1947 *Present:* **Howard C.J. and Soertsz S.P.J.**

PERERA, Appellant, *and* MORAES, Respondent.

S. C. 286—D. C. Colombo, 112Z.

Specific performance—Agreement to transfer portion out of lot allotted in partition decree—Lot less in extent than portion agreed upon—Vagueness of contract—Subject-matter insufficiently identified—Can agreement be enforced?

One Lewis agreed to transfer to plaintiff 20 perches out of a lot that would be allotted to him in a partition case that was pending. Lewis died and the defendant as his heir was allotted lot H in lieu of his undivided interests. Lot H was in extent 13.88 perches. Plaintiff sued defendant for the transfer of lot H for a price in proportion to the extent. Defendant contended that the contract could not be enforced because it was vague in that the property to be transferred was not sufficiently identifiable and that it was impossible of performance because Lewis was allotted only 13.88 perches.

Held, that specific performance could be enforced.

APPEAL from a judgment of the District Judge, Colombo.

N. K. Choksy, K.C. (with him *V. Thillainathan*), for the defendant, appellant.

N. E. Weerasooria, K.C. (with him *J. M. Jayamanne* and *W. D. Gunasekera*), for the plaintiff, respondent.

Cur. adv. vult.

October 24, 1947. HOWARD C.J.—

The defendant appeals from a judgment of the District Court, Colombo, giving judgment for the plaintiff as claimed together with costs. The plaintiff by an agreement dated February 12, 1944, entered into an agreement with one Don Lewis by which Lewis agreed to transfer to him for a sum of Rs. 750 a portion of land in extent 20 perches out of the lot that would be allotted to Lewis in the partition case then pending. The transfer was to be executed within two months of the final decree in the partition case. It was established that on the execution of the agreement the plaintiff paid Rs. 50 to Don Lewis and agreed to pay the balance of Rs. 700 at the execution of the transfer. On March 15, 1944, Lewis received from the plaintiff two sums of Rs. 100 and Rs. 60 and gave the plaintiff two promissory notes in respect thereof. Don Lewis died on April 9, 1944, leaving the first defendant his sole heir. The final decree in the partition case was entered on September 13, 1944, and the first defendant as the heir of Lewis was allotted lot H in extent 13.88 perches. The plaintiff thereupon requested the first defendant to execute a transfer of the 13.88 perches for the balance due, namely, Rs. 520 less Rs. 215 or Rs. 305. The first defendant has refused to execute the transfer. After filing the action the plaintiff discovered that, when the first defendant filed his answer he had disposed of lot H to the second defendant who was subsequently added as a party.

The District Judge has held that, although Don Lewis was not entitled to the extent of land he had contracted to convey to the plaintiff, the plaintiff was entitled to specific performance of the agreement. The

only question at issue is whether the District Judge was correct in law in coming to this conclusion. Mr. Choksy has contended that the contract is unenforceable (*a*) because it is vague, the property to be transferred not being sufficiently identifiable; and (*b*) because it is impossible of performance inasmuch as Lewis was only allotted 13.88 perches.

In regard to (*a*) it is a proposition of law that Courts before enforcing a contract must be satisfied that it is certain. Uncertainty may arise in various ways: (1) where the contract is so vague in its general terms that the obligations of the parties are not ascertainable, (2) where the subject-matter of the contract is not sufficiently identified, (3) where the parties are not sufficiently identified, (4) where, in the case of a sale the price is not ascertained, and (5) where some material term of the contract is omitted. Mr. Choksy has contended that the present case comes within (2) and has cited the cases of *Hodges v. Horsfall*[1] and *Lancaster v. De Trafford*[2]. In the latter case the Court refused at the instance of the lessee to decree specific performance where the agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease. In *Hodges v. Horsfall* (*supra*) the boundaries of land to be leased were to be settled in accordance with a plan. It was, however, not established which particular plan had been agreed upon. In these circumstances specific performance was refused. I do not consider that the facts in the two cases cited are applicable to the facts of the present case in which the contract was for the transfer of 20 perches out of the land allotted to Lewis in the partition decree. The contract would be fulfilled by a transfer by Lewis of 20 perches. Vide *Jenkins v. Green*[3]. No question would arise as to which particular plot out of the land allocated was to be transferred. In my opinion the subject-matter of the contract was sufficiently identified and this contention fails.

In regard to (*b*) Mr. Choksy contends that the contract was unenforceable inasmuch as Lewis was allocated only 13.88 perches and the contract was for 20 perches. The English law with regard to this matter is formulated in the 6th edition of Fry on Specific Performance, paragraphs 1257-1258, pages 582-583, as follows:—

"1257. Although, as a general rule, where the vendor has not substantially the whole interest he has contracted to sell, he, as we have seen, cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference.

1258. 'If', said Lord Eldon, 'a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract; and, if the

[1] (*1829*) *1 Russell & Mylne 116.*

[2] (*1852*) *8 Jurist 873.*

[3] *54 E. R. 172.*

vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole.'"

Mortlock v. Buller [1]; *Rutherford v. Acton-Adams* [2]; *Rudd v. Lascelles* [3]; and *Barnes v. Wood* [4] are authorities for this proposition. In the first of these cases the Lord Chancellor at p. 318 stated as follows:—

"I also agree, if a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."

In view of the authorities I have cited I am of opinion that Mr. Choksy's contentions must fail and the appeal dismissed with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.