[PRIVY COUNCIL]

1971 *Present :* **Lord Hodson, Viscount Dilhorne, Lord Wilberforce, Lord Diplock and Lord Cross of Chelsea**

THE SINHALESE FILM INDUSTRIAL CORPORATION LTD., Appellant, *and* H. C. MADANAYAKE and others, Respondents

PRIVY COUNCIL APPEAL No. 42 of 1970

S. C. 454/65 (F)—D. C. Colombo, 1265/ZL

Contracts—Executory contract—Discharge by repudiation—Quantum of evidence—"Election"—Evidence of anticipatory breach of a written executory contract—Admissibility of parol evidence—Inapplicability of Evidence Ordinance, s. 92—Claim against a deceased person's estate—Requirement of careful scrutiny.

On 2nd March 1959 one M, who was a Director of the appellant Company entered into an Agreement to sell a land to the Company within eighteen months. The price was Rs. 40,000, of which Rs. 15,000 were paid upon the execution of the Agreement. The balance of Rs. 25,000 was payable on completion. One of the terms of the Agreement was that M should perfect his title (i.e., by partition actions) within eighteen months. Subsequently the financial position of the Company deteriorated. The Company was unable to pay its debts, one of which was very urgent and amounted to Rs. 91,000. Much less was it in a position to find the Rs. 25,000 required to complete the purchase of the land. On 9th November 1960 the Directors of the Company held a meeting, the relevant minute of which was fairly capable of the interpretation that the Directors expressed an intention not to complete the purchase of the land. On 18th November 1960 M withdrew the partition actions which he had instituted to perfect his title to the land. Even if there was any ambiguity in the terms in which the Company expressed its intention as regards its further performance of the Agreement at the meeting of 9th November 1960, the conduct of the Directors of the Company between November 1960 and September 1961 gave rise to the irresistible inference that by the latter date at latest the Company had made it clear to M that it had abandoned any intention of completing the purchase of the land, and that M had accepted this as a repudiation of the Agreement.

M died in March 1963. In the present action the Company claimed from the respondents, who were the heirs of M, specific performance of the Agreement on the payment of the balance sum of Rs. 25,000.

Held, (i) that, by September 1961 both parties to the Agreement were treating it as having been repudiated by the Company. Repudiation by that date was sufficient by operation of law to have released M from any further obligation to perform the Agreement on his own part, even if the date of the final repudiation could not be pinpointed as having occurred at the meeting of the Directors held on 9th November 1960, ...

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(ii) that where a party to an executory contract which is required by law to be notarially attested seeks to be discharged from his obligation on the ground of repudiation by the other party, parol evidence of the repudiation is admissible. Section 92 of the Evidence Ordinance is not applicable to a case of anticipatory breach.

(iii) that a claim brought against the estate of a deceased person should be scrutinised with great care and inferences of fact against the deceased should not be lightly drawn.

"Where one party to an executory contract makes it manifest to the other party that he does not intend to perform an obligation imposed upon him by the contract which is fundamental to it, his conduct constitutes an anticipatory breach or wrongful repudiation of the contract by him. The other party may then elect either to ignore the wrongful repudiation and to treat the contract and the obligations which it imposes upon him as well as upon the repudiating party as still binding upon each of them, or to treat the contract and the obligations which it imposed upon each party as no longer binding on them, save as respects the liability of the repudiating party for damages for non-performance. Although the latter choice is often described as an election to rescind the contract, their Lordships would observe, that the non-repudiating party's obligation to perform the contract any further is terminated by operation of law and not as the result of any agreement between the parties to rescind it. Section 92 of the Evidence Ordinance accordingly has no application to cases of anticipatory breach."

APPEAL from a judgment of H. N. G. Fernando, C.J. (de Kretser J. agreeing) delivered on 10th May, 1969.

B. J. Fernando, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *B. Eliyatamby*, for the defendants-respondents.

Cur. adv. vult.

May 24, 1971. [*Delivered by* LORD DIPLOCK]—

On 2nd March 1959 Mudaliyar Jayasena Madanayake ("the deceased") entered into a notarially attested agreement ("the Agreement") to sell to the appellant Company ("the Company") an area of land near Colombo ("the Land") at the price of Rs. 40,000, of which Rs. 15,000 were paid upon the execution of the Agreement. In the circumstances to which their Lordships will advert hereafter the Land has never been conveyed to the Company. The deceased died on 13th March 1963. The respondents are his heirs. On 27th January 1964 the Company called

upon the respondents to convey the land to it. The respondents declined to do so. The Company sued them for specific performance of the Agreement. The District Court granted the Company a decree of specific performance. The judgment was reversed by the Supreme Court on appeal. The case now comes on further appeal to their Lordships' Board.

The only question in the appeal is whether the contractual obligation of the deceased under the Agreement to convey the Land to the Company was still subsisting on 27th January 1964. Although the pleadings and the argument have ranged over a wider field, their Lordships agree with the Supreme Court that the answer to this question turns upon whether or not the deceased's obligation to convey the Land to the Company had been discharged by operation of law before that date, by reason of the Company's wrongful repudiation of the contract and the deceased's acceptance of this as terminating his own obligation to perform the Agreement any further.

It is common ground that the legal consequences of an anticipatory breach of an executory contract are the same in Roman-Dutch law as at common law. Where one party to an executory contract makes it manifest to the other party that he does not intend to perform an obligation imposed upon him by the contract which is fundamental to it, his conduct constitutes an anticipatory breach or wrongful repudiation of the contract by him. The other party may then elect either to ignore the wrongful repudiation and to treat the contract and the obligations which it imposes upon him as well as upon the repudiating party as still binding upon them, or to treat the contract and the obligations which it imposed upon each party as no longer binding on them, save as respects the liability of the repudiating party for damages for non-performance. Although the latter choice is often described as an election to rescind the contract, their Lordships would observe, that the non-repudiating party's obligation to perform the contract any further is terminated by operation of law and not as the result of any agreement between the parties to rescind it. Section 92 of the Evidence Ordinance accordingly has no application to cases of anticipatory breach.

The issues in the instant appeal are in the main issues of fact, and turn upon events which took place between 1960 and 1962. The date for completion contemplated by the Agreement was 2nd September 1960. The deceased, who was the person best qualified to give evidence of the facts, did not die until two-and-a-half years later. The Company made no claim to have the Land conveyed to it until there had been a change of shareholding and management following upon the death of the deceased. The claim is brought against his estate. Their Lordships agree with the Supreme Court that it should be scrutinised with great care and that inferences of fact against the deceased should not be lightly drawn.

The deceased, who was a prominent businessman in Colombo, was one of the moving spirits in the formation of the Company in July 1957. Its principal object was to produce cinematographic and television films. As the early minutes disclose the motive of its promotors was, at least in part, the patriotic one of promoting Sinhala culture. Its only source of funds was by the issue of shares and the directors' policy was to encourage a broad-based public ownership of its capital.

The Agreement of 2nd March 1959 was the first step taken by the Company to acquire the capital assets needed to enable it to carry out its objects, by purchasing land on which to build a studio and to shoot films. It appears from the Annual Report of the Directors that the price of Rs. 40,000 was, even at that date, less than its market value. The deceased held it under a "village title". It was a term of the Agreement that the deceased should perfect his title (*i.e.*, by partition actions) within eighteen months. The Land was to be conveyed to the Company when the title had been perfected. Rs. 15,000 was to be paid on execution of the Agreement and the Company was to be given immediate possession with the right to put up buildings. The balance of the purchase price Rs. 25,000 was payable on completion.

The Rs. 15,000 was duly paid. It appears in the Balance Sheet of the Company for 31st March 1959 as a "Fixed Asset" under the rubric "Advance on Studio Site". The Company had cash available to the amount of Rs. 107,000.

During the following year building proceeded on the site at a cost of some Rs. 36,000 and on 15th September 1959 the Company entered into a contract with a French firm to purchase equipment at a total cost of some Rs. 220,000. Of this amount 30% was payable at date of shipment and the remainder by 24 monthly drafts accepted by the Company and endorsed by the deceased and the Chairman of Directors of the Company, Mr. Gunasekera, as guarantors. These payments very nearly exhausted the cash resources of the Company by 31st March 1960. The Company's Balance Sheet at that date includes among the fixed assests "Studio site cost Rs. 40,000" and among the liabilities the deceased as creditor for Rs. 25,000, the unpaid balance of the purchase price. It also discloses a debt to the French firm of Rs. 135,000 for monthly drafts yet to fall due. As against this the cash available had fallen to about Rs. 7,000.

Applications for new shares had, however, still been coming in though at a reduced rate, and in April 1960 the deceased commenced seven partition actions to perfect his title to the Land as he was required to do under the Agreement. His proctors were the firm of which Mr. Gunasekera, the Chairman of the Company, was senior partner.

By August 1960, however, the financial position of the Company had deteriorated further. New capital was coming in at a negligible rate.

The Company was compelled to borrow from the Directors moneys to meet even quite minor day-to-day expenses, as well as the monthly draft in favour of the French firm which would fall due in September. The major part of these advances were made by the deceased.

It was in these circumstances that at a meeting of Directors held on 7th October 1960 the deceased to whom the Company was already indebted in the sum of about Rs. 31,000 for cash advanced, apart from its liability to pay him Rs. 25,000 for transfer of the Land when judgment in the pending partition actions had been obtained, expressed his willingness to refund the sum of Rs. 15,000 which had been paid to him on account of the purchase price of the Land. This proposal was left over for consideration of the Board.

On 9th November 1960 there was held a meeting of Directors on which much of the argument in this case has turned. The relevant minute is in the following terms :—

> "3. The question of settling the studio site at Dalugama was taken up and after a lengthy discussion the Board decided to switch on to a long lease of 50 years (fifty years) instead of purchasing outright. because the Board finds it not possible to pay the purchase price the balance being Rs. 25,000 at this junction owing to the non-availability of Company's funds. The Board further decided that a long lease of 50 years as good as proprietary holding and placed the entire matter of drawing up the necessary legal documents in the hands of the Chairman Mr. D. L. Gunasekera. Mudaliyar J. Madanayake also agreed that he will co-operate to the utmost by providing ample scope and facilities embodied in the Notarial Document or Documents for the lease of the property of ten acres at Dalugama on which the Kalyani Studios is being built now."

This was a meeting of Directors who had already shown in practical form that they had the interests of the Company at heart. It was in no position to pay its outstanding drafts in favour of the French firm which totalled Rs. 91,000 and were falling due at the rate of about Rs. 6,500 monthly. Much less was it in a position to find the Rs. 25,000 required to complete the purchase of the Land. The subject matter of the Board's discussion was one in which the deceased had a dual interest. He was a Director of the Company which was the purchaser under the Agreement. In his personal capacity he was the vendor. The meeting was not an ordinary confrontation between adverse parties to a contract which one of them is unable to fulfil. In their Lordships' view it would be neither right nor realistic to decide this appeal upon narrow points of construction of the actual words used to summarise what is described as a "lengthy discussion".

There are two possible interpretations of what is recorded in the minute. The first is that the Directors, acting on behalf of the Company, expressed an unequivocal intention not to complete the purchase and coupled this with an independent offer to enter into negotiations with the deceased for a long lease of the Land. The second is that they did not repudiate the Agreement there and then but merely offered to enter into negotiations with the deceased for a long lease of the Land which, if entered into, would replace the Agreement. If the long lease were not entered into the Agreement would continue in force.

If the matter rested upon the minute alone the latter interpretation, which was that adopted by the District Judge, would not be implausible; although their Lordships, in view of the dire financial straits in which the Company then found itself, would be inclined to prefer the former, as did the Supreme Court. But the matter does not rest there and their Lordships, in agreement with the Supreme Court, consider that what happened thereafter throws light upon the intention which the Company manifested to the deceased as respects the further performance of its obligations under the Agreement.

On 18th November 1960 the deceased withdrew the seven partition actions. He thereby abandoned the steps which he was taking to fulfil his obligation under the Agreement to perfect the title to the Land. In view of the fact that his proctor was the Chairman of the Company who had been present at the meeting of 9th November 1960 the inference is that the deceased would not have been advised to do so by Mr. Gunasekera unless the understanding of both of them was that the Company had repudiated the Agreement. Otherwise the partition actions would have been left on foot although active steps to proceed with them might have been suspended.

The minutes of subsequent meetings of Directors show a continued deterioration in the financial position of the Company. By 31st March 1961 six drafts of the Company in favour of the French firm totalling Rs. 40,000 had been dishonoured. The Balance Sheet of the Company of that date shows a cash balance of only Rs. 104. What is particularly significant about this Balance Sheet is that the Land no longer figures among the fixed assets of the Company nor does the liability of Rs. 25,000 to the deceased for the balance of the purchase price of the Land figure among the sums due to creditors. Instead the Rs. 15,000 paid to the deceased on account of the purchase price, which he had offered to refund at the meeting of 7th October 1960 appears as a current asset of the Company against a contra-entry of the Company's indebtedness to the deceased on loan account, of Rs. 34,000.

This Balance Sheet, in their Lordships' view, is a clear recognition by the Company that on 31st March 1961 it was no longer entitled to have the Land conveyed to it by the deceased. That there is no entry relating

to the Company's liability for damages for its wrongful repudiation of the contract can be accounted for by the fact that the purchase price under the Agreement was less than the market value of the Land and any damages for anticipatory breach would be nominal.

This Balance Sheet, however, was not approved by the Directors until 23rd September 1961. By that date much more that is of significance had happened.

It appears that at some time after November 1960 a draft lease of the Land was prepared and submitted to the deceased. But the negotiations for a lease proceeded no further. Indeed the minute book records that on 15th May 1961 the Board decided to recommend the shareholders to wind up the Company, but agreed to give the Manager, Mr. Hewavitarana, until 31st July to see if he could bring in more shareholders with enough new capital to enable the Company to complete the expenditure needed to enable it to start production of films. The Manager's success was minimal and at Directors' meetings in July 1961 it was agreed to cease to incur the expense of employing a salaried Manager and to close the Share List. This put it out of the Company's power to obtain capital from new shareholders.

On 18th August 1961 the keys of the laboratory which had been built on the land were handed over to the deceased. The watcher on the Land became employed by the deceased. The deceased received the produce of the Land.

Thereafter the Company was for practical purposes moribund until the death of the deceased, except for attempts to find ways and means of meeting the claims of its external creditors. In June 1962 the Directors resolved to sell the water-cooling plant. In November 1962 they resolved to sell the equipment purchased from the French company. The Company thus finally put it out of its power to embark upon the business for which it was originally formed.

In their Lordships' view the conduct of the Directors of the Company and of the deceased between November 1960 and September 1961 gives rise to the irresistible inference that by the latter date at latest the Company had made it clear to the deceased that it had abandoned any intention of completing the purchase of the Land, and that the deceased had accepted this as a repudiation of the Agreement which operated in law to release him from any further obligation to perform the Agreement on his own part. If there was any ambiguity in the terms in which the Company expressed its intention as regards its further performance of the Agreement at the meeting of 9th November 1960 that ambiguity was clearly resolved by the conduct of the parties over the following months to which their Lordships have referred. It is clear that by the date of

the approval in September 1961 of the Company's Balance Sheet as at 31st March 1961 both parties to the Agreement were treating it as having been repudiated by the Company. Repudiation by this date is sufficient to entitle the respondents, as representing the Estate of the deceased to succeed in their defence to the action even if the date of the final repudiation cannot be pinpointed as occurring at the meeting of Directors held on 9th November 1960.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant Company must pay the costs of the appeal.

Appeal dismissed.