1918.

*Present:* Ennis J. and Shaw J.

ABEYASEKERA *v.* GUNASEKERA.

*102—D. C. Kalutara, 7,259.*

*Specific performance—Want of mutuality—Promise deliberately made.*

An action for specific performance lies under our law if there is reasonable cause to support the contract.

The rule that specific performance should be refused for want of mutuality must be considered from the point of view of Roman-Dutch law, and not of English law.

THE facts are set out in the order of the District Judge, Allan Beven, Esq.:—

This is an action for specific performance, and plaintiff asks that defendant be ordered to execute a conveyance of half share of plaintiff's leasehold interests mentioned in deed of agreement 13,863 of November 10, 1915 (D 2). The facts are as follows. The defendant took on lease for a period of eight years 100 acres of rubber land on indenture of lease 13,860 of November 10, 1915 (D 1), for a sum of Rs. 35,000. At the execution of the lease the sum of Rs. 10,000 was paid on the same day the plaintiff and defendant entered into the deed of agreement D 2, whereby defendant agreed to assign over to plaintiff, subject to certain covenants, half of the leasehold interests, whenever plaintiff pays defendant the sum of Rs. 7,500 within two years from the date of the agreement.

The covenants referred to are: (1) the defendant was to carry on the lease and incur expenditure, and, after looking into accounts, if the expenditure and the interest on Rs. 15,000 at 12 per cent. per annum exceed the income accruing from the property, the plaintiff should pay the defendant half of the sum in excess; (2) if the income exceed the expenditure and interest, half of the profit shall be regarded as paid by the plaintiff to defendant and set off against the sum of Rs. 7,500 due by him; (3) whenever within two years the sum of Rs. 7,500 or the balance found to be due is paid, defendant was to execute a transfer of half his interests to plaintiff; (4) in default of his doing so, this deed was to be cancelled; (5) if defendant failed to make the transfer on payment being made of the Rs. 7,500, plaintiff had the right to sue him.

The defendant contends there is no consideration for, and want of mutuality in, the agreement, and therefore the Court cannot give the plaintiff the relief he seeks. This being a contract for specific performance, the principles of English law are applicable.

It is quite clear that at the execution of the contract the sum agreed upon between the parties was Rs. 7,500. It is not alleged that this sum was tendered to plaintiff, but he alleges that, as the income of the leasehold interests exceeded that sum, the defendant was bound, in terms of the agreement, to make a conveyance of half his interests. But it is essential in a contract such as this that plaintiff must show some real, substantial consideration proceeding from himself, and that consideration must be ascertained at the time of the execution of contract.

In this case there is nothing proceeding from him to defendant. As regards want of mutuality, the agreement is manifestly unfair and one-sided. There is nothing in the contract to compel plaintiff to pay the consideration and take the transfer. Defendant can bring an action only after the expiry of two years. He claims now in reconvention only because plaintiff instituted this action. The agreement becomes null and void if plaintiff within two years fails to pay the sum of Rs. 7,500. It will be seen, therefore, that the contract is unilateral, the defendant having no rights at all.

I hold, therefore, that for want of consideration and of mutuality, and on the ground of unfairness and hardship on defendant, plaintiff cannot maintain this action, which is dismissed, with costs.

The deed referred to in the case was as follows:—

D 2.—Know all men by these presents.

The deed of agreement entered into by and between the two parties, Nelis Cornelisge Don Tharnolis Gunasekera Appuhamy, of Kalutara, in the totamune of Kalutara, hereinbelow called the party of the first part, on the one part, and Bennet Francis Abeyesekera, of Kalutara aforesaid, hereinbelow called the party of the second part, on the other part, purports, to wit:—

It was agreed that out of the lease for a period of eight years of the soil and the rubber, plantains, and other trees thereon of the rubber land called Wadiyakanda, containing in extent about one hundred acres, bounded, &c., in the Mawata pattu of Paranakuru korale in Four Korales, in the District of Kegalla, in the Province of Sabaragamuwa, taken upon lease deed No. 13,860, attested on November 10, 1915, by D. J. Fernando, Notary Public, by me, the party of the first part,

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one-half share shall be assigned over unto the party of the second part by me, the party of the first part, subject to the under-mentioned covenants, whenever the party of the second part pays the sum of Rs. 7,500 within two years from the date hereof.

The said covenants are:—

1. That the party of the first part shall carry on the lease from the date hereof, and whilst carrying on the lease the expenditure and the interest on Rs. 15,000 at the rate of 12 per cent. per annum and the income accruing shall be looked into, and if the expenditure and interest exceed the income, the party of the second part shall pay unto the party of the first part one-half share of the said sum in excess, and if the income exceed the expenditure and interest, one-half share of the said profit shall be regarded as paid by the party of the second part to the party of the first part.

2. That if the party of the second part fail to pay the Rs. 7,500 within two years as aforesaid, and any sum due as aforesaid, the said sum, or if any amount is credited to the party of the second part as excess of profits, the said sum shall be deducted from the said sum of Rs. 7,500, and the balance sum shall be paid, and the half share of the lease shall be taken over, and in default this deed shall be cancelled.

3. That when the party of the first part so executes the deed, the same shall be executed as a lease, so that the lease or one-half share of the lease cannot be assigned over to any outsider but to the party of the first part, and to accept the same.

4. That if the party of the second part pay the amount unto the party of the first part as aforesaid within two years, one-half share of the lease shall be delivered over by the party of the first part upon a deed of assignment or a lease deed, and in default of such delivery the party of the second part shall obtain a proper right by process of law. . . . . (*Signed*) ———.

*Bawa, K.C.*, (with him *J. S. Jayawardene* and *Canakaratne*), for appellant.

*Drieberg*, for respondent.

June 26, 1918. ENNIS J.—

This was an action for specific performance of an agreement to assign a half share of a lease. Several issues were framed, and the case dismissed on the first issue, which was heard as a preliminary issue. By the agreement D 2 the defendant promised to convey half share of a lease to the plaintiff " whenever the plaintiff paid the sum of Rs. 7,500 within two years." The agreement was subject to certain " covenants, " the plaintiff was to carry on the lease, and if the income exceeded the expenditure, half the profits were to be " regarded as paid " to the plaintiff, while if the expenditure exceeded the income, half the loss was to be deducted from the sum of Rs. 7,500. In default of payment the agreement was to be cancelled.

The first issue was: " Is there an absence of consideration for, and mutuality in, the agreement sued upon? If so, can the plaintiff maintain this action?"

In the agreement the plaintiff made no promise to pay the sum of Rs. 7,500. The only promise is that by the defendant. Further, the agreement does not disclose any consideration, in the English sense of the word, for the option given to the plaintiff. By Roman-Dutch law, however, any reasonable cause is sufficient to support a contract, and any nude pact made deliberately and in earnest is binding and begets an action (*Pereira : Laws of Ceylon, 2nd ed., page 566*). There can be no question in the present case that the agreement was deliberately made: it is in writing notarially executed.

The learned Judge held that as the action was one for specific performance the principles of English law applied. Specific performance was not, however, unknown to Roman-Dutch law (*Pereira, ib., page 578*), and the rule that specific performance should be refused for want of mutuality must be considered from the Roman-Dutch point of view. No issue as to whether there was a "reasonable cause" for the agreement was raised in the case, and in the absence of evidence it must be presumed that there was a reasonable cause for a promise so deliberately made; and presuming a reasonable cause, there is no want of mutuality, as the doctrine of mutuality is understood in England (*Arnold v. The Mayor of Poole* [1]). In the circumstances I am of opinion that the appeal should be allowed, and the case sent back for further proceedings on the other issues. I would order accordingly, with costs.

SHAW J.—I agree.

*Appeal allowed.*