

1952

*Present : Gratiaen J. and Gunasekara J.*

S. SIVASAMBŪ *et al.*, Appellants, and KATHIRESAR  
 . AMBAGAR *et al.*, Respondents

*S. C. 496—D. C. Jaffna, 652*

*Contract—Transfer of property—Condition for reconveyance—Provision for damages on refusal to reconvey—Is obligation of transferee alternative?—Specific performance—Trusts Ordinance, s. 93.*

Where property is transferred subject to the terms that the transferee should reconvey it to the transferor upon payment of a certain price within a stipulated period and that, on refusal to reconvey, the transferee should pay a certain sum as damages, action for specific performance of the reconveyance would lie at the instance of the transferor if the promise to pay damages represents merely a penal stipulation which is nothing more than accessory to the principal obligation. If, on the other hand, the promise to pay damages introduces in truth an alternative obligation at the transferee's option, it is open to the transferee to discharge the contract by complying with either (and not both) of the alternative obligations stipulated in the contract.

**A**PPPEAL from a judgment of the District Court, Jaffna.

*N. E. Weerasooria, Q.C.*, with *C. Shanmuganayaṣam*, for the 4th defendant appellant.

*H. W. Tambiah*, with *V. Ratnasabapathy*, for the plaintiffs respondents.

*Cur. adv. vult.*

May 28, 1952. GRATIAEN J.—

By a deed No. 15,600 dated 17th September, 1941, the 1st, 2nd and 3rd plaintiffs sold the land to which this action relates to Poothar Sittamparapillai for a consideration of Rs. 5,300. The deed contingently provided for a reconveyance of the property to the plaintiffs (or to their nominee Thambipillai) upon the following conditions :—

“ We do further declare that if we jointly and severally or Thambipillai Nalliah of Udduvvi with our consent, pay the consideration of Rs. 5,300 with interest thereon at the rate of 6½ per cent. p.a. within 3 years of the date hereof and ask for a transfer at our expense the said Sithamparapillai or his heirs and administrators should transfer the said lands without any objection and if they refuse to execute accordingly should pay a sum of Rs. 2,700 as damages. We do hereby further declare and bind ourselves that if we fail to pay the said principal and interest within the time prescribed and obtain a transfer of the said lands from him or from his aforewritten the said lands do belong to the said Sithamparapillai and his heirs after the said period without asserting any right, title or interest from the said lands. ”

The learned District Judge has held, and I accept his finding, that the sum of Rs. 5,300 and interest had been duly tendered to Sithamparapillai within the time stipulated. Nevertheless, the reconveyance asked for was “ refused ” and Sithamparapillai sold the property shortly afterwards to the appellant for valuable consideration in terms of Deed No. 1,222 dated 20th September, 1944.

In the present action the 1st, 2nd and 3rd plaintiffs and Thambipillai sued Sithamparapillai for the execution of a conveyance in terms of the original agreement, and the appellant was added as a party defendant when his subsequent purchase was disclosed. The stipulated consideration was deposited in Court by the plaintiffs to the credit of the action.

Some of the original parties died during the pendency of the proceedings, and the substitution of their representatives in interest has contributed to the long delay in arriving at a final determination of the litigation.

The learned District Judge has correctly held that, by virtue of the provisions of Section 93 of the Trusts Ordinance, such rights as had vested in the plaintiffs and in Thambipillai under the deed No. 15,600 against Sithamparapillai have become legally enforceable against the appellant as purchaser of the property. He also took the view that, upon a proper interpretation of the deed, an action for specific performance did lie. A decree against the appellant was entered upon that footing.

For the purposes of this appeal it is necessary to examine and construe the language of the clause which I have quoted. If, as the learned District Judge has held, Sithamparapillai had undertaken without qualification to reconvey the property upon payment of the agreed price within the stipulated period, and if his promise to pay Rs. 2,700 merely represented a penal stipulation which was merely accessory to the principal obligation, then an action for specific performance of that principal obligation

lay at the instance of the 1st, 2nd and 3rd plaintiffs and/or of Thambi-pillai with their consent. If, on the other hand the stipulation for the payment of Rs. 2,700 introduces in truth an alternative obligation at the obligor's option it was clearly open to Sithamparapillai (or his successor-in-title) to discharge the contract by complying with either (and not both) of the alternative obligations stipulated in the deeds.

The principle under consideration has been explained by *Pothier on Obligations*<sup>1</sup> in the following terms:—

“ An alternative obligation is contracted when a person engages to do, or to give, several things in such a manner that the payment of one will acquit him from all . . . . In order to constitute an alternative obligation, it is necessary that two or more things should be promised *disjunctively*. When they are promised *conjunctively*, there are as many obligations as the things which are enumerated, and the debtor cannot be wholly liberated without discharging them all; but when they are promised in the alternative, though they are all due, there is but one obligation which may be discharged by the payment of any of them. *The choice belongs to the debtor.* ”

The method of approach laid down by Pothier exactly corresponds with that indicated in *Fry on Specific Performance*<sup>2</sup> where reference is made to a class of contract in which “ the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done ”. As was held in *Roper v. Bartholomew*<sup>3</sup> “ the Court must in all cases look for their guide to the primary intention of the parties as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation ”.

Our attention has been drawn to a number of earlier decisions of this Court where similar problems of interpretation have arisen, vide *Mathes Appuhamy v. Raymond*<sup>4</sup>; *Appuhamy v. Silva*<sup>5</sup>; *Paiva v. Marikar*<sup>6</sup> and *De Silva v. Senaratne*<sup>7</sup>. As I read these judgments, they have all adopted the test which Pothier lays down, but in each case the language of the document under consideration differed widely from the language of those construed in the others. With respect I think that, so long as the true principle is borne in mind, the interpretation (right or wrong) of any particular words appearing in one written instrument is seldom of much assistance as a precedent for deciding the true meaning of some other written instrument.

Having given my best consideration to the language of the deed 15,600 dated 17th September, 1941, I have reached the conclusion that Sithamparapillai had bound himself and his successors-in-title *either* to convey the property “ without any objection ” upon due payment of the agreed consideration *or*, should he “ refuse ” to fulfil that particular

<sup>1</sup> Vol. 1, page 136 (Article 6 Paragraphs 245-247).

<sup>2</sup> (5th Ed.) page 68 Section 142.

<sup>3</sup> 12 P.R.I. 821 (147 E. R. 880).

<sup>7</sup> (1949) 50 N. L. R. 313.

<sup>4</sup> (1896) 2 N. L. R. 270.

<sup>5</sup> (1914) 17 N. L. R. 238.

<sup>6</sup> (1936) 39 N. L. R. 255.

obligation, to pay instead a sum of Rs. 2,700. I am quite unable to subscribe to the view that both these promises were made conjunctively in the sense that failure to fulfil the first obligation exposed him to the duty to fulfil them both. In this particular context the word "and" is not inconsistent, I think, with the idea of disjunctive promises. Finally, the word "refuse" seems to negative to some extent the view that the alternative obligations provided by the agreement were enforceable at the option of the proposed purchasers of the property.

*Fry on Specific Performance*<sup>1</sup> refers to the authority of *Hobson v. Trevor* which is not available to me, for the proposition that "where the amount of penalty is small, as compared with the value of the subject of the contract, it is a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract". It seems to me that a stipulation for a substantial payment may reasonably be accepted as some indication that the parties intend to provide for an alternative obligation at the debtor's option. In the present case, the plaintiffs could hardly have been in a position in September, 1941, to persuade Sithamparapillai to bind himself to pay so large a sum, in proportion to the contract price, either as a penalty for securing the performance of a single and compellable obligation or even as liquidated damages, payable at the purchaser's option, in the event of its breach. The plaintiffs must have been pressed for money at the time of the transaction, and presumably they could not prevail upon Sithamparapillai to pay them Rs. 5,300 except as consideration a *sale rather than a mortgage* of the property. Having secured an absolute transfer in his favour, he agreed either to reconvey the property in exchange for that sum, together with reasonable interest if paid within 3 years or, in effect, to increase the amount of the original purchase price from Rs. 5,300 to a round sum of Rs. 8,000. The language of the deed does not suggest to my mind any other acceptable theory as to how precisely the sum of Rs. 2,700 could have been arrived at by agreement between the parties.

In the view which I have taken, the claim for specific performance of the first alternative obligation, namely, the promise to convey the property, is not enforceable by the plaintiffs as of right. The other alternative obligation to pay a sum of Rs. 2,700 therefore became enforceable upon Sithamparapillai's refusal to convey the property, and Mr. Weerasuriya conceded that this obligation has now passed to the appellant. I would accordingly substitute for the decree entered in the Court below a decree ordering the appellant to pay the 1st, 2nd and 3rd plaintiffs a sum of Rs. 2,700 with legal interest thereon from the date of the institution of this action until payment in full. Subject to this, the appellant is entitled to his costs both here and in the Court below, the aggregate amount of which must upon taxation be deducted from the sum payable by him to the plaintiffs under this decree.

GUNASEKARA J.—I agree.

*Appeal allowed.*