1973 *Present* : **Deheragoda, J., and Walgampaya, J.**

H. E. A. JAYAWICKREMA and another, Appellants, *and* A. DAVID SILVA, Respondent

S. C. 80/67 (F)—D. C. Colombo, 1453

(i) *Contract—Agreement to sell immovable property within a specified period—Whether payment of the purchase price must be made within the specified period—Whether time is of the essence of the contract.*

(ii) *Civil Procedure Code—Section 547—Action to recover property of a deceased person's estate worth over Rs. 2,500—Action instituted prior to issue of letters of administration—Maintainability.*

(iii) *Appeal—Point of law—Whether it can be raised for the first time at the stage of appeal.*

(i) An agreement to sell certain immovable property provided that, within a month after the happening of an expected event, the vendor should convey the property to the vendee.

Held, that, in such a case, time is not of the essence of the contract. Accordingly, the vendee was entitled to a conveyance of the property if, after the happening of the expected event, the purchase price was offered by him within a reasonable time after the expiry of a month.

(ii) Although Section 547 of the Civil Procedure Code provides that no action is maintainable to recover property belonging to a deceased person's intestate estate worth over Rs. 2,500 unless letters of administration have been issued, the Section does not debar an action being instituted before the issue of letters of administration and the decree being entered after such letters of administration have been obtained.

(iii) A pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *E. A. G. de Silva* and *Miss Ivy Marasinghe,* for the defendants-appellants.

A. C. Gooneratne, with *R. C. Gooneratne,* for the plaintiff-respondent.

Cur. adv. vult.

May 23, 1973. WALGAMPAYA, J.—

At the argument of this appeal several interesting matters of law were raised.

The plaintiff's case was that David Abeydeera Jayawickrema the 4th defendant in D. C. Tangalle partition case 4445 by deed No. 6052 of 3rd May, 1951, agreed to convey certain extents of land to be ultimately allotted to him in that partition case to

certain persons. On that deed 12 acres were to be transferred to E. A. Wijesinghe. In the final decree in the aforesaid partition case the 1st and 2nd defendants in the instant case who were added as defendants 4A and 4B in the room of the late Jayawickrema (4th defendant) in partition case No. 4445 were allotted certain shares.

After the demise of E. A. Wijesinghe his two children A. E. Wijesinghe (Jnr.) and Doreen Wijesinghe transferred to plaintiff on deed No. 1456 of 14.9.64 their right title and interest to obtain the conveyance in terms of the deed No. 6052 referred to earlier.

The main position for the defendants was that the plaintiff did not tender the money within the agreed period.

The learned Trial Judge who saw and heard the witnesses has found as follows :—

> "The plaintiff through a Proctor wrote to the 1st defendant a copy of which letter is marked P4. In this letter the fact the plaintiff had gone to the defendant's house was mentioned. The defendants were called upon to sign the deed of transfer and accept the sum of Rs. 96. The 2nd defendant admitted that the 1st defendant had received the letter from Mr. Kulatunga. She knew that Rs. 96 was available. But she stated that she was not prepared to accept the money as the time for the execution of the deed had elapsed".

The Trial Judge after referring to the recitals in the deed of agreement to transfer, viz. 6052 of 1951, has said—

> "This is not like one of those agreements where a party undertakes to re-transfer the land within a certain time on the payment of a certain sum of money by the transferor. It appears to me that in this case the vendor, that is Jayawickrema, had to execute the deed within one month. In order to discharge this obligation he could have called upon the 2nd to 7th parties to pay the money on a particular date and informed them that he was ready to execute the deed on payment of the money. The deed does not state that the 2nd to 7th parties had to deposit the money or tender the money and call upon the first party to effect the transfer. Agreements to re-transfer stand in a separate class....."

I am in full agreement with those observations of the learned Trial Judge. For by clause 1 in deed No. 6052 Jayawickrema undertook to convey to the various parties separate extents of land within a month of the entering of the final decree.

And clause 2 of the said deed stated that the 2nd to 7th parties shall remain in possession of the said extent of 75 acres to be allotted to him so as to entitle him to convey the same to the 2nd to 7th parties without being liable for any compensation, on payment of Rs. 600 by the 2nd to 7th parties computed at the rate of Rs. 8 per acre by way of pro-rata costs. Wessel's Law of Contract in South Africa 2nd edition vol. 2 page 626 Section 2247 states—

> "If time is not of the essence of the contract and if it was not in the contemplation of parties that a failure to pay on a particular date would entail a forfeiture, the mere fact that a contract mentions a date of payment will not prevent the debtor from making valid payment within a reasonable time after such day. As a general rule time is not presumed to be of the essence of the contract and it is for the Court to say whether a payment has or has not been made within a reasonable time."

In the case of *Williams v. Great Rex*[1] (1956) 3 A. E. R. 705 at 708) Denning, L.J. said—

> "It is stated by counsel for the vendor that time was of the essence of the contract of May 1946 and that if the purchase of any plots was not completed within 2 years, then stated, there could be no further claim in respect of any such plots. He said that it was a commercial transaction and that, therefore, time should be considered of the essence. I cannot agree to that argument. It seems to be that this was a contract for the repurchase of land, in which the parties through their own common solicitor put forward the period of 2 years as their target for completion, but, as usual, in cases of sale of land, that was only a target, it was not a thing which was of the essence of the matter."

Those observations of Denning, L.J. apply with greater force to the facts of the instant case for what the plaintiff had to do was to tender Rs. 96 and call for a transfer from the 1st and 2nd defendants. The plaintiff was in possession of this 12 acres on th eclaim of title pleaded by him. What the defendants had to do was to accept the Rs. 96 tendered by plaintiff and execute the transfer. It is clear from the recitals in the deed to the plaintiff that when his deed was executed interlocutory decree for partition had been entered in case 4445. The final decree was entered on 31.7.64.

[1] *(1956) 3 A. E. R. 705.*

The learned District Judge had to decide another important issue :

> " Is the plaintiff entitled to maintain this action in view of the fact that the provisions of Section 547 of the Civil Procedure Code have not been complied with ? "

On this issue the learned District Judge has found as follows :—

> " There is no doubt that the right that Wijesinghe had to have the land transferred was worth more than Rs. 2,500. He has in fact executed D1 whereby he has agreed to sell the land for Rs. 9,600. His heirs have sold those rights to the plaintiff on P2 for a sum of Rs. 4,000. Therefore there is no question that Wijesinghe's estate was well worth over Rs. 2,500. But this Section does not say that action cannot be instituted. The action cannot be maintained without obtaining letters of administration.
>
> The decree can be entered after such letters of administration have been obtained. "

I agree with this finding of the learned District Judge.

Another important matter is that Francis the transferee competing with plaintiff on his deed D1 which was an agreement to transfer the 12 acres did not intervene in the partition action. The deed that he obtained from the transferor to plaintiff was No. 23040 dated 27.11.57 which was an agreement to transfer the 12 acres, and the question of competing claims does not arise.

Another point raised by senior counsel for the appellants was that the obligations under P1 were indivisible and the plaintiffs cannot ask for part performance. No issue was raised on this point in the original Court. A pure question of law can be raised in appeal for the first time but if it is a mixed question of fact and law it cannot be so done. The facts elicited in the original Court on this point are not sufficient to decide the question of law raised in appeal.

The judgment of the learned District Judge is affirmed and the appeal is dismissed with costs.

DEHERAGODA, J.—I agree.

Appeal dismissed.