1940 *Present* : **Soertsz and Nihill JJ.**

FERNANDO *v.* COOMARASWAMY.

132—D. C. Colombo, 8,805.

Agreement to transfer lands—Agreement embodied in terms of settlement recorded in an action—Agreement non-notarial—Validity of agreement —Failure to carry out agreement—Action for damages—Civil Procedure Code, s. 408 (Cap. 86).

An agreement to transfer lands in accordance with the terms of settlement filed of record in an action and accepted by Court is binding on the parties to the settlement although the agreement was not notarially executed and was not embodied in a formal decree.

The party entitled to the transfer is not precluded from bringing a separate action for damages against the other party for failure to carry out the terms of the agreement.

THIS was an action brought by the plaintiff to recover damages from the defendant for failure to carry out an agreement to transfer land in terms of a settlement recorded in a mortgage action brought by the defendant against the plaintiff.

In execution of the hypothecary decree entered in the action the plaintiff's property was put up for sale but on application of the plaintiff to set aside the sale the action was settled.

The terms of settlement were that the property should be transferred to the defendant subject to a right of retransfer in the plaintiff on payment of the purchase price within a certain period.

The plaintiff took steps in the case in which the settlement was entered and succeeded in the end in securing specific performance of the agreement to transfer.

The present action was brought to recover damages sustained in consequence of the delay on the part of the defendant to give the transfer.

H. V. Perera, K.C. (with him *C. Thiagalingam* and *A. S. Ponnambalam*), for the defendant, appellant.—It cannot be said that this action is based on the decree entered in a case. The motion P 28, containing the terms of the settlement, was submitted after the sale in pursuance of the hypothecary decree had already taken place and at the stage of the inquiry to set aside that sale. That portion, therefore, of the agreement providing for the retransfer of certain lands was foreign to the subject-matter and decree of the hypothecary action. The words of the settlement should not be paraphrased and given the effect of a decree.

[1] *20 N. L. R. 140.*

Assuming that the settlement acquired the force of a decree, the effect on it of the judgment of the Supreme Court in the appeal taken earlier has to be considered. The order of the Supreme Court set aside the earlier settlement and provided for the execution of the conveyance at a later date. It gave further time to pay the money and further time to execute the reconveyance. Inasmuch as the judgment of the Supreme Court superseded the earlier decree, the earlier obligation ceased to exist to the extent of the variation. There cannot be two obligations contradictory of each other.

The terms of settlement in P 28 cannot constitute a valid agreement. Under section 2 of the Prevention of Frauds Ordinance any contract relating to land has to be notarially executed. The fact that it is embodied in a decree would make no difference. The District Judge has purported to follow *Meis Singho v. Josie Perera et al.*[1] but a close reading of the judgment in that case does not support the view he has taken. The transfer that was executed was not on the basis of the agreement which was non-notarial but on the basis of the order of Court.

If the agreement is valid and it is possible for the plaintiff to rely on it, we submit that there was no tender of the money on her part. Tender means the actual production of the money. The contract provides for payment before the execution of the retransfer. In point of fact the money was not really available when the tender was made.

In regard to the right of the plaintiff to bring an action for damages caused by the delay in executing the retransfer, no separate action is possible. Damages were not provided for in the order of the District Court. The only remedy of the plaintiff was by way of application under section 334 of the Civil Procedure Code and, even then, a contumacious disobedience of the order of the Court has to be proved. No action can be maintained on an obligation imposed by a decree—*Ismail v. Ismail*[2]. The District Judge in adopting *Kolintavita Mama Amma v. Kolintavita Haji Kandi*[3] has misapplied that case.

N. Nadarajah (with him *N. K. Choksy* and *C. X. Martyn*), for the plaintiff, respondent.—Settlements under section 408 of the Civil Procedure Code can include terms which may not be strictly relevant to the questions at issue—*Hemanta Kumari Devi v. Midnapur Zamindari Co.*[4]; Chitaley & Rao's *Commentary on the Civil Procedure Code*, Vol. 2, page 2189, Note 19. Notarial execution is not necessary where the agreement relating to land is embodied in a settlement under section 408 of Civil Procedure Code. See *In re U. L. M. Alim*[5]; *Meis Singho v. Josie Perera*[6].

In the earlier proceedings in the Supreme Court, no point was taken about any failure of tender or about the non-notarial nature of the agreement. At that stage, we could not have asked for mesne profits in anticipation. An action upon a decree is possible—*M. K. Avichchi Chetty v. Marikar and Nainamu*[7]; *Weerawagoe v. Fernando*[8]. A conflicting view was taken in *Ramen Chetty v. Frederick Appuhamy*[9]. It has been held

[1] *(1929) 31 N. L. R. 168.*
[2] *(1920) 22 N. L. R. 190.*
[3] *I. L. R. (1907) 31 Mad. 37.*
[4] *I. L. R. 47 Cal. 485; (1919) A. I. R. (P. C.) 79.*
[5] *(1921) 3 C. L. Rec. 5.*
[6] *(1929) 31 N. L. R. 168.*
[7] *(1904) 1 Bal. Rep. 106.*
[8] *(1893) 2 C. L. Rep. 207.*
[9] *(1906) 9 N. L. R. 133.*

that an assignee of a decree can maintain an action—*Mohamado Hanifa v. Lavina Marikar et al* [1]. The fact that there is a remedy available under section 344, Civil Procedure Code, does not debar a separate action—*Sultan v. Packeer et al.* [2]. A different view was taken in *Perera v. Abeyratna et al.* [3] and *Goonetilleka v. Goonetilleka* [4]. A separate action for mesne profits lies for profits obtained subsequent to the date when action was brought for declaration of title and ejectment—*Sarkar et al. v. The Secretary of State for India in Council et al.* [5]; *Bhirav v. Sitaram* [6]; *Sheo Kumar v. Narain Das* [7]. Section 334, Civil Procedure Code, could not have served to catch up the mesne profits which we ask for in the present case. Section 344 too was inapplicable because we are asking for damages regarding a breach which occurred subsequent to the date of our application to Court for retransfer. Those two sections relate to the execution of the main decree in a case, not to the enforcement of incidental matters which arise subsequently.

The plaintiff is entitled to mesne profits. A vendor is in a fiduciary position, in relation to the purchaser, for the rents and profits—*Plews v. Samuel* [8]; Fry on *Specific Performance* (6th ed.), page 655, para. 1436.

The decree of the Supreme Court did not supersede the agreement; it, in fact, interpreted it. The agreement has already been acted upon and the defendant is estopped from questioning its binding nature and validity—*S. Golam Lall v. Beni Prosad* [9]; *John v. Mendoza* [10].

On the question of tender, the evidence is clear that it was the conduct of the defendant which prevented the execution of the retransfer.

H. V. Perera, K.C., in reply.—The law in Ceylon is that an agreement relating to land, which is not notarially executed, is null and void. *Hemanta Kumari Devi v. Midnapur Zamindari Co.* (*supra*) is not applicable because, in India, any agreement embodied in a decree of Court is, by the law of the land, made valid. Indeed on the basis of that Privy Council decision alone the appellant is entitled to succeed. *In re U. L. M. Alim* (*supra*) is not applicable because that was a testamentary case and a Court could, under section 741, Civil Procedure Code, pass a decree embodying terms relating to immovable property.

Cur. adv. vult.

February 19, 1940. SOERTSZ J.—

Although the promiscuous manner in which issues were framed in the Court below makes this case appear formidable, the questions submitted to us on appeal as the questions in controversy are few, and the facts necessary for their determination lie within narrow compass, and may be stated briefly.

The appellant held a mortgage over forty blocks of land belonging to the respondent. He put his bond in suit in case No. 17,049 of the District Court of Kalutara, and, at the sale held in execution of the decree he obtained, he was declared the purchaser of those lands. The sale appears

[1] *(1908) 11 N. L. R. 177.*
[2] *(1910) 14 N. L. R. 52.*
[3] *(1912) 16 N. L. R. 414.*
[4] *(1912) 15 N. L. R. 272.*
[5] *I. L. R. (1890) 17 Cal. 968.*
[6] *I. L. R. (1894) 19 Bom. 532.*
[7] *I. L. R. (1902) 24 All. 501.*
[8] *L. R. (1904) 1 Ch. 464.*
[9] *I. L. R. (1879) 5 Cal. 27.*
[10] *(1939) 1 K. B. 141.*

to have been conducted on conditions that made its confirmation by the Court a necessary step towards vesting the purchaser with title. Before this confirmation could be given, the respondent presented to the Court petition P 26 supplemented by P 27 praying that the sale be set aside on the ground that there had been material irregularities in the mode of advertisement of the sale, and in the mode of the sale itself, and alleging that in consequence she had suffered substantial injury.

May 14, 1936, appears to have been the day appointed for inquiry into this matter. On that day, the parties and their lawyers came to an agreement, and submitted to the Court a written motion (P 28) in the following terms :—

" It is agreed that—

(1) The sales of lands 1 to 40 be confirmed, land 1 to 39 inclusive at Rs. 37,053.12 and land No. 40 at Rs. 2,092.50.

(2) The plaintiff (the present appellant) agrees to sell and retransfer the lands 1 to 39 to the first defendant (the present respondent) or her nominee if within the space of one year from the date hereof the first defendant pays a sum of Rs. 35,500 to the plaintiff.

(3) The plaintiff be given possession of the lands purchased on or before June 1, 1936.

(4) The plaintiff is entitled to all the coupons in respect of lands 1 to 39 of the March issue now in the hands of the Rubber Controller.

(5) When the first defendant obtains the transfer in her favour, the expenses of the transfer will be borne by her ". Thereupon, the Court made order (P 29) as follows :—" of consent, sale of lands No. 40 in the sale report confirmed. Sale of lands 1 to 39 confirmed subject to the terms of settlement filed ".

In March, 1937, the appellant was about to embark for Europe on furlough, and the respondent began correspondence, at first, with the appellant, and later, with his attorney with a view to obtaining the transfer provided for in the agreement of May 14, 1936. But when May 10, 1937, arrived, she was still without a transfer, and in a difficult situation inasmuch as the appellant's attorney was refusing to act in the matter till he had heard from his principal with whom, he said, he was in communication, and was suggesting to her to safeguard herself in the meantime by depositing in Court the sum of Rs. 35,500 agreed upon (P 15.) In this state of things, the respondent felt compelled to invoke the assistance of the Court and on May 11, 1937, the proctors acting for her in the mortgage suit submitted a motion P 22 to the Court asking it to direct the appellant's attorney " to appear in Court on the 14th instant and to sign the necessary conveyance on payment of the said sum of Rs. 35,500, or on his failure to do so, that the Court do execute the necessary conveyance in terms of the settlement ". The District Judge heard counsel on both sides in regard to this motion and said " I order the defendant to deposit the amount in Court before he can compel the plaintiff to execute the necessary conveyance ". The respondent appealed from this order and when the appeal came up for

hearing, it would appear, and we were so informed at the Bar, the present appellant who had, by this time, returned to the Island was willing to give the transfer asked for, and this Court on being addressed to that effect, delivered judgment holding that "in view of the fact that there is no mention in the settlement of May 14, 1936, in regard to the payment of this amount into Court . . . . the Judge was wrong in holding that it must be deposited in Court before the execution of the conveyance". The order appealed from was set aside and direction was given "that if within one month of the receipt by the District Court of our order, the defendant should pay Rs. 35,500 to the plaintiff, the plaintiff shall at the same time execute the necessary conveyance". In accordance with this order, the appellant executed a conveyance on February 1, 1938. The respondent now brings this action alleging that there was default on the part of the appellant between May 14, 1937, and February 1, 1938, and claiming a sum of Rs. 7,406.08 as the loss she suffered in consequence of this default. In her plaint she put forward a further claim, but with that we are no longer concerned.

On a broad view of the facts established by the evidence in the case, unhampered by questions of legal form and of legal procedure, I find myself in agreement with the conclusion to which the trial Judge came, for I am convinced that the respondent when she sought the assistance of the Court on May 11, 1937, had done everything that could reasonably have been expected of her to obtain the transfer that had been unequivocally promised, and that she was driven to Court by the intransigence of the appellant's attorney, and that, therefore, the appellant is responsible for the delay that occurred. But, it is said that the law stands in the way and prevents us from giving effect to this view. If that is the case, there can be no question but that the law must take its course and prevail.

The question, then, is whether the law compels us in this case to a conclusion which, on the ultimate facts as found by the trial Judge and concurred in by us, appears inequitable.

Let us now examine the contentions on which counsel for the appellant relied. He submitted firstly that the agreement of May 14, 1939, involved a transaction that was obnoxious to section 2 of the Prevention of Frauds Ordinance, and that it was of no force or avail in law, and that the respondent was, therefore, out of Court if her action be treated as based on the agreement. In regard to the respondents' counsel's argument that this action is on the decree of May 14, 1936, counsel for the appellant contended (*a*) that only so much of the agreement as related to the action could have been embodied in the decree, and that the part of the agreement providing for retransfer of these lands did not relate to the subject-matter of the action and could not be considered a part of the decree, (*b*) that even if the part relating to the transfer of these lands be regarded as part of the decree, it was, none the less obnoxious to section 2 of the Prevention of Frauds Ordinance. An agreement prohibited by section 2 did not acquire validity by being embodied in a decree.

It seems clear from the plaint filed by the respondent that her action is based on the order made by the District Court of Kalutara on May 14, 1936. No formal decree was entered in terms of that order, but I do not think it is or can be disputed that if a minister of the Court addressed himself to the task of putting the order in the form of a decree, he would have included in the decree a direction that the plaintiff (in that case) do execute a transfer of lands 1 to 39 to the defendant (in that case) on the latter paying within one year the sum of Rs. 35,500 and the expenses of the transfer, for those were terms 2 and 5 of the agreement, and the Judge had ordered "sale of lands 1 to 39 confirmed *subject to terms of settlement now filed*". The respondent's action must therefore, be regarded as an action on the decree. The questions then are those involved in the contentions I have set forth as (*a*) and (*b*). As regards (*a*) my opinion is that the interpretation given by Counsel to "action" and "subject-matter of action" in section 408 of the Civil Procedure Code is too narrow. The "action" at the stage of the case at which the settlement was reached was the proceeding that arose from the application, on the one hand, by the appellant to have the sale confirmed and by the respondent on the other hand, to have it set aside in respect of the lands involved in the sale, and not in respect of any other lands. The compromise was that the sale of those lands should be confirmed, but that, within a year it should be open to the respondent to obtain a transfer of lands 1 to 39 by fulfilling certain conditions. Clearly, therefore, the compromise related to the subject-matter of the action. I cannot entertain the submission that the subject-matter of the action, at that stage, was purely and simply the question whether the sale should be confirmed or not.

In regard to (*b*), appellant's counsel argued that the case of *Hemanta Kumara Devi v. Midnapur Zemindari Co.*[1] relied on by the respondent's counsel strongly supports not the respondents' case but his own, I have examined that case carefully and, in my view, the opinion of the Privy Council delivered by Lord Buckmaster is not of much assistance in this case in view of the fact that we are here concerned with section 2 of the Prevention of Frauds Ordinance, and its bearing on section 408 of our Civil Procedure Code, whereas in the Indian case the Privy Council examined two sections of the Indian Registration Act of 1908 which are very different from section 2 of the Prevention of Frauds Ordinance, in relation to section 375 of the Indian Code of Civil Procedure which is almost identical with our section 408. But as counsel relied so much on this case I think I ought to give some account of it. Kumara Bebi, the appellant in that case, instituted two actions, No. 72 against the Government and No. 73 against W. & Co.. to obtain possession of certain lands. Action 73 was compromised on terms agreed upon, one of which was that W. & Co. were to retain possession of the lands involved in that case, recognizing the appellant as the owner thereof, and that the appellant should grant them a *jote* settlement of the lands involved in the Government suit 72 if, and when, she succeeded in that suit. This agreement was reduced to writing and a petition of compromise was filed

[1] *I. L. R. 47 Cal. p. 485.*

in case No. 73, and judgment was given in terms of the compromise and decree was entered thereon. The appellant succeeded in her case against the Government, but refused to grant the *jote* settlement to W. & Co. in regard to those lands. The respondents, the successors of W. & Co., brought this action for specific performance of the agreement. The appellant denied having made or authorized the agreement and objected that the petition and consent decree were not admissible in evidence against her because, treated as an ordinary contract, it had not been registered in terms of section 17 of the Registration Act of 1908, and because, as a decree, it was inoperative in relation to the lands in dispute which were not the subject-matter of the action in which the compromise had been made. Lord Buckmaster who delivered the opinion of the Privy Council held that the agreement to give the *jote* settlement was not, in the circumstances, an agreement to lease, as it was contended it was, and that, therefore, registration was not necessary in that way; and in regard to liability to registration under section 17 (1) (*b*) of the Indian Registration Act which, required registration of "*other non-testamentary instruments* which *purport* or operate to create, *declare,* assign, limit or extinguish, whether in present or *in future,* any right, title or interest whether vested or *contingent* of the value of one hundred rupees and upwards to or in immovable property", His Lordship pointed out that by sub-section 17 of the Registration Act, decrees of Court were exempted from the requirement of registration. The question that remained was whether the agreement relied on was a part of the decree entered in pursuance of the compromise. It was contended for the appellant in that case that the decree was that part of it which referred to the lands involved in the suit that was compromised and that the lands in suit 72 which were the lands in respect of which the *jote* settlement was given were foreign to the decree and outside it. The Board rejected that contention and held that the decree included the whole agreement because the agreement in regard to the lands outside the action *had also been submitted to the Court as part of the compromise.*

Now Mr. Perera submits that there is no equivalent in our law to section 17 (2) exempting decrees from the purview of section 2 of the Prevention of Frauds Ordinance and that, therefore, the fact that the agreement in question is embodied in a decree is of no avail in our law. I cannot find anything in the opinion of the Privy Council in the Indian case that supports this contention of the appellant's Counsel. The point in the present case did not arise before the Board.

So far as local authorities go, there is the ruling of Ennis A.C.J. and Shaw J., in the case of *The Estate of N. L. M. A. L. M. Alim,*[1] that "the Code of Civil Procedure has made an express provision in section 408 with reference to agreements in settlements of disputes and compromises, and does not require such agreements *if they relate to land to be notarially executed*". That undoubtedly is the view on which our Courts have acted.

[1] *3 C. L. Rc. 5.*

It is also submitted that deed D 14 given by the auctioneer to the appellant after the sale had been confirmed is an absolute conveyance and contains no *agreement to retransfer*. That is so. But there is reference to the confirmation given by the Court on May 14 and in view of all the attendant circumstances, it cannot be inferred that the respondent's beneficial interest was disposed of by that deed. The appellant was, therefore, his constructive trustee. In point of fact, he fulfilled the trust eventually.

The next point taken by counsel for the appellant is that if this decree which is implicit in the order of May 14, 1936, is good and operative in regard to the transfer of lands that was undertaken by the appellant, the respondent can obtain only as much relief as she may, by executing the decree and not by a separate action. The answer to this, as I conceive it, is that the respondent has executed so much of the decree as was executable. She took steps in the case in which the settlement was entered and succeeded in the end in securing specific performance of the agreement to transfer. Her present suit is to recover damages, she says, she sustained in consequence of the delay on the part of the appellant to give her the transfer. It is true that it was open to the parties when they were compromising their dispute, to take a long view and to make provision for damages in the event of default or delay. But, they were not bound to do that. In point of fact, they did not do that, and I am not aware of any rule of law or procedure which can be said to debar the respondent from bringing a suit to recover damages that resulted from a breach of one of the directions given in the order. Parties are entitled to act, and generally do act, on the assumption that agreements and undertakings will be performed, and not broken.

Appellant's counsel also submitted that the judgment of this Court directing that the appellant should execute a conveyance on payment being made to him by the respondent within a month of the order of this Court being received in the Court below, superseded the agreement of the parties and the decree thereon, and that for this reason, the appellant could not be said to have made default. But by the time this Court made its order, the default had already occurred, and there is nothing to show that either by agreement or by direction of Court, it was understood that performance at the time indicated in the judgment of this Court was to be regarded as performance *nunc pro tunc*.

Finally, it was submitted that the respondent failed because there had not been "tender" of money as required by law. "Tender", says Harris in the 1908 edition of his book on that subject at page 1, "is the instinctive resource of the oppressed against the exactions of the relentless". The question, then, is whether the respondent made proper use of this resource. The learned trial Judge records his findings on this point in these words "To my mind it is perfectly plain that the money was available for payment to the defendant or his attorney if the retransfer transaction materialized, or if the attorney had definitely stated that the reconveyance would be made". But, it is objected that the money that was being offered was not money at the disposal of the respondent, that it was money belonging to Messrs. Lee Hedges & Co.

and would come to be the respondent's money only when the respondent obtained a transfer from the appellant and gave Messrs. Lee Hedges & Co. a mortgage of the lands transferred to him. This appears to have been the position at a certain stage of this transaction. See for instance P 5 and P 8. Those letters indicate that Messrs. Julius & Creasy were then acting for Messrs. Lee Hedges & Co. But by P 10 Messrs. Julius & Creasy wrote on April 29, 1937, that they were acting for the respondent as well, although Messrs. Lee Hedges & Co. were still envisaged as mortgagees P 12. By P 14 Messrs. Julius & Creasy informed the appellant's attorney's proctor on May 8, 1937, "this money is now in our office and we are in a position to pay it to your client upon his executing the appropriate conveyance . . . . we suggest that this matter be completed at say 2 P.M. on Tuesday the 11th instant when we shall be pleased to call at your office and obtain your client's signature to the conveyance against payment of the amount due."

They followed up with their letter of May 11, 1937, in which they say "Mrs. Fernando has now nominated Messrs. Lee Hedges and Co., Ltd., to receive the transfer . . . . and we accordingly tender an amended draft conveyance in their favour." It will be remembered that the agreement P 29 provided for a Transfer to the respondent *or her nominee.* There was no longer any question of money not being immediately available to the appellant's attorney. In the face of all this, to hold that the money was not duly tendered would be to make the Law of Tender a horrible snare.

It was also said that the money was not actually produced, but that observation sits ill on the lips of the appellant when we find the appellant's attorney replying to the letters of Messrs. Julius & Creasy on May 1 saying "my client has yet to decide whether he should execute the retransfer and he will decide the question *only after the money is paid if* the same is paid within time"; again on May 7, "in the event of Mrs. Fernando paying the amount as well as the cost of retransfer within time, *my client if so advised* will execute a deed"; on May 10 P 15 "My client has been advised not to sign any deed of retransfer without written instructions from the principal. Mr. Coomarasamy has been written to, but a reply has not been received. Until a reply is received my client will not sign any deed of retransfer". To have produced the money to one who was taking up this attitude, would have been an idle formality.

It is not without significance that till answer was filed in this case there was not a word said or heard to suggest that there had not been proper tender. I must, therefore, find that the respondent did everything she had to do to entitle her to the transfer. She took her horse to the water but she could not make him drink.

For these reasons, I am of opinion that the trial Judge came to a correct conclusion, that the appeal fails and that it must be dismissed with costs. The case will go back for the assessment of damages.

NIHILL J.—I agree.

Appeal dismissed.