1947 *Present:* **Canekeratne J.**

UDUMA LEBBE *et al.*, Appellants, *and* KIRIBANDA, Respondent.

263—C. R. Kandy, 1,033

Trust—Specific performance—Sale of land—Condition for repurchase within a certain period—Claim by vendor's heirs for specific performance of agreement to retransfer, after expiry of specified period—Trusts Ordinance (Cap. 72), ss. 96, 97.

U.L., who died on May 19, 1945, had sold a land to the defendant on August 9, 1940. The habendum clause of the deed of transfer showed that the vendee was "to have and to hold the land subject to the condition that the vendee agreed to retransfer the land to the vendor by paying a sum of Rs. 100 . . . . within a period of 5 years from the date hereof".

Held, that the heirs of U.L., some of whom were minors, could not, alleging the existence of a trust, obtain specific performance of the agreement to retransfer, after the expiry of the period specified in the agreement.

APPEAL from a judgment of the Commissioner of Requests, Kandy.

H. W. Thambiah, for the plaintiffs, appellants.

C. E. S. Perera, for the defendant, respondent.

Cur. adv. vult.

March 12, 1947. CANEKERATNE J.—

This is an appeal by the plaintiffs, the heirs of one Uduma Lebbe, from an order dismissing an action for specific performance of an agreement. Uduma Lebbe, who died on May 19, 1945, sold a land to the defendant by Deed P 1 of August 9, 1940. The habendum shows that the vendee was "to have and to hold the land subject to the condition that the vendee agreed to retransfer the land to the vendor by paying a sum of Rs. 100 with interest at the rate of cents fifteen per Rs. 10 per month within a period of 5 years from the date hereof".

The case as presented to the trial Judge was that a tender of money had been made to the defendant by Uduma Lebbe during his lifetime and after his death by the plaintiffs before the date specified in the agreement. This they failed to prove. No one can seriously contend that the finding of the Commissioner was wrong. The main contention in appeal was that the third to sixth plaintiffs were minors, that the defendant was a trustee and that the expiry of the period specified in the agreement does not stand in the way of an application for enforcement of a trust. The decission in *Jonga v. Nanduwa*[1] holds that a condition with regard to repurchase is binding on the vendee although he has not signed the instrument of transfer.

The deed calls the term a condition; I apprehend, however, that the name thus given to the interest acquired by Uduma Lebbe cannot change the character of the right, but the language used must be considered in order to ascertain what right or interest passed. If a stipulation or term contained in a deed amounts to a condition of such a nature as to extinguish the right of the grantee and cause the property to pass to another, then, the term will take effect although the deed is not signed by the grantee, as where A transfers a property to B subject to the condition that on the happening of a certain event the property is to pass to another. The term may, on the other hand, not be a condition of this nature; a grantor may reserve a right to deal with the land or a right to revoke the grant: such grants have been held to be good (see *4 Appeal Court Reports, page* [illegible]). One way of construing such a grant may be this:—The grantor does not become absolutely

[1] *(1944) 45 N. L. R. 128.*

entitled to the land, the grant confers only a limited estate on the grantee, an estate for a particular period till the grantor deals with the land or revokes the grant. But where a right or mere privilege in respect of the land is reserved to the grantor the reservation would generally operate as a new grant by the grantee to the grantor but the deed should be executed by the grantee, otherwise no legal right is created. The provision contained in the Statute of Frauds (Ordinance No. 7 of 1840, section 2) would apply unless an equitable right or interest was conferred on the grantor, for this section does not appear to affect equitable rights[1]; it does not affect rights arising by operation of law. One having only an equitable right in a land has obtained relief though there is no notarial document[2]. If a person entered on and agreed to have the land by force of the deed is he not bound to perform the condition in the deed? Is this a right arising by operation of law?

The language used in this deed shows that a right in respect of the land was conferred on the vendor and as the deed was not executed by the grantee and as the doctrine of part performance does not apply in Ceylon the agreement would be unenforceable by section 2 of the Statute of Frauds. It is contended that there is a trust. Abdul Majeed conveyed the land for a sum of money to the defendant and intended to make the defendant the owner. In these circumstances it seems that both the beneficial and the legal interest in the property passed to the defendant. If both the legal and beneficial interest were intended to pass and did pass it is difficult to see how any question of trust, as known to English Law, could arise. Mr. Thambiah contends that the reasons given in the judgment—*Jonga v. Nanduwa*[3]—are binding on me. The provisions of section 96 of the Trust Ordinance (Chapter 72) were applied to the facts of that case. The language of the section assumes that there is no trust—("in any case . . . . where there is no trust".—see also section 83). According to the section the grantee must hold the property for the benefit of the person having the beneficial interest therein to the extent necessary to satisfy his just demands, *i.e.*, from the date of execution of P 1 the defendant had, according to this view, to hold the land for the benefit of the grantor to the extent necessary to grant him a retransfer of the land if he demanded one. So far no difficult situation is created in this case for the defendant did not say that this term was not binding on him.

The next contention of Council for the appellant is that the doctrine of equity that time is not of the essence of the contract applies to this case as the defendant is a trustee. He strives to make the doctrine one of universal application when it is not so.

The plaintiffs are not, according to the argument, debarred from making a tender at any reasonable time. It was urged by Counsel for the respondent that the decision in *Jonga v. Nanduwa* (*supra*) itself shows that the tender must be made within the time specified and he referred me to page 130.

[1] *Rochfaucald v. Boustead (1897) 1 Chan. at page 203.*
[2] *Gould v. Inasitamby (1904) 9 N. L. R. 177; Narayanam v. Finlay (1927) 29 N. L. R. 65.*
[3] *(1944) 45 N. L. R. 128.*

The words must, as a matter of construction merely, have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions but the grammatical meaning of the expression is the same in each. If this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than in law. But in equity there may be circumstances which will induce the Court to give relief against the breach, and sometimes even though occassioned by the neglect of the suitor asking relief: but at law the legal consequences of the breach must be allowed strictly to follow. In equity a person may make out a case for relief against the breach of the contract in two cases—in mortgages and specific performance. Time is not of the essence of the contract in mortgages or there would be no such thing as an equity of redemption. This rule will not help the plaintiffs for there has been no contention that a mortgage was created by P 1.

As regards specific performance the rule laid down by Lord Justice Turner in *Roberts v. Berry*[1] is this:—A Court of Equity will enforce specific performance and relieve although the dates assigned by the contract are not kept if there is nothing in (i) the express stipulation between the parties, (ii) the nature of the property, or (iii) the surrounding circumstances, to make it inequitable to interfere with or modify the legal right. Equity enforced contracts for the sale and purchase of land though the time fixed therein for completion had passed where, unless the contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. But time is material owing to the nature of the property in several cases, one of which is in options to purchase or sales with options to purchase—*Dibbins v. Dibbins*[2]. Specific performance is a remedy not unknown to the Roman-Dutch law. The juristic writers are all practically unanimous that obligations *ad dandum, i.e.,* a contract of sale, could be specifically enforced[3]; it is a remedy well known to the law of Ceylon[4]; the principles observed in the granting of relief are those of the Roman-Dutch law, not of the English law on the subject[5]. If analogy is a safe guide the rule applied by English law in transactions other than sales of land as options may usefully be applied here.

Counsel for the appellant lastly contended that the defendant was a trustee for the plaintiffs, the beneficiaries, and that they were entitled to some sort of relief. The defendant, however, was not a trustee nor were the plaintiffs *cestuis que trust.* The remarks made by Lord Westbury in an action brought against a person who was the surviving partner may well be referred to (*Knox v. Gye*[6]):—" Another source of error in this matter is the looseness with which the word ' trustee ' is frequently used. The surviving partner is often called a ' trustee ' but the term is used

[1] *(1853) 3 De G. M. & G. 284.*
[2] *(1896) 2 Chan. 348.*
[3] *Grotius Introduction 3-2-14, 3-15-6.*
Schorer, note 311.
Voet 19-1-3: but see 19-1-14, and cf Berwick's Translation, revised edition 80.
Vander Linden (Henry) 198.
[4] *Holmes v. Marikar (1896) 1 N. L. R. 282.*
[5] *Abeyesekera v. Gunasekera (1918) 20 N. L. R. 404.*
[6] *Law Reports, Eng. & Irish Appeals, Vol. 5, 675.*

inaccurately. He is not a trustee either expressly or by implication . . . . The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a Court of Law, where the Court of Law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the Judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust,* but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser . . . . It is most necessary to mark this again and again for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust,* well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor. This is one of the sources of error in this case".

The obligor has to perform the same duties as if he was a trustee of the property (section 97) but this cannot be made use of to show that no time can run as between him and the heirs of the grantor.

The appeal must be dismissed with costs.

Appeal dismissed.