1933 *Present* : **Dalton A.C.J. and Koch A.J.**

TIKIRI MENIKA *v.* LOUSA ALWIS.

94—D. C. Kandy, 40,719.

Agreement to retransfer land—Right of heirs of vendor to exercise option—Absence of time limit—Validity of agreement—Prescription—Validity.

Where a conveyance for the sale of land cantained an option for retransfer on the payment of a certain sum of money, the right to obtain a retransfer passes to the heirs of the vendor.

Such an agreement is not bad in law merely because it does not specify the time within which the option is to be exercised.

APPEAL from a judgment of the District Judge of Kandy.

One Loku Banda by deed dated November 19, 1930, sold and transferred certain property to the defendant. The deed contained a provision whereby defendant undertook to retransfer the lands to the vendor for the same consideration. This action was instituted by the heirs of Loku Banda on January 21, 1931, claiming to enforce specific performance of the agreement to reconvey. The learned District Judge gave judgment for the plaintiffs.

H. V. Perera (with him *D. W. Fernando*), for appellant.—The agreement is for a retransfer without a time limit. Executory interests in land of this nature are governed by the Trusts Ordinance. The doctrine of reasonable time cannot be imported into a contract of this kind. Either the demand

[1] *34 N. L. R. 185.*

had to be made by Loku Banda alone or it was perpetual. Documents with an option to repurchase must be strictly construed ((1871) 12 *Equity Cases* 9). Time is of the essence of the contract. If no time limits is expressed the Courts will infer a limitation from the document itself. In this case the time limit is the lifetime of Loku Banda.

[DALTON A.C.J.—Suppose the defendant had died. Could Loku Banda claim a retransfer from his heirs?]

That may be the consequence of a strict construction of the document. But the position is not exactly the same. The defendant is bound to sell if the offer is made. He cannot retract. But Loku Banda is not bound to make the offer. The obligation of the defendant therefore may devolue on his heirs although Loku Banda's right may be personal. His interest is only an executory one. Such an agreement comes within section 93 of the Trusts Ordinance. If it is unlimited in time it is void. Section 116 of the Trusts Ordinance brings in the English law. Counsel cited *(1881) 20 Ch. 5562 ; (1905) 2 Ch. 257 ; 38 Madras 114.*

N. E. Weerasooria, for respondents.—The document affects immovable property. The Roman-Dutch law must be applied. Van Leeuwen's *Cens. For. 1, 4, 20, 3 to 7. Voet 18, 3, 7, and 8* says that no time limit need be imposed. The right is a right in land and passes to the heirs unless the contract is limited in express words to a particular party (*Hameed v. Zeynambu*[1]*; 3 Searle 75; (1868) Buch. 247*). Under the Roman-Dutch law such a right could not even be prescribed. In this case no question of prescription can arise. Where no time limit is expressed the right may be enforced at any time under the Roman-Dutch law or at any time before it is prescribed under our Prescription Ordinance. Even ordinarily in the case of a contract where no time is mentioned the contract must be performed within a reasonable time. There is no distinction in this respect between the sale of goods and the sale of land. (*Leake, 6th ed., 613.*)

H. V. Perera, in reply.—A party has no right to come into Court until there has been a demand and a refusal. It is only then that a cause of action arises. Prescription begins to run only where the right of action commences. The solution to this problem cannot be sought in the rule of prescription. The right to make the demand is not transmissible to the heirs. But if the demand has been made and refused the right to sue is transmissible. All assignable rights do not necessarily pass to the heirs, *e.g.*, a life-interest.

Cur. adv. vult.

June 29, 1933. DALTON A.C.J.—

Two questions were raised on this appeal, (1) as to whether an option to obtain a retransfer of land on the payment of a certain sum was a right that passed on death to heirs, and (2) whether, if the agreement under which the option is granted does not specify the time within which it is to be exercised, it is bad in law and unenforceable.

One Loku Banda by deed (P 1) of November 19, 1930, sold and transferred six pieces of land, described in the schedule to the agreement, to G. L. Alwis, the present defendant, for the sum of Rs. 1,000. This sum was retained by Alwis, on the conveyance being executed, in order to pay a debt due on a promissory note by Loku Banda to one Perera, and no

[1] *28 N. L. R. 175.*

money passed between transferor and transferee. The deed also contained a provision whereby Alwis undertook to retransfer all the lands to Loku Banda, on demand, for the same consideration. Loku Banda died the following month, December, 1930, unmarried and intestate leaving as his heirs his brothers and sisters. By this action instituted on January 21, 1931, having brought the sum of Rs. 1,000 into Court, they are seeking to enforce specific performance of the undertaking to reconvey, which defendant refuses to do. They succeeded in their claim in the lower Court, and defendant now appeals.

On the first point it was argued on his behalf that the deed P 1 set out all the terms of the contract between the parties, and that under it Loku Banda alone had the right to demand a reconveyance. There is no doubt, of course, that the parties to the deed could have so provided if they wished, but I am unable to agree that the words used contain any such restricted provision. It is conceded that had Alwis died and not Loku Banda, the latter would have been able to obtain a reconveyance from the heirs of the former. Having regard to the words used in the deed, I can see no such limitation there as counsel contends.

In that event, is this a right which passes to Loku Banda's heirs? Can they demand a retransfer as claimed in this case on payment of the sum mentioned in the agreement?

We have been referred to the provisions of *Voet XVIII. tit. 3, ss. 7, 8,* where the subject is discussed at some length under the title of *jus redimendi or pactum de retrovendendo.* There the remedy of the vendor on such an agreement is dealt with, and it is stated that his right passes to his heirs and is also assignable. *Van Leeuwen (Censura Forensis, Pt. I., bk. IV., ch. 20)* is to the same effect. The law as laid down in these authorities has been applied in South Africa. One of the cases cited to us (*Joseph Executor v. Peacock*[1]) raises just the same question as is raised in the case before us. Peacock who was the owner of a farm, under a written agreement, in 1843 sold half the farm to Joseph. There was a stipulation that if either wished to dispose of his half share, the party wishing at any time to sell shall be obliged to offer his share to the other for the amount of the original cost of the half, together with such amount as might be agreed upon for improvements. Joseph died in 1866 being still the owner of his half share. His executor, son of deceased, thereafter sold the share to a third party, in whose name it was then registered, without having offered it to Peacock. The latter thereupon instituted this action praying for transfer of the half share in question, tendering to pay £2,500 on receipt thereof, or otherwise £5,500 as damages. The trial Judge gave judgment for plaintiff for the sum of £1,500. On appeal the Court only wished to hear counsel for the successful plaintiff on the question whether the agreement of 1843 bound only the parties to that agreement, or whether the obligations therein contained descended to their heirs. Counsel citing *Voet 18, 3, 8* argued that the heirs were bound unless specially exempted, and that the benefits and obligations of such agreements must be mutual and correlative. The Court thereupon dismissed the appeal and affirmed the decision of the lower Court. The case of *Meyer, Executrix of Smuts v. Meyer*[2], is to the same effect.

[1] *(1868) Buch. 247.*

The matter was also considered by the appellate division of the Supreme Court of South Africa in *Zandberg v. Van Zyl*[1]. That case concerned movable property and the principal question raised was whether the original transaction was really a sale with the right to redeem or in effect merely a pledge. The law, however, would appear to be the same whether the pact deals with movable or immovable property. In the course of his judgment dealing with the law De Villiers C.J. refers to the *pactum de retrovendendo* mentioned by *Voet 18, 3, 7 and 8* as being a usual and legal pact. The stipulation in the agreement (although it was eventually held that the transaction was a pledge and not a sale) was to the effect that the ostensible vendor was to have the right at any time to repurchase the property for the price at which it was alleged she had sold it. That, it was held on the same authority, was a perfectly legitimate stipulation.

These, I think, are sufficient authority to show what is the common law on this first point. The latter case I have cited would also, it seems to me, answer the second question raised on this appeal. I am unable to agree with Mr. Perera in his argument that the provisions of section 93 of the Trusts Ordinance, 1917, has any bearing on the case before us.

If no time be fixed in the agreement within which the right is to be exercised, it was urged the agreement was bad in law and unenforceable. In the agreement in *Joseph's Executor v. Peacock* (*supra*) however, nothing was said about time, whilst in *Zandberg v. Van Zyl* (*supra*) Innes J. (later C.J.) and Solomon J. (later C.J.) both held that a stipulation to repurchase and reconvey *at any time* was quite legal. Mackeurtan, in his *Sale of Goods in South Africa at p. 72 in dealing with the pactum de retrovendendo* and the *jus retractus* sets out the law in the same way. If the right be *in perpetuum*, for example, if it be exercisable " at any time hereafter ", there is no suggestion that such a stipulation is other than valid, although the authorities to which he refers are not agreed as to whether the right is subject to prescription. That latter question does not, however, in any event arise in the case before us. It was suggested to us that to uphold such a stipulation, when unlimited in point of time, might raise difficulties, for instance, as to the title of a subsequent purchaser, but I do not think that in practice they are likely to occur. In any event it is not necessary to deal with the arguments in support of or against this suggestion, for it can have no effect in altering the law. If the statute law places any limitation directly or indirectly upon the exercise of such a right, then effect of course must be given to it, but it is not suggested there is any statutory limitation applicable in the case before us. No authority was cited in support of the learned trial Judge's conclusion that where no time is fixed the right of pre-emption must be exercised within a reasonable time. This conclusion, as will be seen from the authorities I have cited, is not correct, although the plaintiffs are still entitled to succeed in their claim.

For the above reasons the appeal must be dismissed with costs.

KOCH A.J.—I entirely agree.

Appeal dismissed.

[1] *(1910) A. D. 302.*