1947 *Present :* **Soertsz S.P.J. and Naglingam J.**

MARIKAR, Appellant, *and* MARLIYA, Respondent.

S. C. 382—D. C. Matara, 15,810.

Sale in execution—Right of debtor to purchase his property—Purchase in the name of another—Trust—Roman-Dutch Law.

There is, in the law of Ceylon, no objection to a debtor purchasing his own property at a sale in execution of a decree against him.

APPEAL from a judgment of the District Judge of Matara.

C. V. Ranawake, with *C. Seneviratne*, for the plaintiff, appellant.

N. E. Weerasooria, K.C., with *M. I. M. Haniffa* and *M. S. Abdulla*, for the defendant, respondent.

Cur. adv. vult.

December 19, 1947. NAGALINGAM J.—

The plaintiff in this case appeals from a judgment of the District Judge of Matara dismissing his action for a declaration that a certain parcel of land described in the schedule to the plaint was held in trust for him by his daughter-in-law, the defendant. The plaintiff in his personal capacity and as executor of the last will and testament of Mohamed Lebbe Marikkar Notaris Omer Saibu and his wife, Ahmedu Lebbe Marikkar Notaris Kadiga Umma, hypothecated the property in dispute belonging to him personally as well as certain other property belonging to the estate to secure the payment of a debt due to a creditor of the estate. The creditor put the bond in suit, and under the hypothecary decree entered in that case, the property, the subject of the dispute, was sold *inter alia* and at the sale the property was knocked down to the defendant and a conveyance was duly executed in her favour.

The District Judge has found, and his finding has not been contested and in fact it could not have been, that the consideration for the purchase was provided by the plaintiff and that in fact the defendant was a trustee for the plaintiff of the property. The learned Judge, however, did not see his way to grant the plaintiff the relief he claimed as he was

of opinion that the purchase by the plaintiff of the property in the name of the defendant was either contrary to low or with a view to achieve an illegal purpose.

The property in dispute was, as already stated, one that belonged to the plaintiff personally, and relying upon two passages in Voet where the propositions are laid down that " the debtor himself who has mortgaged it (pledge) cannot do so (purchase) inasmuch as there can be no purchase of one's own property " (Voet lib. XX. tit. V. sec. 3—Berwick's Voet page 440) and that " no one who is prohibited from purchasing for himself can attain the same end through the interposition of another person ; for this would be a fraud on the law " (Voet lib. XVIII. tit. I. sec. 12—Berwick's Voet page 17) the learned District Judge has held that the plaintiff could not either in his own proper person or through the intervention of another have made the purchase of his own property and therefore the purchase the benefit of which he seeks to obtain in this case was against the law, thus disentitling him to relief.

Voet, however, goes on to say in the first citation from which the passage relied upon by the learned Judge has been quoted that a contrary view is held by some and refers to the opinion of Matthaeus : de auction. lib. I. cap. 10. num. 10. Berwick adds a note setting out in full a translation of Matthaeus' opinion, which runs as follows :—

> " Magister states that the debtor himself whose goods are sold in execution is not to be allowed to bid, and argues from the custom of Amsterdam. For why should he be allowed to bid who has hitherto frustrated his creditors ? Should he fool them longer ? If he has the money to pay the price, he should rather prevent the sale by consigning the debt due with the officer of Court. But Paponius and Rebuffus approve the contrary opinion, and theirs seems most in accordance with the law. For the debtor is not obscurely admitted to bid by Dig. 1º. 1. fr. 52. (de act empti) and Dig. 17. 1. fr. 22. sec. 3 (mandati) . . . . "

Berwick also adds :—

> " Groenewegen seems to support the view of Matthaeus (not indeed as to what was the Roman Law but) as to what is the Modern Law ; stating that the Roman Law *de distractione pignorum* (which respected private sales) is absolete, all sales of mortgaged property being now public under judicial decree and having the effect of *res judicatae.*"

The reason underlying the distinction between the Roman Law and the Dutch Law as stated by Groenewegen is not only illuminating but is of the greatest significance to us. Under the Roman Law, which is really what is set out by Voet in the passage quoted by the learned District Judge, the reason for denying to the debtor the right to purchase his property is that an owner cannot be the purchaser of his own property.

It may be of advantage at this stage to notice the development of the right of a creditor to purchase the debtor's property. Voet in the same citation referred to above states :—

> " The creditor cannot rightly purchase the pledge (under the Roman Law), not even by the interposition of another ; for the is most frequently

himself the seller of it, and no one can buy from himself and be at once vendor and purchaser. Plainly, if the creditor has purchased the pledge, the debtor being the vendor, it would be of pernicious example that the sale (thus) perfected by consent should be revoked by the debtor, for in such a case one person is vendor and another is purchaser. . . . . And it is the same if the Magistrate sells a judicial pledge in execution of a judgment, for as then the property is sold not by him who obtained the judgement, but by the ministry of office of the judge who decreed the sale, there is no reason why the creditor should not be admitted to bid along with others, just as if he were a stranger . . . . the consequence is that hypothecary creditors are not now repelled from purchasing the things mortgaged, although they themselves have prayed for the sale." (Berwick's Voet pages 441–442).

It would thus be seen that according to Voet himself, where the sale takes place on the orders of a Judge, the sale is not regarded as being carried out by the creditor, which was the ground for denying to him under the Roman Law the right to bid. By a parity of reasoning it would follow that where by the interposition of a decree of court the debtor's property is ordered to be sold, the debtor cannot be regarded, for the purpose of the sale, as continuing to be the owner of it; more so is this the position under our law, for when a hypothecary decree is entered by court, the property is brought *in custodia legis*, and assuming that the creditor has complied with other provisions of law such as those relating to registration, the debtor becomes incapable of dealing with the property, and to this extent he must be regarded as one whose title has been divested; for indeed, when a conveyance is executed in favour of the purchaser, it is not the debtor who executes the conveyance, but the Fiscal or an auctioneer, both of whom are merely officers of court. The reason given, therefore, by Voet, for the view taken that a debtor is not entitled to buy his own property can hardly be said to exist under our law. In South Africa the view of Voet does not appear to have been adopted. Wille on "Mortgage and Pledge in South Africa" (1920, page 386) states that "it does not appear that in South Africa there is any objection to the mortgagor buying the property". I am of opinion that there can be no objection under our law too to a debtor being permitted to buy what had been his own property.

The second ground upon which the learned Judge declined to grant the prayer of the plaintiff is that by the plaintiff making a purchase of his own porperty in the name of the defendant, he put the property beyond the reach of his creditors and in any event the purchase had the effect of delaying his creditors. The property was sold publicly and to the creditor was secured the full value in regard to it. The property, therefore, cannot be said to have been put beyond the reach of the creditor. It has, however, been urged that by the plaintiff purchasing the property in the name of the defendant the creditor was prevented from following that property which would have been available to him for excussion if the plaintiff had purchased the property in his own name. The short answer to this is that the creditor being a mortgage

creditor could not have followed this property even if it had been purchased in the name of the plaintiff, till he had proceeded to execute the decree in regard to all the other properties hypothecated, and it is in evidence that there were four other properties yet remaining bound under the decree which were available to the creditor for sale. But in fact after the sale of this property, the purchase of which the plaintiff secured to himself by making use of the name of his daughter-in-law, there yet remained only a sum of Rs. 297·47 due to the creditor, who agreed to stay the sale of the other properties and granted to the plaintiff time to pay a smaller sum than was due to her. The plaintiff did in fact pay this smaller sum in terms of the agreement, and the sales of the other properties were not proceeded with.

Can it be said that there was any attempt on the part of the plaintiff to defeat the claim of the creditor or even to delay her? I do not think so. But it has been contended that there were other creditors whose rights were jeopardized as a result of the plaintiff making the purchase. Reference is made to two other decrees, D 10 and D 11; but these two decrees were in favour of mortgagees who had security, and in fact the two documents D 10 and D 11 show that the creditors granted time to the plaintiff and that the plaintiff paid and settled their debts without rendering it necessary for them to have recourse to execution proceedings. These creditors themselves being mortgage creditors were not entitled to pursue any other property of the mortgagor till they had first excussed the hypothecated property and they cannot be said to have been delayed.

The question has been asked as to why the plaintiff, if he did not intend to put the property beyond the reach of his creditors, did resort to this device of purchasing the property in the name of his daughter-in-law. The answer is provided by the plaintiff himself when he gave evidence. He said that he was under the impression that he being the judgment-debtor could not have purchased his own property, a position which I have shown is untenable under our law. I would therefore hold that there is no material on record from which could be deduced that the plaintiff in making the purchase in the name of his daughter-in-law did so with any ulterior motive.

At the argument, however, a further point not taken before the trial Judge was raised, namely, whether the plaintiff who was an executor could have purchased the property; but this proposition was argued on the footing that the property purchased by the plaintiff was the property of the estate that had belonged to the deceased person, but in fact the record shows that the property that is in dispute in this case was not property that belonged to the estate but was one that belonged to the plaintiff himself personally, and that explains why this point raised in appeal was never put forward before the trial Judge. In this state of the facts, I do not think I need discuss a question of law that is purely academic so far as this case is concerned.

In veiw of the conclusions I have reached, I would set aside the decree of the District Judge and enter judgment for the plaintiff as prayed for with costs both in this court and in the court below.

SOERTSZ, S.P.J.—I agree.

Appeal allowed.

1947 *Present :* **Jayetileke and Canekeratne JJ.**

MUHANEIRAM *et al.*, Appellants, *and* SALAM *et al.*, Respondents.

S. C. 469—C. D. Kandy 1,980.

Sale—Option to repurchase—Obligation impersonal—Is it assignable ?—Place of tender—Money desposited in proctors' office.

An agreement to resell or a right of retransfer is not personal and can be assigned.

Where the assignee of the right of retransfer deposited the sum agreed upon with the Proctor and requested the other party to call for it at the Proctor's office and excute the retransfer—

Held, that there was a proper tender of the money.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera, K.C. with *S. R. Wijayatilake*, for the plaintiffs, appellants.

H. W. Thambiah, for the defendants, respondents.

Cur. adv. vult.

December 8, 1947. CANEKERATNE J.—

This is an appeal by the plaintiffs from a judgment dismissing an action for specific performance of a contract of sale.

One Abeysin Banda conveyed by deed P 1 (dated April 17, 1940) to the defendants the properties in question ; the deed reserved the right to obtain a retransfer "within three months after the expiration of five years from this date on the payment of the sum of Rs. 350 ". On May 1, 1942, Abeysin Banda for a sum of Rs. 200 executed deed P2 in favour of the plaintiffs. The plaintiffs instituted this action on July 31, 1945, averring that the defendants failed to execute a deed of re-transfer in their favour. The trial Judge dismissed the action on the ground that the right to obtain a retransfer which was a personal right was not sold to the plaintiffs on P2. Mr. Thambiah argued that the decision of the Judge on this point was correct; he also tried to support the order of dismissal on the ground that there was no valid tender.

It is argued that the obligation under the contract of sale, P1, was to transfer the properties " to Abeysin Banda and to his aforewritten", that is to his heirs, executors and administrators and that it cannot be transformed into an obligation to convey the properties to strangers with whom the defendants made no contract. But contractual rights

are in general assignable except where the obligations of the other party are personal in their nature. Obligations are impersonal where the law considers that the personality or identity of the person in whose favour they are to be performed is a matter of indifference to the performing party. Where the obligation is impersonal the corresponding right is assignable. An agreement to resell or a right of retransfer is not a personal right and can be assigned or ceded to a stranger[1]. The language used in the deed is not sufficient to show that the defendants expressly undertook performance in favour of Abeysin Banda and his aforewritten exclusively, and not in favour of his assignees.

By deed P2 Abeysin Banda assigned and set over unto the plaintiffs "the premises in the Schedule herto fully described". It is necessary to see what the Schedule states, for the word "premises" is used in this deed to show the subject of the conveyance specified in the conveying part. The word used in the Schedule are these:—All my right, title, interest, claim and demand in and to the following lands—then follows a description of the properties in question. If these words are substituted in the conveying part of the deed, it becomes clear that what the assignor intended to, and did, assign was the rights which were reserved to him in deed P1, that is the right to obtain a retransfer of the properties in question. This intention is also made manifest by the word used by the assignor in describing the nature of his right—"the said premises have been held and possessed by me upon right reserved in transfer deed No. 6,074".

The evidence shows clearly, and the Judge has found that the first plaintiff met the first defendant by arrangement on July 5, 1945, and tendered the sum of Rs. 350 to him when the first defendant made an excuse that he could not accept the money in the absence of the other defendant, A meeting at the office of the Proctor-Notary who attested deed P2 appears to have been arranged for the following day for the receipt of the money and the signing of the deed. "The defendants" as the Judge states "did not turn up and though letters were sent under registered cover to both defendants by first plaintiff at first and later through the Proctor, defendants ignored them"—letters sent by first plaintiff on July 6, by the Proctor on July 9. The second defendant accepted delivery of the letter of July 6 : the defendants appear to have declined to accept the other letters.

It was contended by Counsel that the plaintiffs should have tendered the money to the second defendant. In this connection he drew the attention of the Court, after the argument was concluded, to an *obiter dictum* on page 160 of *2 N. L. R.* where the learned Judge stated—"In the second place, the money was not offered. It has been repeatedly held that a mere statement that money is ready is not sufficient". That dictum should be confined to the particular facts of that case. If the relation of the purchaser and vendor is that of creditor and debtor, it must be remembered that that purchaser is creditor and the vendor is debtor for delivery, the seller is, on the other hand, creditor and the buyer debtor for the price.

[1] *Voet 18–3–8.*

If there is no agreement for postponing payment the buyer is bound to pay the purchase money immediately the contract is concluded on the vendor's delivery or offering to deliver the property. In the absence of agreement to the contrary each of the parties is bound to perform his side of the contract immediately it is concluded. Unless otherwise agreed delivery of the property and payment of the price are concurrent conditions : the seller must be ready and willing to give possession of the property to the buyer and the buyer must be ready and willing to pay[1]. The rule of the Roman-Dutch Law is almost similar to that in English Law. It is a fundamental principal that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably[2].

The first duty of the vendor is to deliver the property, he is bound to put the purchaser in actual possession of the property and he is deemed to do so by giving him the means of immediately appropriating it. The obligation of delivery is an obligation to deliver so as to enable the purchaser to have and hold the property as his own. Delivery is either actually made by the induction into possession if it be immovable property or it is constructive when some symbol of the thing sold is given as the key of the house. The delivery or the act, or instrument of sale, was another species of constructive or *ficta traditio*[3]. If a place has been agreed upon for performance it should take place there. Otherwise, as is obvious in the case of land, the proper place of performance that is where actual delivery is sought, would be the place where the property is : but where, as in Ceylon, delivery of the deed is sufficient for the consummation of a sale the proper place of performance would *prima facie* be the place where the deed is executed by the party and attested by the Notary. The letter P6 dated July 6, 1945, was handed to the second defendant by the postal peon on July 7, and a receipt obtained for it (P8). The letter makes it clear that the sum of Rs. 350 was deposited with the Proctor- Notary ; the defendant is requested to accept the money to call at the Proctor's office, and to execute a transfer on or before July 13, 1945. The defendant neither called at the office nor sent a reply. He did not at any time take up the position that the Proctor's Office was not a convenient place for the execution of the deed. The appellants did everything they were bound to do for the purpose of obtaining a transfer of the properties.

The appeal is allowed with costs. Judgment will entered in terms of paragraphs (*b*) and (*c*) of the prayer. The respondents will have the right to get the sum deposited in Court on the execution of the deed.

JAYETILLEKE J. —I agree.

Appeal allowed.

[1] *See passage from Cujacius quoted on p. 326 of Norman on Sale. Cf. Grotius Introduction, 3-14-1 ; 3-15-3.*

[2] *Palmer v. Lark (1945) 1 A. E. R. at p. 356.*

[3] *Appuhamy v. Appuhamy (1880) 3 S. C. C. 61.*
Goonetilleke v. Fernando (1919) 21 N. L. R., 257, p. 265 and 22 N. L. R. 385.