1961 *Present:* H. N. G. Fernando, J., and T. S. Fernando, J.

C. KANAGAMMAH HOOLE, Appellant, *and* K. K. NATARAJAN, Respondent

S. C. 589/57—D.C. Jaffna, 396/L

Contract—Specific performance—Agreement to sell immovable property—Scope of right of purchaser to claim specific performance—Repudiation of agreement by vendor—Tender of price by vendee not necessary then.

The defendant entered into an agreement with the plaintiff to sell a piece of land. Clause 8 of the agreement provided that in the event of the defendant refusing or neglecting to convey the land on tender of the balance consideration within a fixed period she should pay the plaintiff a sum of Rs. 2,000 as damages. Prior to the expiry of the time for payment of the balance consideration, the defendant informed the plaintiff by letter D2 that she was not prepared to place the plaintiff in possession of the land in terms of another clause of the agreement, and stated that the agreement had been signed by her while she was ill and while she " was not in a position to understand the nature and effect of the agreement ".

On a proper interpretation of the entire agreement, the stipulation embodied in clause 8 was merely a penalty and not an alternative or substituted obligation. It was intended to be merely accessory to the principal obligation, viz., the obligation to transfer the land.

Held, (i) that the plaintiff was entitled to a decree for specific performance compelling the defendant to transfer the land.

(ii) that the plaintiff was under no legal obligation, after the receipt by him of letter D2, to allege or prove a tender of the balance purchase price.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Ranganathan* and *Miss S. Wickremasinghe*, for defendant-appellant.

H. W. Jayewardene, Q.C., with *E. R. S. R. Coomaraswamy, K. Palakidnar* and *C. P. Fernando*, for plaintiff-respondent.

Cur. adv. vult.

March 24, 1961. T. S. FERNANDO, J.—

The substantial question that arises upon this appeal is the interpretation of a notarial instrument P.1 executed on 21st November 1956 by which the defendant agreed to sell to the plaintiff a certain piece of

land out of a larger land, the agreement being expressed therein in the following clauses :—

(1) The owner agrees to sell and the purchaser agrees to buy from the owner the landed property described in the schedule hereto at the fixed price of Rupees Thirteen thousand two hundred and fifty (Rs. 13,250) subject to conditions hereinafter stipulated.

(2) The owner hereby admits and acknowledges receipt of Rupees One Thousand (Rs. 1,000) as advance.

(3) The owner shall fix the boundary mark as per survey plan hereinafter mentioned at her cost and fence the boundary fence.

(4) The owner shall receive the balance consideration within any period not exceeding six months from date hereof from the purchaser and discharge the existing mortgage and cause a conveyance of the said property unto the purchaser.

(5) The owner shall permit the purchaser to take possession of the said land as from *today*, repair and complete the incomplete building existing thereon and go into occupation of the said land and use and enjoy the same free of any rent.

(6) The purchaser shall pay the balance consideration within a period of six months from date hereof unto the owner and cause a conveyance of the said property to be effected in his favour at his own cost and expense.

(7) In the event of the purchaser failing to pay the balance consideration within a period of six months herein stipulated the said purchaser shall pay a sum of Rupees Two Thousand (Rs. 2,000) as *liquidated damages* and *yield up possession* of the said land unto the owner and shall not claim any compensation for improvements to the said land or buildings.

(8) In the event of the owner refusing or neglecting to obtain the balance consideration within the stipulated time and convey the said property the owner shall pay a sum of Rupees Two Thousand as *damages*.

(9) The owner shall permit the purchaser to draw water from the well in the remaining portion of this land for a period of six months from date hereof.

The defendant received from the plaintiff the sum of thousand rupees referred to in clause 2 above, but failed to give over possession to the plaintiff as stipulated in clause 5. On the plaintiff calling upon the defendant to place him in possession, the defendant by her letter D. 2 of 2nd January 1957 informed the plaintiff that she is not prepared to do so, and stated that the agreement P.1 had been signed by her while she was ill and while

she " was not in a position to understand the nature and effect of the agreement ". In answer to the plaintiff's claim in this case for specific performance of the agreement P. 1 the defendant, while denying her liability to execute a conveyance of title, contended, inter alia, (*a*) that the instrument was only intended to be an informal writing, (*b*) that it had been signed by her on false representations made to her by the notary and another person who acted as a broker, and (*c*) that the instrument was neither read over nor explained to her. Several issues were raised at the trial based on these allegations made by the defendant in her answer. These issues have all been answered in favour of the plaintiff and, rightly, no attempt was made to canvass before us the decisions thereon by the learned trial judge who has also held that for some two years before the execution of P.1 the defendant had been anxious to sell the land in question.

In regard to the claim for specific performance the contention of the plaintiff was that the stipulation in clause 8 of P.1 that in the event of the defendant refusing or neglecting to convey the land she shall pay a sum of Rs. 2,000 as damages was a penalty and therefore merely accessory to the principal obligation to execute a conveyance, while for the defendant it was argued that it was an alternative or a substituted obligation. The learned trial judge, after a consideration of a number of decisions of this Court, has held in favour of the plaintiff and decreed that he is entitled to specific performance of agreement P.1 by the defendant. It is this finding that has been canvassed before us. Mr. Perera argued that in terms of clause 8 the consequence of a repudiation of the agreement on the part of the defendant is only a liability to pay a sum of Rs. 2,000 by way of damages. He pointed to clause 7 as embodying the corresponding liability of the plaintiff had there been a failure by him to perform his part of the agreement. Apart from the circumstance that the notary has been careful to distinguish between the damages which the plaintiff will have to pay for the non-performance by him of his obligation under the agreement which damages have been described as *liquidated damages*, while in the very next clause 8 the damages which the defendant will have to pay for non-performance by her of her principal obligation under the same agreement have been described merely as *damages*, one must not overlook the circumstance that the plaintiff has undertaken by clause 7 to forgo the common law right of an improver of land to claim compensation and to remain in possession of the land by virtue of the *jus retentionis*. Moreover, the agreement is silent (*a*) as to the return of the sum of Rs. 1,000 received by the defendant as advance—vide clause 2, and (*b*) in regard to the restoration of possession to the defendant although clause 5 contemplated the plaintiff being placed in possession from the date of the execution of P.1 itself. These circumstances tend to strengthen the view which the trial judge formed that the stipulation embodied in clause 8 was merely a penalty and not an alternative or a substituted obligation.

relevant law is now fairly well settled by our own decisions. It
it fairly recently that Gratiaen J. (with whom Pulle J. and
i J. agreed) stated in *Thaheer v. Abdeen* [1] that—

'n this country the right to claim specific performance of an agree-
; to sell immovable property is regulated by the Roman-Dutch
nd not the English law. It is important to bear in mind a funda-
al difference between the jurisdiction of a Court to compel per-
ance of contractual obligations under these two legal systems.
ngland, the only common law remedy available to a party complain-
f a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party ; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of particular cases."

This statement of the law was accepted by Their Lordships of the Judicial Committee—see *Abdeen v. Thaheer* [2]. Their Lordships also approved of another dictum contained in the same judgment that " it is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to elect one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance *or* damages ". Rightly construed, it does not appear to me that the instrument P.1 contains an agreement by which the purchaser has bound himself to be confined to a receipt of compensation in the form of damages on the refusal or failure by the owner to convey the property to him.

Mr. Perera, however, drew our attention to another passage [3] in the same judgment which I produce below :—

" Be that as it may, I think that in a system of law which recognises that two alternative legal remedies are *prima facie* available to the innocent party as of right, an agreement providing that, in the event of a breach, the defaulter shall forthwith be obliged to pay an agreed sum by way of compensation, raises, in my opinion, a presumption that the parties intended to rule out recourse to the other legal remedy."

and contended that the particular provisions of the agreement construed by the Court in the case of *Thaheer v. Abdeen* (*supra*) served merely to confirm the presumption. Relying on the passage referred to above, he argued that the absence of a confirmation of the presumption does not mean a rebuttal thereof. Their Lordships of the Judicial Committee have not felt obliged to say anything in regard to the dictum which this passage embodies probably for the reason that it played no real part in the decision of the case, the ratio decidendi of which was that the party

[1] *(1955) 57 N. L. R. at p. 3.* [2] *(1958) 59 N. L. R. at pp. 388–9.*
[3] *(1955) 57 N. L. R. at p. 6.*

who is ready to carry out his term of the contract *prima facie* enjoys a legal right to demand performance by the defaulting party, and that this right can be taken away only by an agreement to the contrary. In the case before us the terms of the agreement cannot reasonably be said to lead one to the conclusion that the purchaser was content to rely solely on his claim for damages. Not only is there no provision for the return of the advance of Rs. 1,000, but the agreement is silent in regard to compensation for improvements where the owner is the defaulting party ; these are circumstances which tend to show that clause 8 was not intended by the parties to cover all the prejudice the purchaser will suffer. I am of opinion that the learned trial judge has correctly interpreted the instrument when he held that clause 8 embodied only a penal stipulation which was intended to be merely accessory to the principal obligation, viz., the obligation to transfer the land.

Mr. Perera, for the defendant, next raised a subsidiary point, viz., that the plaintiff not having tendered the balance money payable by him was not in any event entitled to demand from the defendant specific performance of the contract. In regard to this, it must be noted that the question of failure to tender was at no stage raised in the issues during the trial. It does not appear to have been raised even as an argument in the Court below, and the petition of appeal to this Court is bereft of any reference to a failure to tender the balance purchase price. Mr. Jayewardene, in objecting to the elaboration of this argument, referred to the case of *Setha v. Weerakoon*[1] where a bench of two judges held that a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more. Having regard to issue 1 which raised the question whether the plaintiff is entitled in terms of P.1 to a conveyance of the land on deposit of the balance amount due and the evidence led at the trial which indicates that the balance sum was not tendered to the defendant, I am unable to take the view that the defendant was precluded from raising before us the question of the consequences, if any, of a failure to tender the balance purchase money within a period of time stipulated in the contract.

The question, however, is covered by authority, both local and English. In *Appuhamy v. Silva*[2], Lascelles C.J. dealing with the same question said (at page 240) :—

> " There can, I think, be no question but that the defendant, by announcing his refusal to accept the money, had waived his right to have a formal legal tender. The principle of law has thus been stated in cases where tender is pleaded as an excuse for non-performance : " If the debtor tells his creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late,

[1] *(1948) 49 N. L. R. 225.* [2] *(1914) 17 N. L. R. 238.*

or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby dispensed with, and there is a good tender of the amount mentioned by the debtor ". The same principle also applies where there is a contract with a condition precedent. The performance of the condition is excused where the other party has intimated that he does not intend to perform the contract. I think it is quite clear that the plaintiffs are not precluded from suing on the contract by failure to make a legal tender of the redemption money, inasmuch as the defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless. "

This case was followed in *Muthuvel v. Markandu*[1] where the Court stated that " it would seem that the appellants have successfully brought themselves within the principle that when a party to an agreement to re-transfer repudiates at a point of time prior to the expiration of the period of the option, it is unnecessary for the other party to allege or prove tender ".

English decisions are to the same effect. For instance in *Braithwaite v. Foreign Hardwood Company*[2], Mathew L.J. said : " But they repudiated the whole contract and by so doing clearly absolved the plaintiff from the performance of conditions precedent which in the ordinary course he would have been obliged to perform ". Again, in *Sinason-Teicher Corporation v. Oilcakes Etc. Co.*[3], Devlin J. expressed himself thus :—

" If the seller's repudiation is such as to display an attitude which shows that he is, in effect, saying to the buyer ; ' Although you are keeping the contract alive, even if you perform your next obligation and tender your documents, I cannot accept them ', the buyer is relieved from the obligation of making an empty and formal tender. He may, if he wishes for his own purposes, keep the contract alive and still claim that he is relieved from the obligation of making an empty or formal tender. "

I would respectfully follow the decisions referred to above and hold that the plaintiff was under no legal obligation after the receipt by him of letter D.2 to allege or prove a tender of the balance purchase price.

Mr. Perera invited us to consider whether the principle that it is unnecessary for a party to an agreement to allege or prove tender when the other party repudiates at a point of time prior to the expiration of the period of option is not limited to cases where the innocent party is suing for damages and does not apply to cases where specific performance is claimed. I do not feel called upon to discuss this point as both the local cases I have referred to above, viz. *Appuhamy v. Silva* (*supra*) and

[1] *(1952) 54 N. L. R. 462.* [2] *(1905) 2 K. B. D. 543 at 555.*
[3] *(1954) 2 A. E. R. 497 at 504.*

Muthuvel v. Markandu (*supra*) were cases in which the actions instituted claimed specific performance of agreements to transfer title to immovable property.

For the reasons indicated above the appeal fails and must be dismissed with costs.

H. N. G. FERNANDO, J.— I agree.

Appeal dismissed.