1936 *Present :* **Moseley J. and Fernando A.J.**

PAIVA *v.* MARIKAR *et al.*

177—D. C. Kalutara, 18,566.

Specific performance—Agreement to transfer land—Alternative option to pay damages—No right to specific performance—Sale to third party—Notice of existing agreement—Trusts Ordinance, No. 9 of 1917, s. 93.

By deed dated April 22, 1931, the first defendant agreed to transfer the premises in suit to the plaintiff before June 30, 1931, after discharging an existing mortgage. The agreement was subject to the condition that in case the first defendant failed to execute the transfer he should pay to the plaintiff the sum of Rs. 250, consisting of Rs. 125 paid in advance and another sum of Rs. 125 as damages.

It was further provided that, if the said amount was not paid, the plaintiff could recover the same according to law. On September 4, 1933, the first defendant conveyed the premises to the second defendant:

Held that, on the failure of the defendant to fulfil the contract, he had the option of paying the sum of Rs. 250 which was an alternative obligation and that the agreement was not one of which specific performance could be demanded.

Held further, that the title acquired by the second defendant was not affected by the agreement as, in view of the time that had expired, it was not an existing agreement within the meaning of section 93 of the Trusts Ordinance.

Mathas v. Raymond (*2 N. L. R. 270*) followed ; *Appuhamy v. Silva* (*17 N. L. R. 238*) distinguished.

THIS was an action for specific performance of agreement dated April 22, 1931, by which the first defendant agreed to transfer the premises at a price of Rs. 325, of which a sum of Rs. 125 was paid in advance. The defendant undertook to discharge the existing mortgage on the premises and to convey the same to the plaintiff before June 30, 1931, free from all encumbrances.

On September 4, 1933, the first defendant transferred the premises to the second defendant.

The learned District Judge held that as the agreement had been duly registered, there was sufficient notice to the second defendant and that the transfer to the latter was subject to the agreement in favour of the plaintiff. He therefore entered judgment in favour of the plaintiff ordering specific performance of the agreement.

H. V. Perera (with him *G. E. Chitty*), for second defendant, appellant. —It is clear from the circumstances that the agreement to pay a sum of money was an alternative to the agreement to convey the property free of mortgage. Among others, the fact that this was one of several properties covered by the mortgage bond to secure a total debt of some Rs. 2,000 (a sum far in excess of the value of the property to be transferred) seems to point to this conclusion. If an alternative method of discharge of the liabilities arising on the contract appears, upon a proper interpretation, to have been in contemplation of the parties at the time they entered upon it, the Court will not decree a specific performance of one of those alternatives. See *Fry on Specific Performance* (*5th ed.*), *p. 68*, also

Mathas v. Raymond [1] and *Appuhamy v. Silva* [2]. The agreement to pay the money was, it is submitted, a substitute for specific performance of the obligation to convey. In any event the time for performance had expired in terms of P1 on June 30, 1931, while the purchase by the second defendant was on September 4, 1933. The registration of P 1, therefore cannot be said to have constituted notice of an existing contract in respect of the property, as against second defendant.

N. E. Weerasooria (with him *T. S. Fernando*), for plaintiff, respondent. —We are here dealing with what is simply an agreement to convey immovable property. That is what the contract should be interpreted to mean. The mention of a sum of money to be paid in default of performance does not alter the true nature of the contract. It merely fixes an amount to be paid as liquidated damages or penalty for a breach of the substantial agreement. The document P 1 was registered as an instrument affecting land and was sufficient notice to an intending purchaser such as the second defendant of a prior agreement binding the property in question. It was at least sufficient notice to put upon inquiry a third party seeking to acquire interests in the very property which was the subject-matter of the earlier agreement contained in P 1. See in this connection section 93 of the Trusts Ordinance and *Silva v. Salo Nona* [3]. There was at least constructive notice to the purchaser.

Cur. adv. vult.

October 15, 1936. FERNANDO A.J.—

By deed of agreement P 1 of April 22, 1931, the first defendant agreed to transfer the premises specified therein. The purchase price was fixed at Rs. 325 and Rs. 125 was paid on the date the agreement was signed, and it was provided in P 1 that the first defendant would on or before June 30, 1931, discharge the present existing mortgage and convey the premises to the plaintiff free of all encumbrances. The agreement was also subject to the condition that in case the first defendant fails to get the transfer executed, the first defendant should pay to the plaintiff the total sum of Rs. 250, consisting of the Rs. 125 paid in advance by the plaintiff and another Rs. 125 as damages sustained by the plaintiff, and the bond recites, " If the said amount is not paid, the second party can recover the same according to law ".

On September 4, 1933, the first defendant executed deed No. 1061 marked 2D1 conveying the premises to the second defendant.

The learned District Judge held that as the agreement had been duly registered that registration was sufficient notice within the meaning of section 93 of the Trusts Ordinance, and that the transfer in favour of the second defendant was therefore subject to the agreement in favour of the plaintiff. He, therefore entered judgment ordering the second defendant to transfer the property to the plaintiff and both defendants to pay the plaintiff his costs of this action.

Two questions were argued in appeal, namely, first, is the agreement P 1 of such a kind as would entitle the plaintiff to ask for specific performance of it ? and second, whether the agreement can be regarded as an existing contract within the terms of section 93 of the Trusts Ordinance.

[1] *2 N. L. R. 270.* [2] *17 N. L. R. 238.* [3] *32 N. L. R. 81.*

With regard to the first point, we were referred to the case of *Mathas v. Raymond* [1], where Bonser C. J. said that the stipulation for damages in the agreement before him was intended to be a substitute for specific performance. Withers J., in the same case said, that the intention of the parties was the material question, and that if the penal stipulation is intended to be merely accessory to the principal obligation, then it is open to the seller to exact specific performance, but if, on the other hand, the penal stipulation is an alternative obligation, specific performance cannot be enforced. "If it is intended", he says, "that the party making the penal stipulation may break the principal obligation, but shall pay the consequent damages, then the party is restricted to his right of action to recover those damages", and Laurie J. who joined in the judgment agreed that in that case "the only remedy competent to the plaintiff was to exact payment of the damages". The Court there appears to have adopted the rules applicable in England, which are set out in *Fry on Specific Performance* (*5th ed.*), *p. 68*, in which contracts of this kind are divided into three classes:—(1) Where the sum mentioned is strictly a penalty, a sum named by way of securing the performance of the contract, as the penalty in a bond; (2) Where the sum named is to be paid as liquidated damages for a breach of the contract; (3) Where 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; and it is stated that where the stipulated payment comes under either of the two first-mentioned heads, the Court will enforce the contract if in other respects it can, and ought to be enforced. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract. The question to which of the three foregoing classes of contracts a particular one belongs is a question of construction. In considering it the Courts must in all cases look for their guide to the primary intention of the parties as 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.

We were also referred to the case of *Appuhamy v. Siiva* [2], where Lascelles C.J. said, "was it intended that the plaintiffs should be entitled to a reconveyance on payment of the agreed sum, a penalty being annexed to secure performance? If this be the true construction, the fact of a penalty being annexed will not prevent the Court enforcing performance of what is the real object of the contract. Or does the contract mean that one of two things has to be done, namely, the reconveyance of the property or the payment of the penal sum at the election of the defendant? If this is the case, the contract is satisfied by payment of the penalty, and there is no ground for claiming performance of the other alternative". From the manner in which this statement of the law is set out it seems clear that Lascelles C.J. was impressed, if I may respectfully say, correctly impressed by the fact elicited in that case that the plaintiffs were asking for a reconveyance of their own land which they had transferred to the defendant on payment of a certain sum of money.

[1] *2 N. L. R. 270.*

[2] *17 N. L. R. 238.*

Applying that test to the facts of the present case, it seems to me clear that the condition set out in P 1 constitutes an alternative obligation. The conveyance by the first defendant was to be preceded by a discharge of the present existing mortgage which the parties then contemplated was for a sum of Rs. 2,000 and affected a number of other lands belonging to persons other than the first defendant. It is true that the first defendant agreed to discharge that mortgage, and to transfer the land to plaintiff, but if the mortgage bond had to be paid by other persons and involved such a large sum as Rs. 2,000 is it likely that the parties intended to compel the plaintiff to secure a discharge of that mortgage ? It is also to be noted that at the concluding part of that condition the expression that is used is that " if the said amount is not paid, the second party (the plaintiff) can recover the same according to law ". I think these words can only mean that the parties set out the only remedy that would be available to the plaintiff in such an event. The first defendant was apparently anxious to receive a sum of Rs. 125 on the day the agreement was signed, and although he was willing to transfer his land at that time in order to secure the money he was not in a position to transfer owing to the existing mortgage. It was probably expected that that mortgage might be discharged within the short period of two months that was to elapse between the deed of agreement and of June 30, 1931, which was the date contemplated for the transfer, and if within the two months, the first defendant succeeded in getting the mortgage discharged, it was agreed that he should transfer the land to the plaintiff on the plaintiff tendering him the money, but if that mortgage could not be discharged then the first defendant was to pay back to the plaintiff Rs. 125 which he received along with a further sum of Rs. 125 as damages. In these circumstances, I would hold that the intention of the parties was that in case of failure on the part of the first defendant to fulfil his contract, he had the option of paying the sum of Rs. 250, which was an alternative obligation, and in view particularly of the discharge of the mortgage bond that was contemplated, the agreement contained in P 1 was not one of which specific performance could be demanded.

The plaintiff must also fail on the second question, namely, with regard to the effect of section 93 of the Trusts Ordinance. It is true that in the case of *Silva v. Salo Nona* [1], this Court held that the mere registration of an agreement to sell land is of itself notice within the meaning of section 93 to a person who acquires the land subsequent to such agreement, but the section refers to an existing contract of which specific performance will be allowed and the date of the purchase by the second defendant was September 4, 1933, whereas June 30, 1931, was the date contemplated for the transfer to the plaintiff. In my opinion, as I have already stated, the contract was not one of which specific performance would be ordered, and in view of the time that had expired I do not think it can be stated that in fact this was an existing contract in September, 1933. The mere registration of the agreement would not be sufficient to show whether the contract had been waived, or any action brought upon it, or the matter settled by payment or otherwise. For these reasons I would hold that

[1] *32 N. L. R 81.*

the title acquired by the second defendant on his purchase is not affected by the agreement P 1, and that the plaintiff must fail on the third issue framed at the trial. I would accordingly allow the appeal, set aside the decree of the District Court and enter an order dismissing plaintiff's action as against the second defendant with costs in appeal and in the Court below.

MOSELEY J.—I agree.

Appeal allowed.