[PRIVY COUNCIL]

1971 *Present :* **Lord Hodson, Lord Guest, Lord Upjohn, Lord Donovan and Lord Gardiner**

C. SANDANAM, Appellant, *and* M. I. M. JAMALDEEN and others, Respondents

PRIVY COUNCIL APPEAL NO. 33 OF 1969

S. C. 215/63—D. C. Kandy, 6642

Vendor and purchaser—Specific performance—Agreement to sell immovable property—Provision for refund of first instalment of purchase price and payment of liquidated damages by vendors if they fail to execute conveyance when second instalment is paid, within a stipulated period, at the time of execution of conveyance —Payment of the second instalment accepted by vendors within the stipulated period—Refusal of vendors thereafter to execute conveyance—Right of purchaser to claim specific performance of the obligation of vendors to execute conveyance —Duty of vendor to pass transfer when immovable property is sold—Roman-Dutch Law.

Clause 1 of an agreement to sell certain immovable property provided that the Vendors should, by a conveyance to be prepared and executed at the cost of the Purchaser, transfer the property for the price of Rs. 3,000 on or before the expiry of three months from 18th December 1957. Clause 2 stated that out of the purchase price of Rs. 3,000 a sum of Rs. 2,000 had already been paid and that the balance sum of Rs. 1,000 should be paid at the time of executing the deed of conveyance in favour of the Purchaser. Clause 3 provided for forfeiture of the Rs. 2,000 if the Purchaser failed to complete the purchase. Clause 4 provided that in the event of the Vendors failing to complete the conveyance in terms of the agreement the Vendors should refund to the Purchaser the sum of Rs. 2,000 already paid in advance, with a further sum of Rs. 2,000 as liquidated damages and not as a penalty.

Before the date of completion the Vendors accepted the payment of the final Rs. 1,000 due under the agreement and gave the Purchaser a receipt dated 10th February 1957. Subsequently, when the Proctors for the Purchaser prepared a deed of transfer and by letters dated 30th October 1961 invited the Vendors to execute the transfer, the Vendors refused to do so. Thereupon the Purchaser instituted the present action in December 1961 claiming specific performance.

Held, that the conduct of the parties made it quite clear that Clause 4 of the agreement could no longer operate. Having accepted the final instalment the Vendors must be taken to have accepted the position that they were under a duty to complete the bargain, for payment of liquidated damages of Rs. 2,000 would no longer be adequate according to the agreement of the parties. The Purchaser, therefore, was entitled to claim specific performance.

Abdeen v. Thaheer (59 N. L. R. 385) distinguished.

Held further, that by Roman-Dutch Law the obligation is upon the Vendor of immovable property to pass transfer and for this purpose he may appoint his own conveyancer although the Purchaser may by the terms of the contract

be compelled to pay the costs of the transfer. Clause 1 of the agreement in the present case did not in any way alter the rights of the parties. Accordingly, as the Vendors were in default in failing to tender the conveyance within the stipulated period of three months, the Purchaser was entitled to waive any condition as to time and claim specific performance of the agreement.

APPEAL from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Eugene Colran*, for the purchaser-appellant.

David Hands, for the vendors-respondents.

Our. adv. vult.

February 2, 1971. [*Delivered by* LORD UPJOHN]—

This is an appeal from the Supreme Court of Ceylon (H. N. G. Fernando, C.J. and G. P. A. Silva, J.) who allowed an appeal from V. Siva Supramaniam District Judge in the District Court of Kandy who made an order for specific performance of an agreement dated 18th July 1956 whereby the three defendants (respondents to this appeal) agreed to sell to the plaintiff (appellant in this appeal) certain land which should be allotted to them in lieu of their undivided shares in certain land in a Partition Action No. P.1119 then pending in the same District. It will be convenient to refer to the three defendants/respondents as the Vendors and to the plaintiff/appellant as the Purchaser.

The Vendors' mother was also a party to the agreement and to the Partition Action but she died subsequently and the Vendors became entitled to all her rights and obligations in the agreement and Partition Action and it is not necessary to mention her further.

A Final Decree was made in the Partition Action on 18th December 1957 and by admission of the parties entered on the same day when certain land being Lot E on a plan referred to in the Decree was allotted to the defendants and the sole question before their Lordships' Board is whether the Purchaser is by virtue of the agreement of 18th July 1956 entitled to specific performance of the agreement with the Vendors to sell this land to him. Their Lordships must set out the relevant clauses of this agreement.

"1. The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the Purchaser sell and transfer unto the Purchaser whatever divided share or shares (together with the buildings plantations and everything thereon) the Vendors will be allotted in the said partition action. . .

for the price or sum of Rupees Three Thousand (Rs. 3,000/-) at any time within three months of the entering of the Final Decree in the said partition action No. P.1119. . .

2. Out of the purchase price of Rupees Three Thousand (Rs. 3,000/-) a sum of Rupees Two Thousand (Rs. 2,000/-) shall be paid by the Purchaser to the Vendors at or before the execution of these presents (the receipt whereof is hereby admitted and acknowledged by the Vendors) and the balance sum of Rupees One Thousand (Rs. 1,000/-) shall be paid at the time of executing the deed of conveyance in favour of the Purchaser."

Clause 3 provided for forfeiture of the Rs. 2,000/- if the plaintiff failed to complete the purchase and clause 4 was in these terms :

"4. In the event of the Vendors failing or neglecting to complete the conveyance in terms of these presents the Vendors shall refund to the Purchasers the sum of Rupees Two Thousand (Rs. 2,000/-) paid as advance as aforesaid together with a further sum of Rupees Two Thousand (Rs. 2,000/-) as liquidated damages and not as a penalty."

This agreement was notarially executed as required by the Prevention of Frauds Ordinance.

It follows that the conveyance was due to be prepared and executed and the balance of Rs. 1,000/- paid on or before the expiry of three months from 18th December 1957.

Had nothing intervened it was not in dispute in the Courts below or before their Lordships' Board that by the law of Ceylon based on the Roman Dutch law when the completion date arrived the Vendors by virtue of clause 4 had the option either to complete the transaction and receive the balance of the Purchaser's money or to refuse to complete upon the terms of refunding to the Purchaser his deposit of Rs. 2,000/- together with a further sum of Rs. 2,000/- as liquidated damages. This was clearly settled by the judgment of their Lordships' Board in *Abdeen v. Thaheer.*[1]

But in fact much did intervene before the date of completion. One of the Vendors, Mr. Haniffa, was anxious to get married so on 28th August 1956 he borrowed Rs. 500/- from the Purchaser and later on after some further correspondence the Purchaser paid to Mr. Haniffa a further sum of Rs. 500/-.

It is clear that these two payments were treated by all parties as together being the payment of the final Rs. 1,000/- due under the agreement for the Purchaser received a receipt dated 10th February 1957 in these terms :

[1] *(1958) A. C. 116 ; 59 N. L. R. 386.*

" Received the sum of Rupees five hundred (Rs. 500/-) being balance due to us for land referred to in the agreement dated 18 July 1956 attested by Mr. M. W. R. de Silva of Gampola. We undertake to give the transfer to Mr. Sandanam the $\frac{1}{6}$th share of the land, named Konakkahena as per partition case No. 1119 D. C. Gampola, without any consideration as we received the full consideration of Rs. 3,000/- (Three Thousand). "

Then in 1959-60 the Vendors permitted the Purchaser to enter upon the land they agreed to sell to him and with their knowledge and acquiescence erect buildings thereon at a cost of over Rs. 25,000/-.

Matters dragged on, no one evidently was in any great hurry ; the Vendors had their money and the Purchaser was in posssession developing the land. Ultimately the Proctors for the Purchaser prepared a deed of transfer and by letters dated 30th October 1961 they invited the Vendors to attend at their offices on 9th November next to execute the transfer. The Vendors failed or neglected to do so and so the Purchaser commenced these proceedings in December of that year.

In both Courts below the question of estoppel by reason of the payment of the Rs. 1,000/- by the Purchaser and with the knowledge and acquiescence of the Vendors his entry into possession and expenditure of money on the land was much debated but before their Lordships' Board Counsel for the Purchaser recognised some difficulties in his way in successful reliance on estoppel and did not pursue this point before them.

In the Supreme Court the learned Chief Justice dealt in his judgment with the submission that the receipt on 10th February 1957 amounted to a distinct subsequent agreement varying the original agreement (an almost conclusive point under English law), but he held that the Prevention of Frauds Ordinance prevented the proof in evidence of the receipt as a subsequent agreement and this submission failed. Counsel for the Purchaser accepted this view and did not rely on the receipt for this purpose.

The issue before their Lordships' Board was therefore the short one which depended upon the construction of clause 4 of the agreement. The Purchaser contends that clause 4 contemplates a situation when the final payment due under the agreement has not been paid. At that stage the Vendors are entitled to elect to refuse to accept the final Rs. 1,000/- and to refuse to complete the transaction on paying Rs. 4,000/- to the Purchaser. But if they accept payment of the final Rs. 1,000/- the position (he says) is changed and clause 4 cannot operate according to its tenor for repayment of Rs. 4,000/- in lieu of completion will not give to the Purchaser the liquidated damages of Rs. 2,000/- for which he has contracted if the Vendors refuse to complete.

The Vendors' answer is even shorter. The Purchaser may have paid the final Rs. 1,000/- prematurely but the agreement continues in existence in each and every part and operates to the full when the time for completion arises. This contention in substance appealed to the Supreme Court.

Their Lordships cannot agree with the Vendors' submission nor with the decision of the Supreme Court which really depended upon the applicability of *Abdeen v. Thaheer* (*supra*). With all respect to their judgment *Abdeeen v. Thaheer* no longer applied for the conduct of the parties made it clear that clause 4 could no longer operate. Having accepted the final instalment the Vendors must be taken to have accepted the position that they were under a duty to complete the bargain, for payment of liquidated damages of Rs. 2,000/- would no longer be adequate according to the agreement of the parties.

Their Lordships are of opinion that the position was accurately stated by the learned District Judge towards the end of his judgment. Having briefly referred to the terms of clause 4 he said :

> " That clause does not refer to the refund of any sum received by them subsequent to the date of the agreement, and if that clause is to be given effect to the defendants would be liable to refund only Rs. 2,000, although they have in fact received Rs. 3,000 from the plaintiff. That, certainly, could not have been the intention of the parties. For the above reasons, I hold that the substituted obligation contained in clause 4 has become inapplicable, and the plaintiff is entitled to enforce specific performance of the obligation on the defendants to execute a transfer of the property. ".

Their Lordships therefore agree with the learned District Judge that so far as clause 4 is concerned it is no longer applicable and the Purchaser is entitled to specific performance.

But their Lordships must deal with an entirely separate point depending upon clause 1 of the agreement which was raised for the first time in the Supreme Court.

The Court held that under clause 1 of the agreement it was the duty of the Purchaser to demand a conveyance. If he failed to do so within the period of three months from 18th December 1957 then he could not maintain any action for specific performance or even for liquidated damages, a proposition which Counsel for the Vendors was not prepared to support.

But the Supreme Court did not have the advantage of the arguments presented to their Lordships nor the citation of authority to which their Lordships were referred and will now consider. By Roman Dutch Law the obligation is upon the Vendor to pass transfer and for this purpose

ho may appoint his own conveyancer although the Purchaser may by the terms of the contract be compelled to pay the costs of the transfer. This was clearly established by the case in the Supreme Court of the Transvaal in *James v. Liquidators of the Amsterdam Township Co.*[1] and in Wessels Law of Contracts in South Africa, 2nd edition, p. 1105, § 4500 the author said:

> " . . . . but where immovables are sold and transfer has to be given, it is the active duty of the seller to pass the transfer, and for that purpose he can appoint his own conveyancer even though the purchaser has undertaken to pay all the expenses of transfer "

and he cites *James'* case (*supra*).

It seems to their Lordships clear that clause 1 of the agreement to which they have already referred did not in any way alter the rights of the parties, for grammatically it must read " The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed *by them* at the cost and expense of the Purchaser. . . . " for as *Innes C.J.* pointed out in *James'* case (*supra*) only the Vendor can pass the transfer.

Accordingly it is clear that the obligation was upon the Vendors to prepare and tender the conveyance, and as the purchase price had long since been paid, to deliver it upon payment of the costs of its preparation. But the Vendors were in default in failing to tender the conveyance within the stipulated period of three months and not the Purchaser. The Purchaser was of course entitled to waive any condition as to time and accordingly in their Lordships' opinion he is clearly entitled to specific performance of the agreement. Subsequently to the Judgment and Order of the Supreme Court on the Purchaser's action they heard and determined the Vendors' counterclaim asking for the Purchaser's ejectment from the land and for damages. During the hearing their Lordships intimated that they would not hear argument on these issues until they had determined the main appeal and in the circumstances it has become unnecessary for them to do so.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the decree of the Supreme Court discharged and the decree of the District Court restored save that for the date of execution of the Deed of Transfer therein there be substituted a date agreed between the parties or settled by the District Court in default of such agreement. There will be no order as to the costs of the appeal to the Supreme Court or of this appeal.

Appeal allowed.

[1] *(1903) Transvaal Reports 653.*