate duty on the final assessment." Exactly when the purchasers had been so informed is not clear. However, if the fact that estate duty was payable was unknown before 31st July, it could not have been the reason why the purchasers did not pay the purchase price and tender the deeds in terms of the agreement.

Although, if as the learned District Judge supposed, the purchasers' would not have touched the transaction with a barge

pole had they known of the fact that estate duty was payable, why did they insist on continuing with the transaction after they came to know that fact? The learned District Judge had observed that "if the Defendant had been frank and explained his difficulties, the combined agile brains of both Mendis and Speldewinde would have perhaps found an easy solution for him." Indeed, the fact that the property was subject to the payment of estate duty was not seen by the purchasers as an encumbrance which would have prevented the vendor from performing his obligations: there was an easy solution they had. On 25th September 1968 Mendis wrote to notaries (P3, X 15) advising them of the fact that a final assessment had been made and that as soon as the payment was made, the certificate of release would be granted. When the vendor's notary, and later the purchasers' notaries, insisted on the inclusion of a provision, Mendis wrote to Abeysinghe on 5th October 1968 (P 5) seeking approval, *inter alia*, for the inclusion of a clause authorizing the payment out of the consideration due, a sum of Rs. 91,262 and interest thereon commencing on 19.9.64 to date of payment to the Department of Inland Revenue on Charge No. 80/01/7/0291. On 17th October 1968 Mendis wrote to the Commissioner of Inland Revenue seeking confirmation that on payment of estate duty out of the consideration, the certificate of release will be granted. (X 21). On 25th October Mendis informed his notaries that the arrangements proposed had been approved by the Commissioner of Inland Revenue. (P19, X 22). A copy of a letter dated 19th October 1968 from the Commissioner of Inland Revenue agreeing to the release of the property if the vendor authorized payment out of the consideration was forwarded to the vendor's notary by the purchasers' notaries on 29th October 1968. (P7A, X 23). On 25th November Mendis sought confirmation from the Commissioner of Inland Revenue that if as directed by the court half the consideration should be paid into court (Rs. 175,000)which would pay the estate duty out of the amount so deposited, the certificate of release would be granted. When letters of administration were granted on 16th September 1965, it was certified by the District Judge on the basis of a certificate issued by the Commissioner of Stamps dated 7th June 1965 that Rs. 23,956 had been paid as estate duty. (Page (620) C.A. Brief). Subsequently, an additional assessment had been made and the Commissioner of Inland Revenue had informed the Court that the certificate of release would be issued on

the payment of Rs. 115,220 and interest. (Journal Entry (76) of 16.1.68 page 451 (531) C.A. Brief). Abeysinghe had appealed against that assessment and so the Commissioner of Inland Revenue had informed the Court that the certificate could not be granted before 1.12.1968. (Journal Entry (86) of 11.11.68, page 452 (533) C.A. Brief). This was no problem for Mendis. On 26th September, he had informed his notaries that Abeysinghe should pay the full amount and call for a refund after the appeal had been finalized. (P 16).

If estate duty was an "encumbrance," it was one which, as the purchasers demonstrated, could have been removed by an appropriate clause embodied in the deed – a clause which the purchasers' notaries said "ordinarily" should have been included in the first place – which ought to have been tendered on or before 31st July. It is not necessary to speculate as to what might have been the consequences of executing the deed on 31st July, since no deed was tendered. However, the learned District Judge did say this: "It would appear that on the date on which the agreement was signed the vendor had failed to disclose . . . . that Estate duty is payable. However, he had the capacity to make the transfer whenever he pleased, but the sale would be subject to Estate Duty ..." I am inclined to agree with that view.

The fact that estate duty had not been paid was not the astonishing surprise sprung by a deceitful vendor, lacking in candour, on two unsuspecting, naive and helpless innocents the learned District Judge made it out to be. The purchasers entered into the transaction because they had an intuitive appreciation of the fact that a substantial profit could be earned by them if the Colombo Paints Ltd., transaction went through. It was, as we have seen, that transaction alone on which they based their hopes. Understandably, they were anxious to be in a position to drive home the bargain at the opportune moment and keep their rights under the agreement alive until such time. The fact that estate duty had not been paid was of little or no concern to their notaries. Hence a deed was prepared for signature on the 11th of September without any reference to the matter. When the purchasers became aware of the fact that estate duty had not been paid, they had a solution. The fact that estate duty was payable was no impediment to the transaction at any time. Nor

was it, as we have seen, a cause for the failure of the Colombo Paints Ltd.

THE ALTERNATIVE CAUSE OF ACTION

Admittedly, the purchasers enjoyed the fruits of the property until dispossession by the Land Reform Commission in August 1972. However, prescription did not begin to run from the date of dispossession. The enjoyment of the fruits of the land was not based on any enforceable obligation on the vendor's part to permit it for there was no notarially executed document in that regard. See per Browne and Withers JJ. in *Mudianse v. Mudianse*[3]. There was no usufructuary mortgage, as the appellant suggests. There was no lien, as the District Judge had supposed. The vendor in his letter to Mendis dated 19th December 1967 (X4) explained that the enjoyment of the valuable fruits of the land was a matter of generosity. Possession and the enjoyment of the produce was not in lieu of interest. Possession was merely security for the payment of the amount promised. The debt, as indicated in X 43 was payable in installments. Recovery became due from the date on which each installment was payable. The first installment was due on or before 31st December 1970. The second on or before 31st December 1971 and the third on or before 31st December 1972. Although the alternative cause of action was brought in by an amendment of the plaint on 16th June 1975, the relevant date for determining whether the action was prescribed was the date when the action was instituted, namely 29th July 1974. The first and second installments fell outside the three year period of limitation in respect of oral agreements and were therefore barred by section 7 of the Prescription Ordinance.

ORDER

For the reasons set out in my judgment, I dismiss the appeal with costs payable to the 1st Respondent.

FERNANDO, J. – I agree.

GOONEWARDENE, J. – I agree

Appeal dismissed.