

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice,  
and Mr. Justice Wood Renton

1908.  
July 6.

AMARASINGHE APPUHAMY v. BOTEJU *et al.*

D. C., Colombo, 24,407.

*Specific performance—Damages—Sale to third party—Notice.*

Where the first defendant by a notarially executed instrument dated June 4, 1906, agreed to convey certain land to the plaintiff, or in default to pay Rs. 100 as liquidated damages, and where the first defendant subsequently, to wit, on December 6, 1906, transferred the said land to the second defendant, who mortgaged it to the third defendant, and the plaintiff sued the defendants, claiming (1) that the first defendant be ordered to execute a conveyance of the land, (2) Rs. 100 damages from first defendant, (3) that the transfer and mortgage of December 6, 1906, be declared null and void—

*Held* (reversing the judgment of the District Judge), that the plaintiff was entitled to damages, even although he is unable to get specific performance of the contract, if the other conditions stipulated in the agreement were complied with.

The second and third defendants having denied that they were aware of the agreement between the plaintiff and the first defendant, and no issue having been settled on the point and no evidence led—

*Held* (affirming the judgment of the District Judge), that the action against them was rightly dismissed.

**A** PPEAL by the plaintiff from a judgment of the District Judge dismissing his action. The facts material to the report sufficiently appear in the judgment of the Chief Justice.

*Bawa*, for the plaintiff, appellant.

*F. J. de Saram*, for the second defendant, respondent.

*A. Driberg*, for the first and third defendants, respondents.

*Cur. adv. vult.*

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The plaintiff appeals from a decree dismissing his action. In his plaint he alleged that by an agreement dated June 4, 1906, the first defendant, in consideration of Rs. 50 paid to him and of a further Rs. 450 to be paid to him by the plaintiff, agreed with the plaintiff to transfer certain land to him within four months from that date, and, in the event of any breach of the agreement, to pay him Rs. 100 as liquidated damages. He said that the land had been mortgaged by the first defendant to the third defendant, and also by a secondary mortgage to the second defendant and had been also leased to the

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second defendant, and that the second and third defendants were well aware of the agreement with him, and (paragraph 4) agreed with him to receive from him the sum due on their mortgages and the surrender value of the said lease, and to cancel the mortgages and the lease on the conveyance of the land by the first defendant to him being completed; that (paragraph 5) he had been always, during the said four months and after, ready and willing to pay the first defendant the balance due, and from time to time offered it to the first defendant and requested him to transfer the land, but the latter failed to do so, and had, in contravention of the agreement, transferred the land by deed of December 6, 1906, to the second defendant, who had by deed bearing the same date mortgaged it to the third defendant. He alleged (paragraph 6) that the first defendant being party to the agreement of June 4, 1906, and the second and third defendants being well aware of its terms, had fraudulently and in breach of it caused the transfer to and the mortgage by the second defendant to be executed. And he claimed that the first defendant be ordered to execute a conveyance of the land to him; (2) the said Rs. 100 damages from the first defendant; (3) that the transfer and mortgage dated December 6, 1906, be declared void and be cancelled.

All the defendants admitted the agreement of June 4, 1906, but each of the second and third defendants denied that he was aware of it (*i.e.*, I suppose, at the date of the deeds of December 6), and denied the agreement alleged in the 4th paragraph of the plaint. The first defendant stated that the plaintiff failed to carry out his part of the agreement of June 4, and that he (first defendant), after the four months mentioned in the agreement had elapsed, transferred the land to the second defendant, who had in the meantime sued on his mortgage bond and obtained judgment. And they all denied the allegation of fraud.

The parties agreed on an issue of law (whether the action was maintainable on the ground stated in the 6th paragraph of the plaint) and an issue of fact (whether the plaintiff tendered to the first defendant the Rs. 450 within the four months). The agreement of June 4 was put in, but no other evidence was taken; and the District Judge dismissed the action on the first issue without making any reference to the second. He held that the plaintiff was not entitled to specific performance of the agreement, because it was now out of the first defendant's power to specifically perform it; that he was not entitled to damages, because where specific performance is the main thing claimed, and the plaintiff fails in that claim, he cannot recover damages as an alternative; and that the claim against the other defendants failed because they were not parties to the agreement.

The agreement of June 4, 1906, recites that in consideration of Rs. 500 the first defendant agrees to sell to the plaintiff within four months the land therein described, subject to the terms thereafter

mentioned; and the terms are, (1) that on payment of the Rs. 500 within the said period the first defendant will transfer the land to the plaintiff; (2) that the plaintiff has paid Rs. 50 in advance; (3) that if the plaintiff fails to pay the amount to the first defendant within four months, the sum paid in advance shall be forfeited; (4) that the first defendant cannot during the four months sell or alienate the land; (5) that if the first defendant commits a breach of any of the above agreements, Rs. 100 shall be paid as damages to the plaintiff.

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Under this agreement, if the buyer tenders the balance of the purchase money within the four months, he is entitled to a transfer; if he does not, he forfeits his deposit, and is under no further liability. And if the seller, upon the money being tendered to him within that time, fails to execute a transfer (I do not say if he fails to execute it within the four months, but at all events if he fails altogether), he has to pay Rs. 100 as damages. The plaintiff contends that, having been ready within the four months to carry out his part of the agreement, he is entitled to specific performance of it. But a fatal objection to that claim is that it is no longer in the seller's power to specifically perform the agreement.

I think there is no good cause of action alleged against the second and third defendants. They denied that they were aware of the agreement, and no issue was settled on that point, or as to whether they knew that the plaintiff had complied with, or that the seller had failed to comply with, the agreement; and the four months had expired before the transfer and mortgage to them.

But as regards the first defendant, his counsel admits that the action ought not to have been dismissed, but that there should have been evidence taken and an adjudication on the second issue. Under our procedure a claim for specific performance of an agreement can be made in the same plaint with a claim for damages for breach of it. If the second issue is answered in the affirmative, the plaintiff will, unless some other good defence is proved, be entitled to the Rs. 100 damages stipulated for in the agreement, and also (I presume, although he has not hitherto asked for it in this action) to the return of the money which he paid on account.

I think the appeal as against the second and third defendants should be dismissed with costs, but that the decree so far as it dismisses the action against the first defendant and orders the plaintiff to pay his costs should be set aside, and the action remitted for trial of the second issue, and for adjudication thereafter on the claim for damages against the first defendant. The costs as regards the first defendant to be costs in the cause.

WOOD RENTON J.—I concur.

*Appeal allowed as against first defendant.*

*Appeal dismissed as against second and third defendants.*