

1949

Present: Jayetileke S.P.J. and Canekera:ආ J.

DE SILVA, Appellant, and SENARATNE *et al.*, Respondents

S. C. 418—D. C. Matara, 16,626

Specific performance—Agreement to transfer land—Registered—Stipulation for damages on failure to transfer—Refusal to transfer—Right of election to pay damages—Trust—Existing contract—Chapter 72, section 93.

First to seventh defendants agreed to transfer to the plaintiff the lot allotted to them by the final decree in a partition action. The agreement was registered. It was further stipulated that if the defendants failed to effect the transfer within one month of the decree they were to pay to the plaintiff a certain sum of money. The defendants failed to convey the land to the plaintiff but in breach of the agreement conveyed it to the eighth defendant. The defendants claimed the right to pay the stipulated sum of money in lieu of performance of the agreement.

Held, that the defendants had no right of election.

Held further, that in the absence of evidence that the plaintiff had waived his right to specific performance, the contract was an existing contract and that the eighth defendant having notice of the agreement was in terms of section 73 of the Trusts Ordinance under obligation to convey the land to the plaintiff.

APPPEAL from a judgment of the District Judge, Matara.

H. V. Perera, K.C., with *H. W. Jayewardene*, for plaintiff appellant.

M. L. S. Jayasekera, for 1st and 8th defendants respondents.

Vernon Wijetunge, for 4th defendant respondent.

U. A. Jayasundere, for 7th defendant respondent.

Cyril E. S. Perera, for 3rd defendant respondent.

Cur. adv. vult.

March 9, 1949. JAYETILEKE S.P.J.—

This is an appeal in an action to enforce the performance of an agreement for the sale of certain shares of lands.

The material facts are the following:—The 1st to 7th defendants claimed to be entitled to 11/32 shares of three lands called Millagahadeniya, Kalawellagoda and Heenwilahena. The 2nd defendant instituted Action No. 11,203 of the District Court of Matara for the partition of Kalawellagoda, and one Hendrick Wanigsekera instituted Action No. 11,331 for the partition of Heenwilahena. The plaintiff was made a party to the said action as he was entitled to certain shares of the said lands. During the pendency of the said actions the plaintiff arranged with the said defendants for the purchase of their shares, and entered into the agreement P1 with them dated November 5, 1938, attested by J. P. Ranasuriya, Notary Public. P1 provided that the said defendants shall, within one month from the date of the final decree in action No. 11,203, sell to the plaintiff, and the plaintiff shall, within the said period, buy from the said defendants the undivided share of Millagaha-

deniya and the lots that would be allotted to them in the said actions in lieu of their undivided shares for a sum of Rs. 1,829·50 subject to the following conditions :—

- (1) That the party of the second part shall pay in advance to the parties of the first part the said sum of Rs. 1,829·50.
- (2) That the parties of the first part shall before the expiration of the one month from the date of entering the Final Decree in the said partition case No. 11,203 convey to the party of the second part on a deed of transfer free from all encumbrances, the lots that will be allotted to the parties of the first part in the said two partition cases Nos. 11,331 and 11,203 and an undivided 11/32 share of Millagahadeniya, and everything belonging thereto.
- (3) That the party of the second part shall bear the costs of stamps and fees and all other expenses of the deed of transfer that shall be executed by the parties of the first part in favour of the party of the second part as aforesaid.
- (4) That the party of the second part shall pay compensation and costs that the parties of the first part shall become liable to pay in the said two partition cases Nos. 11,331 and 11,203.
- (5) That if there be any compensation due to the parties of the first part in the said two partition cases Nos. 11,331 and 11,203, the parties of the first part shall forthwith obtain and pay the same to the party of the second part.
- (6) That the parties of the first part shall proceed on with the said action 11,203 instituted by them till the final determination thereof without neglecting same at the various stages.
- (7) That the parties of the first part shall put the party of the second part in possession of the said premises till the said deed of transfer is executed in favour of the party of the second part as aforesaid.
- (8) That if the said parties of the first part failed to transfer the said premises before the expiration of one month from the date of entering of the Final Decree in the said partition case No. 11,203 the parties of the first part shall pay to the party of the second part a sum of Rs. 2,829·50, to wit, Rs. 1,000 being damages that will be thereby sustained by the party of the second part and Rs. 1,829·50 being the amount paid in advance by the party of the second part to the parties of the first part and that the party of the second part shall have the full right to recover the said sum of Rs. 2,829·50.

The plaintiff paid to the said defendants the full consideration at the time of the execution of the agreement and entered into possession of the undivided shares to which they were entitled. Final decree was entered in action No. 11,331 on February 21, 1941, and lot No. 4 in plan No. 135 dated March 8, 1940, made by John de Silva, Licensed Surveyor, was allotted jointly to the said defendants and to plaintiff. Final decree was entered in action No. 11,203 on May 29, 1944, and lots Nos. 1 to 6 in plan No. 782 dated April 30, 1944, made by the said John de Silva, were allotted to the said defendants and the adjoining lot No. 7 to the plaintiff. The plaintiff paid all fees and expenses connected with the

said actions and the costs and compensation payable by the said defendants. It was admitted by Counsel that the sums expended by the plaintiff amounted to nearly Rs. 1,500.

After May 29, 1944, the plaintiff called upon the said defendants to execute a conveyance in his favour in terms of their agreement but they failed to do so. Notwithstanding the said request, the first defendant, in breach of his agreement, conveyed lot No. 1 and his interests in lot No. 4 to the 8th defendant by deed P23 dated September 22, 1944, attested by A. P. Daluwatte, Notary Public. Thereupon, the plaintiff instituted this action against the defendants to enforce the performance of the agreement contained in P1.

The 1st to 7th defendants did not dispute that they failed to convey the said lands to the plaintiff but relying on condition 8 they said that they had the option of either transferring the said lands to the plaintiff or paying him the sum of Rs. 2,829.50.

The law that is applicable to the case is very clear. Our task lies in the application of the law to the facts. In *Mathes Appuhamy v. Raymond*¹, which is a decision of a bench of three Judges, Withers J. who delivered the principal judgment, said :—

“ Can the intending buyer compel the intending seller specifically to perform an agreement to sell a particular land if that agreement contains an express stipulation to pay damages generally, or a certain sum by way of damages in the event of the seller not conveying the land in terms of the agreement. The answer to this question seems to me to depend on the wording of the agreement and the intention of the parties as indicated by their contract.

If the penal stipulation is intended to be merely accessory to the principal obligation, then it is surely open to the seller to exact specific performance. If, on the other hand, the penal stipulation is an alternative obligation, and it is intended that the party making it may break the principal obligation, but shall pay consequent damages, then the party is restricted to his right of action to recover those damages. He cannot enforce specific performance. A party who breaks a binding contract is responsible in damages, whether he specially engages to pay those damages or not.

To add a stipulation to pay damages may be of advantage to the party for whose benefit it is made, especially when a definite sum is agreed to as a measure of damages, and that sum is secured by a mortgage or otherwise.

The mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator. Rather, I think, that if such a stipulation intended to be alternative and not accessory the intention should be clearly expressed or indicated.”

In *Appuhamy v de Silva*² Lascelles C.J. said :—

“ Specific performance is an equitable remedy, and in deciding whether this remedy should be given, the Courts in Ceylon are guided by the same principles as the Courts of Equity at home.

¹(1896) 2 N. L. R. 270.

²(1914) 17 N. L. R. 233.

(*Holmes v. Alia Marikar*). The real reason is, what is the true intention of the parties? Was it intended that the plaintiffs should be entitled to re-conveyance on payment of the agreed sum, a penalty of Rs. 450 being annexed to secure performance? If this is 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 re-conveyance 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 the payment of the penalty, and there is no ground for claiming performance of the other alternative."

In a case from Australia, *Fullers Theatres Ltd. v. Musgrove*¹, which is referred to in Wessels on Contracts, Volume 2, page 275, it was held that the inclusion of a clause providing for the payment of a certain sum as compensation in the event of a party failing to carry out his obligations does not entitle that party to determine the contract on payment of the specified sum.

The principal question for our decision is whether condition 8 gives the 1st to 7th defendants, who have broken their undertaking to sell, the option to purge their default by the payment of money.

The condition provides that the said defendants "shall" sell to the plaintiff the said lands and if they fail to do so, they "shall" pay to the plaintiff Rs. 2,829.50

I am quite unable to see anything in the condition which gives the said defendants such a right. I think the right to elect is rather with the plaintiff. It seems to me that the legal intention and effect of the condition is to give the plaintiff the right to recover the amount paid by him and a further sum of Rs. 1,000 as damages if, for instance, the 1st to 7th defendants were unable to make a complete title to all the shares they agreed to sell.

A condition similar to condition 8 was considered in the case of *Appuhamy v. de Silva (supra)*. It provided that if the defendant was unwilling or neglected to transfer the property on demand and tender of the agreed sum within the stipulated period he should pay to the plaintiff a sum of Rs. 450 as a penalty. In the course of his judgment Lascelles C. J. said:—

"What is this but an ordinary penal clause to enforce the principal obligation? It cannot be inferred from the word 'unwilling' that the defendant had any option in the matter; for the phrase is 'unwilling or neglect to transfer'."

Counsel for the respondent relied very strongly on the judgment of this Court in *Paiya v Marikar*². I have considered that judgment very carefully, and, with great respect, I would wish to say that it should be limited to the special facts of that case.

For the reasons I have given I am of opinion that condition 8 does not give the 1st to 7th defendants a right of election whether they would perform their contract or only pay damages for the breach of it.

¹ (1923) 31 Commonwealth L. R. 524.

² (1936) 39 N. L. R. 255.

There remains the question whether specific performance could be enforced against the 8th defendant. Section 93 of the Trusts Ordinance (Cap. 72) reads :—

“ Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract : Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition. ”

This shows that if a person agrees to sell a land, and afterwards refuses to perform his contract and then sells the land to a purchaser who has notice of the agreement, the latter will be compelled to perform the contract of his vendor. In *Silva v Salo Nona*¹, it was held that registration of an agreement to sell land is of itself notice, within the meaning of the Trusts Ordinance, to a person who acquires the land subsequent to such agreement.

The learned District Judge took the view that P1 is not an existing contract. That finding cannot, in my opinion, be supported in the absence of evidence that the plaintiff waived his right to enforce specific performance of the contract.

In all the circumstances of the case, therefore, it seems to me that there must be judgment for the plaintiff. I would accordingly set aside the judgment appealed against and direct that judgment be entered for the plaintiff as prayed for in his plaint. The plaintiff will also be entitled to the costs of the appeal.

CANEKERATNE J.—I agree.

Appeal allowed.
