1954 *Present :* **Gratiaen J. and Fernando A.J.**

W. D. BAIYA, Appellant, *and* K. D. A. KARUNASEKERA, Respondent

S. C. 92—D. C. Kurunegala, 5,662 L

Vendor and purchaser—Sale of immovable property—Tender of price by purchaser—Sufficiency of guarantee that is reasonably adequate—"Escrow"—Proviso (3) to s. 92 of Evidence Ordinance.

In the absence of an agreement on the point, a purchaser of immovable property would make a sufficient tender of the purchase price if he offers security which effectively guarantees payment of the price immediately upon the vendor's complete fulfilment of his reciprocal obligations.

Held further, that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only.

APPEAL from a judgment of the District Court, Kurunegala.

Certain immovable property had been sold to the defendant subject to an express agreement that the defendant should in turn sell it to the plaintiff for Rs. 4,200 within a stated period. As plaintiff did not possess the money to buy the property he successfully negotiated with the Agricultural and Industrial Credit Corporation to raise a loan on the property for Rs. 5,000 by mortgaging it to the Corporation immediately on the defendant signing a conveyance of the property in his favour. The intention was that Rs. 4,200 out of the loan should be applied towards the consideration for the sale. Defendant, however, refused to affix his signature to the transfer of the property unless he received the purchase price at or before the time of the signature. The plaintiff thereupon instituted the present action asking for a decree ordering the defendant to convey the property to him.

H. V. Perera, Q.C., with *N. C. J. Rustomjee,* for the plaintiff appellant.

N. K. Choksy, Q.C., with *C. E. S. Perera, Q.C.*, and *T. B. Dissanayake,* for the defendant respondent.

Cur. adv. vult.

July 20, 1954. GRATIAEN J.—

The plaintiff had sold three allotments of land to two persons named Don Dharmadasa Gunasekera and Don Lewis Perera in 1945. He was anxious to re-acquire the properties, but did not possess the means to do so. He succeeded, however, in persuading the defendant to purchase them for the time being from Perera and Gunasekera (by P1 dated 4th November, 1946), subject to an express condition that the defendant should in turn sell them to the plaintiff for Rs. 4,200 at any time before 4th November, 1949.

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The plaintiff was very energetic in his endeavours to place himself in a position to exercise this option in his favour. Certain proceedings between the parties were initiated before the Debt Conciliation Board, but I agree with Mr. Choksy that a settlement arrived at in January, 1948, before that tribunal has not materially altered the legal rights or obligations of the parties under P1. What is important, however, is that shortly afterwards, in pursuance of that settlement, the plaintiff successfully negotiated with the Agricultural and Industrial Credit Corporation to raise a loan on the properties for Rs. 5,000 by mortgaging them to the Corporation immediately on the defendant signing a conveyance in his favour in terms of P1. The intention was that Rs. 4,200 out of the loan should be applied towards the consideration required to settle the defendant's claim. The defendant agreed to co-operate in implementing this arrangement which provided a practicable solution to the plaintiff's problem without derogating from the defendant's contractual rights.

The Corporation was precluded by statute from handing over the amount of the promised loan until the defendant's deed of transfer in favour of the plaintiff, and the plaintiff's primary mortgage in favour of the Corporation. had both been duly registered. It was therefore arranged that these two instruments should be signed, notarially attested, and forwarded for registration at the same time ; this arrangement, if implemented, would make it possible for the Corporation to pay a sum of Rs. 4,200 on the plaintiff's behalf to the defendant as soon as the registration of the transfer and the mortgage had been contemporaneously effected. Accordingly, the documents were prepared for signature and both parties were invited to attend a notary's office together on 25th January, 1949, in order to complete the transaction. Eventually, a deadlock arose because, although the defendant was still willing to implement the plan, he maintained that he was legally entitled to receive the purchase price at or before the time when he actually signed the transfer. The plaintiff denied that this was a correct interpretation of the defendant's rights under P1.

There were still several months to run before the expiry of the time-limit within which the plaintiff could exercise his option. Throughout this period the Corporation kept open its offer, in terms of the agreed plan, to hold a sum of Rs. 4,200 (out of the promised loan of Rs. 5,000) at the defendant's disposal pending contemporaneous execution and registration of the necessary instruments. The defendant, however, was adamant in his refusal to execute the transfer unless the consideration was paid to him " against signature ". Alternative offers to deposit the money (pending registration) in Court or even with the defendant's own lawyer (who, it was suggested, should himself be responsible for attesting and attending to the registration of the documents) were also rejected.

The plaintiff thereupon instituted the present action in October, 1949, and asked for a decree ordering the defendant to convey the properties to the plaintiff in fulfilment of his obligation under P1. The foundation of his claim was that he had made a good and sufficient tender of the consideration within the stipulated time-limit.

Upon the facts which I have set out, the question for our adjudication resolves itself into a question of law. The learned judge decided the issue in favour of the defendant and dismissed the plaintiff's action. He held that, upon a proper construction of the agreement of sale, the defendant was entitled to insist on payment of the consideration contemporaneously with the signing of the conveyance demanded by the plaintiff.

It is, of course, a sound proposition of law that a tender of payment is bad " if it is subject to conditions to which the (creditor) would have a right to object "—*Odendhal v. de Plessis* [1]. As to *the form of the tender*, the defendant was not averse to accepting in lieu of cash a cheque drawn in his favour by the Corporation. *His sole objection to the tender related to the point of time when the cheque was to be made available to him.*

A slight complication has no doubt arisen in the present case because, in order to obtain the funds to pay the purchase price, the plaintiff was under a necessity to mortgage the properties to the corporation. I shall consider at a later stage whether this complication had the effect of vitiating the tender. At the outset, however, I shall discuss the question *whether the defendant was justified in demanding payment of the consideration as soon as he had signed the transfer, and in refusing otherwise to proceed further with the implementation of the agreed plan.*

Fulfilment of the covenant to sell the properties on payment of Rs. 4,200 involved obligations on both sides. In the absence of an agreement fixing some other limit of time for payment of the consideration, the common rule law is that the payment of the purchase price and the effective passing of title from the vendor to the purchaser should take place *pari passu*—*Trichardt v. Muller* [2]. Where the parties to the contract are willing to co-operate with one another, the practical difficulty of synchronising the performance of reciprocal obligations presents no serious obstacles. *Voet 19.1.23.* discusses the situation which arises when, owing to mutual distrust or business caution, one party refuses to perform his obligations until the other's obligations have first been fulfilled. " Nothing else remains ", says the jurist, " but for both the thing sold (*if it be a movable*) and the promised price to be sequestered, and for the depositary to deliver the price to the vendor and the thing to the purchaser; *or that both parties give adequate security for fulfilment of the contract.* "

This principle of the Roman-Dutch law has also been applied by the South African Courts *where immovable property is the subject of a sale.* " The expedient which is resorted to in practice is quite reasonable; transfer is seldom or never passed into the name of the purchaser until some kind of guarantee is given, usually a bank guarantee, that the money will be paid "—*Trichardt's case* (*supra*) at p. 178. " When the rule (for simultaneous payment and delivery) cannot be strictly carried out, Voet says that some reasonable compromise may be adopted " —*ibid.* at p. 180.

This eminently sensible solution was approved by a very distinguished bench of judges in *Breytenbach v. Van Wijk* [3]. Wessels J., delivering the principal judgment, explained that the vendor was obliged to transfer

[1] *(1918) S. A. A. D. 475.* [2] *(1915) T. P. D. 175.*
[3] *(1923) S. A. A. D. 541.*

his title if he was offered adequate security for the due fulfilment of the purchaser's part of the contract. "*Any guarantee that is reasonably sufficient*", he said, "*will meet the case*". The security or guarantee offered must of course be adequate; in addition, its availability for immediate realisation must not be delayed beyond the point of time when the vendor's contractual obligations have been completely discharged. In the present case, the adequacy of the security or guarantee offered (i.e., payment by the Corporation's cheque) is not disputed; the only question is whether the refusal to hand over the cheque *as soon as the transfer was signed and before it was even delivered*, constituted, in the circumstances of this case, a bad tender.

In this country the bare execution of a notarially attested conveyance of land represents only a partial fulfilment of the vendor's obligations under a binding agreement to sell immovable property. He must implement the agreement not only by executing an appropriate instrument in proper form, but also by taking certain other steps *effectively to transfer his title to the purchaser*. Under our law, the affixing of the vendor's signature to the conveyance does not automatically operate to pass title. *Delivery of the deed* is the minimum pre-requisite (as constituting constructive delivery of the land itself) to the creation of a title which is sufficient even to enable the purchaser to maintain an action to recover the property from "*a third party* in possession without, or under a weaker, title"—*Appuhamy v. Appuhamy* [1]. Berwick J. explained at p. 67 that in Ceylon "the notarial execution and the registration of the deed—formerly in Court and now with the Registrar of Lands—with delivery of the deed takes the place of the old Dutch symbolical delivery before the judge and registration of the proceedings among the acts of court; with the same result as in Holland, the principles being the same—viz., contract of sale *plus* symbolic delivery, equal to *dominium*, with the consequent right to sue in ejectment". *As against the vendor*, however, "the purchaser is not bound to accept the conveyance only; he is entitled to ask to be put in vacant possession"—*Ratwatte v. Dullewe* [2].

It is always a wise precaution to insert an express term in the agreement of sale unambiguously fixing the time for payment of the consideration. In that event, the agreement would precisely regulate the rights and obligations of the parties in this respect. If the contract is, however, silent on the point, a purchaser would make a sufficient tender of the consideration if he offers security which effectively guarantees payment of the consideration immediately upon the vendor's complete fulfilment of his reciprocal obligations. Provided, therefore, that the security offered is perfectly adequate to ensure the vendor's protection, he cannot justifiably refuse to fulfil his part of the contract unless he is assured of payment of the consideration before title has passed to the purchaser. In South Africa, apparently, the registration of the deed is a pre-requisite to the transfer of *dominium*. I do not say that this is also the law of Ceylon, but a binding agreement to "convey" immovable property is not fulfilled in this country by the mere affixing of a signature to a notarial conveyance. In the present case, the defendant had been invited, and

[1] *(1880) 3 S. C. C. 61 F. B.* [2] *(1907) 10 N. L. R. 304 F. B.*

he had agreed, to pass *dominium* by delivery of a deed of transfer only after it had been duly attested and registered. In view of this agreement, the time fixed for delivery of the deed was also the proper time for the receipt of the purchase price.

For these reasons, the plaintiff's action would certainly have been maintainable if the Corporation had, on the plaintiff's behalf, guaranteed payment of the purchase price *as soon as the defendant's conveyance, duly registered, was actually delivered to the plaintiff*. Indeed, the plaintiff might well have demanded vacant possession as well before the money was released.

The only outstanding question is whether the additional condition imposed by the Corporation vitiated the tender—namely, that the plaintiff's contemporaneous mortgage in favour of the Corporation must also be registered before the money was finally released to the defendant.

The defendant would certainly have been justified in rejecting this condition if it was calculated to prejudice the defendant's rights or, alternatively, if its implementation would have resulted in the slightest postponement of the appropriate point of time for the receipt of the consideration (for instance, if the execution and due registration of both instruments could not have been virtually synchronised). But in truth there was no such risk. Both instruments had been prepared for signature in due form, and the arrangement agreed to by the defendant was that both parties should attend the notary's office at the same time ; that the signature to the mortgage should be taken immediately after the transfer was signed, and that both instruments should comtemporaneously be tendered for registration by the same attesting notary. In the result, the implementation of the agreed plan would have ensured that the defendant would receive the Corporation's cheque exactly as if the transaction had not been complicated by this special feature.

Mr. Choksy raised a pertinent question which I must not overlook. What, he asked, would be the position if the plaintiff refused to sign the mortgage after the transfer had been signed ? In that event (it was asked) would not the defendant have parted with his title to the land and also been deprived of his consideration ? The answer is that there was no legal or practical foundation for the entertainment of such fears. I have already explained that *the title could not have passed without delivery of the deed*, and it was implicit in the procedure agreed to that the deed should not be delivered to the plaintiff by the notary until after the contemporaneous registration of both instruments. In other words, the notary (selected by the defendant himself) was required in this particular case to perform the functions of the " depositary " recommended by Voet (*supra*). " A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only "—*Macedo v. Strand* [1]. If, therefore, the plaintiff dishonestly backed out of the arrangement by refusing to sign the mortgage after the transfer had been signed, the entire transaction would have fallen through and the title would have continued to vest in the defendant. *Vide* also Proviso (3) to section 92 of the Evidence Ordinance and *Punchi Nilame v. Dingiri Etana* [2].

[1] *(1922) A.C. 330 at 337.* [2] *(1909) 1 Curr. L. R. 239.*

In the particular circumstances of this case, the defendant wrongfully rejected in anticipation any form of tender or guarantee except payment before the title had effectively passed to the plaintiff in terms of the agreed plan. The plaintiff has therefore established his cause of action to claim a transfer of the properties in terms of the covenant contained in P 1.

Mr. H. V. Perera informed us at the conclusion of his argument that the plaintiff is now willing and able to deposit Rs. 4,200 unconditionally in Court, to be paid to the defendant upon the execution, attestation and delivery of the deed of transfer. I would therefore set aside the judgment under appeal in so far as it dismisses the plaintiff's action, and enter a decree in the following terms :—

(*a*) that the plaintiff be ordered to deposit a sum of Rs. 4,200 to the credit of this action within 14 days from the date on which this record is received in the lower Court, and that an order for payment be issued in favour of the defendant upon the execution and attestation of the deed of transfer hereinafter mentioned ;

(*b*) that, within 14 days from the date of such deposit, the defendant must execute a conveyance at the plaintiff's expense in favour of the plaintiff (in a form agreed upon or, in the absence of such agreement, in a form approved by the Court) of the properties described in the schedule to the deed P1 ;

(*c*) that if the defendant fails to comply with (*b*) above, the learned District Judge should take steps to have the approved conveyance signed by an officer of the Court in terms of the Civil Procedure Code.

There remains for consideration the defendant's claim in reconvention. It has been established that on 3rd March, 1950, i.e., *some months after the institution of this action*, the plaintiff, without due process of law, took forcible possession of two of the properties specified in the schedule to P1. and also refused to hand over a third property which he had previously occupied with the leave and licence of the defendant. This conduct was wholly unjustified, and the decree ordering him to pay damages to the defendant at the rate of Rs. 350 *per annum* must therefore be affirmed. The damages will be payable with effect from 3rd March, 1950, until the date of the conveyance ordered to be executed in terms of my judgment.

Should the plaintiff fail to deposit the consideration within the time stipulated in this decree the plaintiff's action will stand dismissed with costs in both courts, and the decree for ejectment in favour of the defendant will also be restored. In that event, the damages will be payable until the date on which the defendant is restored to possession of the properties. Subject to compliance with paragraph (*a*) of this decree, the defendant must pay to the plaintiff the costs of this appeal together with half the costs of the proceedings in the Court below.

FERNANDO A.J.—I agree.

Judgment set aside.