Present: Lyall Grant J. and Jayewardene A.J. 1926.

JEREMIAS FERNANDO *et al.* *v.* PERERA *et al.*

383—D. C. Kalutara, 12,115.

Agreement to reconvey within a limited time—Action for specific performance—Tender of price.

Where a vendee agrees with his vendor to retransfer the lands which he has purchased, on the payment of a certain sum of money by the vendor, within a definite period of time,—

Held, that the tender of the price was a condition precedent to the performance of the promise, and that time was of the essence of the contract.

APPEAL from a judgment of the District Judge of Kalutara.

Drieberg, K.C. (with him *J. S. Jayewardene*), for plaintiff, appellant.

H. V. Perera, for 1st to 3rd defendants, respondents.

Soertsz (with him *C. J. C. Jansz*), for 4th defendant, respondent.

September 8, 1926. LYALL GRANT J.—

The facts in this case are fully set out in the judgment from which this appeal is taken, and are not in dispute. The plaintiff sued the respondents for the retransfer of certain lands. Stripped of various complications which do not affect the points at issue, the facts are that A sold certain lands to B for a sum which represented the debt which A owed to B. By a separate deed of the same date it was agreed that on repayment of the price with interest thereon at the rate of 18 per cent., or 15 per cent. if the interest be paid annually, within a period of three years B should retransfer to A. A was to remain in possession during the three years. This deed also contained a clause that A should possess the land for a term of three years. A remained in possession for three years and then handed over possession to B's assign, the present defendant. A died nine months later and her children the present plaintiffs asked the defendants to retransfer the land.

The defendants say—

(1) That the period of redemption had expired; and

(2) That the plaintiffs have not tendered the of price of the land.

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There was an issue as to whether tender of the price was necessary and another as to whether the request for a retransfer was made in time.

The learned District Judge did not consider it necessary to answer the issue with regard to the tender as he held that the plaintiffs were estopped from bringing the action for a retransfer owing to the conduct of A in leaving the premises without protest at the expiration of the three years.

The question as to whether time was of the essence of the contract was argued at considerable length, but it seems to me that the case can be decided on the question of tender.

The plaintiffs ask for a specific performance of a contract. One must examine closely what the contract is they seek to enforce. They say it is a contract to reconvey, but even assuming that time is not of the essence of the contract, the agreement is to reconvey only upon the happening of a certain event. That event is the payment of a certain sum of money. Unless the Court is satisfied that the plaintiffs have fulfilled their part of the contract, so far as it is possible for them to do so, namely, by tender of the price, it seems obvious that it cannot order the defendants to perform their part of the contract inasmuch as the condition precedent to such performance has not been fulfilled. There is not a scrap of evidence that the plaintiffs have even offered the price of the land to the defendants, and the defendants deny that any such offer has been made. In such circumstances I do not think it will be proper for the Court to decree a specific performance.

In *Babahamy v. Alexander*,[1] it was assumed that tender was a necessary preliminary to an action of this nature. The same assumption was made in *Appuhamy v. Silva*.[2] In that case no doubt it was held that the defendant by announcing his refusal to accept the money had waived his right to a formal legal tender. There is no evidence here of any such waiver. It is not enough for the plaintiffs to say that it was of no use to tender the money because they knew that the defendants would not accept it.

On this ground alone the appeal must fail.

The case of *Babahamy v. Alexander* (*supra*) is also an authority for the proposition that in a transaction of this nature time is of the essence of the contract. The facts in that case appear to be indistinguishable from those in this case and the decision in that case has never been overruled.

Mr. Drieberg for the appellants cited a large number of English cases for the purpose of showing that in cases similar to this time has been held not to be of the essence of the contract.

[1] *(1896) 2 N. L. R. 159.*

[2] *(1914) 17 N. L. R. 238.*

These cases, however, proceed upon the assumptions of the English common law and the rules of equity, and it has to be considered whether the same rules apply to the Roman-Dutch law as modified by section 92 of the Evidence Ordinance. Section 92 of our Evidence Ordinance corresponds to section 92 of the Indian Evidence Act, and cases were cited to show that in India the strict wording of that Act has been held to be subject—when a question of time was mentioned in a contract—to the rules which prevail in England.

The Roman-Dutch law, however, has its own rules in regard to the construction of agreements and repurchase. *Voet (Bk. 18, Tit. 3, para. 8)* says there is no limit of time within which the *jus redimendi* prescribes if the liberty to redeem has been given *in perpetuum* by the pact. It seems to be assumed that if the pact has limited this right the limitation must prevail. In this paragraph Voet assimilates the right of repurchase to the right of freeing a pledge, and he says in *Bk. 20, Tit. 6, para. 10*, that a pledge for the debt of another will be free from the *vinculum pignoris* at the expiry of that period, " for a limited concession must produce a limited effect. "

The important question to which one must address one's mind whether one proceeds according to the English rules or according to those of the Roman-Dutch law is what was the true intention of the parties as far as it can be ascertained from a perusal of the documents themselves.

Applying the same principles of law as were applied by the Privy Council in the case of *Balkishen Das v. W. F. Legge* [1] and construing section 92 of the Evidence Ordinance in the same way in which section 92 of the Indian Act was construed in that case, I have come to the view that the facts here are substantially different from the facts in that case.

In *Narasingerji Jyanagerji v. Paringanti Parthasaradki Rayanam Garu* [2] a transaction was held to be a conditional mortgage and the time mentioned in the deed providing for a reconveyance was allowed to be extended. In that case, however, the Privy Council held that the intention to constitute a conditional mortgage clearly appeared on the face of the deeds.

In the present case the points most favourable to the plaintiffs are that the vendor was allowed to remain in the premises after the sale without the payment of any sum in the name of rent. What took the place of rent was the interest which was stipulated to be paid on the sum of Rs. 5,500 on payment of which the vendor could demand a reconveyance. It would appear from the documents that if the vendor did not choose to ask for a reconveyance, no rent would be chargeable for the time during which she remained

[1] *I. L. R. 22 All. 149.*

[2] *47 I. L. R. Mad. 729.*

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in possession. This somewhat curious arrangement would seem to favour the plaintiffs' contention that the deeds taken together were intended to operate as a mortgage. On the other hand clause 7 of the agreement provides that at the expiration of the term of three years the vendor should quit the premises and hand over possession to the vendee, and this is what actually happened. There is a further provision in clause 8 of the agreement that after the expiration of the term of three years the deed of agreement should be considered null and void and of no effect.

It seems to me quite clear that the intention of the parties was that the right to demand a reconveyance was to be strictly limited to three years from the date of the conveyance. The facts point to the vendor having understood her contract in this sense. There was no obligation on the vendor to pay either the principal or the interest, and it is obvious that she would not have been entitled to remain on the land indefinitely without payment.

I think the decision of the learned District Judge that time was of the essence of the contract should be affirmed.

The appeal is dismissed with costs.

JAYEWARDENE A.J.—I entirely agree.

Appeal dismissed.