BERNARD PERERA
V.
WIJEYATUNGA

COURT OF APPEAL
PALAKIDNAR, J. &
SENANAYAKE, J
C.A. NO. 403/80F
D.C. COLOMBO 3139/ZL
MAY 10, 1991

Contract – Specific performance - Roman Dutch Law - Liquidated damages - Penalty - Substituted alternative obligation.

In an agreement to sell, a clause for liquidated damages which is really *in terrorem* a penalty cannot be treated as a substituted alternative obligation available to the vendor who declines to go through with the agreement

The clause regarding damages is only accessory to the principal obligation. The Roman Dutch Law applies.

Cases referred to:

1. *Thaheer v. Abdeen* 57 NLR 1,3
2. *Lombard Bank Ltd.* v. *Excell and another* (1963) 3 all ER 486.
3. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New George and Motor Co. Ltd.* (1914 - 1915 All ER 739)
4. *Hoole* v. *Natarajan* 66 NLR 484

APPEAL from judgment of the District Court of Colombo.

H.L. de Silva, P.C. with *S. Parathalingam* for appellant.

L.C. Seneviratne, P.C. with *R. Perera* for respondent.

Cur. adv. vult.

July 25, 1991
PALAKIDNAR, J.

Mrs. Nanda Wijeyatunga the plaintiff-respondent is the administratrix of her husband's estate. Her husband Wijeyatunga died on 22.10.1977. They were in occupation of premises mentioned in the schedule to the plaint as tenants of the owner Bernard Perera the defendant-appellant in this appeal.

Prior to his death Wijeyatunga entered into a notarial agreement to purchase the premises from Bernard Perera for a sum of Rs. 100,000/- by Indenture dated 10.6.1977 (marked P2).

Wijeyatunga died and the plaintiff-respondent to the appeal having obtained letters of administration to the deceased's estate (marked P1) filed this action for specific performance on the agreement P2. At the argument of the appeal learned counsel for the appellent drew attention to clauses six and seven of the agreement p2 which read thus; Clause 6. "In the event of the Vendor failing and neglecting to transfer the land and premises described in the schedule hereto the purchaser, free from encumbrances, on the purchaser being ready to pay the balance sum of Rs. 60,000/- on or before the 31st December 1978, the vendor shall be liable to refund the said sum of Rs. 40,000/- together with a further sum of Rs. 40,000/- as liquidated damages and not as a penalty and it is agreed that the purchaser shall not be called upon to prove the damages in the event of such eventuality". Clause 7. "In the event of the purchaser failing and neglecting to purchase the land and premises described in the schedule hereto on or before 31st December 1978 the vendor shall be entitled to appropriate the said sum of Rs. 40,000/- as liquidated damages and not as a penalty and the vendor shall not be called upon to prove the damage in the event of such eventuality".

It was stated by the defendant in his answer that the purchaser did not pay the forty thousand rupees agreed upon in clause six. This issue (No 4) was answered in favour of the plaintiff. The learned trial judge having regard to the evidence of the attorney who drafted the agreement P2 and the testimony of the plaintiff; widow of the deceased held that the purchaser had in fact paid the money. This finding on the facts was not challenged by the appellant counsel.

On the question of the claim for specific performance by the plaintiff the learned trial judge has observed that the defendant did not deny the claim in his answer, but chose to rest his case on the non-performance of the purchaser's obligations under the agreement P2. In regard to this aspect the learned judge has said that at the trial the defendant was clutching at straw in seeking to avoid specific performance. It was urged by appellant's counsel that the agreement made it quite plain that if the vendor did not transfer the land he

would refund Rs. 40,000/- paid to him and Rs. 40,000/- as liquidated damages and not as penalty. A tenant who had the expectation of ownership of the property cannot be denied of his right under the law of specific performance unless he agreed specifically to avail of a substituted obligation clearly stated in the agreement.

It is settled law that specific performance of an obligation as governed by the Roman Dutch Law is the relief available in these circumstances when the vendor resiles from his obligation. Vide *Thaheer* Vs. *Abdeen* (1) Justice Gratiaen stated that every party who is ready to carry out his terms of contract prima facie enjoys a legal right to demand performance. It was contended that the words "liquidated damages and not a penalty" in clause six quoted above constituted a substituted obligation. Whether in fact such a clause was a substituted alternative obligation or was it an accessory to the principal obligation is a matter not to be understood by the words used in the agreement but the circumstances of every case. (vide 13 N.L.R. 47 and 59 N.L.R. 385 Pv.Cl).

The scope of this inquiry is set out in *Lombard Bank Ltd.* vs. *Excell and another* (2).

Law Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* vs. *New George and Motor Co. Ltd.* (3) stated that the court must in fact find out whether the amount stipulated is in truth penalty or liquidated damage.

Penalty is an amount of money to be paid as stipulated in terrorem by the offending party.

Liquidated damages is a genuine conventional preestimate of the damage. It is in fact a question of construction to be judged as at the time of making the contract and not at the time of the breach.

In *Hoole* vs. *Natarajan* (4) the clause 8 in the agreement read "in the event of the owner refusing or neglecting to obtain the balance consideration within the stipulated time and convey the said property the owner shall pay the sum of Rs. 2000/- as damages". Justice T.S. Fernando held that the clause was accessory to the principal obligation and not a substituted alternative obligation. Views expressed in the cases referred to above are all relatable to the facts of each case.

In the instant case if Wijayatunga did not pay the balance 60,000/- rupees on or before 31.12.78 the defendant would have kept the 40,000/- rupees already paid and become entitled to another sum of Rs. 40,000/- Thus the position would be that he would remain owner of this property having sustained loss and become entitled to receive the 40,000/- rupees while the plaintiff losing 80,000/- would be in the same position of the tenant. It is clear from this circumstances that the 40,000/- was "in terrorem" a penalty and not a substituted obligation. Clause seven also does not lend itself to the view that it was anything other than a penalty.

We are of the view that the learned District Judge was correct in holding that it was not a substituted obligation but a penalty and ordering specific performance of the contract entered into by the agreement.

In fact the plaintiff had paid the balance 60,000/- into court before 30.12.78. The obligation of the purchaser has been fullfilled.

I therefore dismiss the appeal with costs.

SENANAYAKE, J. - I agree.

Appeal dismissed.