HURBERT FERNANDO
V.
KUSUMANANDA DE SILVA

SUPREME COURT
AMERASINGHE, J.
DHEERARATNE, J. AND
GOONEWARDENA, J.
D.C. NEGOMBO CASE NO. 2570/L
CA. 425/81 (F)
C.A. (LA) S.C. APPLICATION NO. 8/88
S.C. APPEAL NO. 17/88
7 AND 11 DECEMBER 1990

Contract - Specific performance - Agreement to sell - Substituted obligation

Held-

On the terms of the agreement to sell no alternative was made available to the vendor as to the mode of performing the contract. The return of the deposit was no alternative in any true sense. Hence the vendor was obliged to make specific performance on the purchase fulfilling his obligations. There was here no substituted obligation.

Cases referred to:

1. *Thaheer* v. *Abdeen* 57 NLR 1
2. *Kannagammah* v. *Kumarakulasingham* 66 NLR 523

APPEAL from judgment of the Court of Appeal

H.L. de Silva, P.C. with *G. Dayasiri, P.M. Ratnawardene* and *Janaka de Silva* for plaintiff -appellant
P.A.D. Samarasekera, P.C. with *Bimal Rajepakse* for defendant - respondent.

Cur. adv. vult.

19 January 1991
GOONEWARDENA, J

This was an action filed in the District Court by the present appellant as plaintiff against the present respondent as defendant, seeking to enforce by way of specific performance an agreement to transfer

premises bearing assessment No. 200, Weboda Road, Negombo called and known as 'Brindhaven'. The agreement which was notarially attested as required by the Statute of Frauds was produced at the trial of the action marked P1. It provided that the consideration for the transaction of sale contemplated thereon was a sum of Rs. 80,000/-. At its execution a sum of Rs. 8000/- was made payable by the plaintiff, the purchaser, as a 'deposit . . . .being 1/10th share of the purchase consideration'. The balance sum of Rs. 72,000/- was to be paid to the vendor, the defendant, at the time of the execution by him of the contemplated deed of transfer and the deposit of Rs. 8000/- made was to be treated by him as a part payment of the purchase price of Rs. 80,000/-. The purchase itself had to be completed not later than 31st July 1979.

Conveniently, at this point, I would reproduce the two principal clauses of P1 of importance to the question of specific performance, thus:-

"5. If upon the purchaser duly observing and performing the terms and condition set forth in this agreement the vendor shall wilfully or otherwise refuse or fail to execute the deed of transfer as provided for in clause 3 hereof then and in that event the vendor shall refund to the purchaser the said sum of Rupees Eight Thousand (Rs. 8000/-) deposited as aforesaid or alternatively the purchaser shall on giving thirty (30) days notice to the vendor have the right to enforce specific performance by the vendor of the agreement herein entered into.

6. If upon the vendor duly observing and performing the terms and conditions set forth in ths agreement the purchaser shall fail wilfully or otherwise to complete the purchase as provided for in clause 3 hereof then and in that event the vendor shall retain the said sum of Rupees Eight Thousand (Rs. 8000/-) deposited as aforesaid as liquidated damages and not as a penalty or alternatively the vendor shall on giving thirty (30) days notice to the purchaser have the right to enforce performance by the purchaser of the agreement herein entered into."

It was admitted that the plaintiff at the execution of P1 paid the defendant the deposit of Rs. 8000/- and took the steps stated to be required of him in the aforesaid clause 5, but by letter P3 the

defendant refused to sell the property and returned the sum of Rs. 8000/- so deposited with him. Thereupon the plaintiff sent back this sum to the defendant and gave him notice as set out in clause 5 and upon the failure of the defendant to perform the contract of sale, instituted this action.

In the trial Court the District Judge, placing reliance upon certain passages in the judgment of Gratiaen J in the case of *Thaheer* v *Abdeen* (1), concluded that it could not be said that the mere refund by the defendant of the sum or Rs. 8000/- was the performance of a substituted obligation for the plaintiff's right to specific performance, as was the defendant's contention, that under the Roman Dutch Law a purchaser is entitled to the right of specific performance provided that he had carried out his part of the contract and that in the event of a breach of the contract it is not the defaulting party but the innocent one who is entitled to exercise the option of an alternative remedy. Consequently he declared judgment for the plaintiff and that resulted in an appeal to the Court of Appeal.

The Court of Appeal overturned the judgment of the District Judge and that in turn has resulted in the present appeal being taken. That Court considered that the words 'or alternatively' as used in clause 5 demonstrated an intention to create a right to elect given to the vendor. Of importance to emphasize is that the Court of Appeal considered that this was a right given to the vendor and that the return of the part payment of Rs. 8000/- necessarily implied that the 'primary obligation' to sell came to an end taking away the plaintiff's right to demand specific performance, but that if on the other hand the defendant failed or neglected to return or refund the said deposit of Rs. 8000/- and instead chose to keep it, that only then the 'primary obligation' to sell was kept alive so as to place the defendant under a duty to convey the property to the plaintiff capable of being enforced by way of specific performance. The Court of Appeal concluded that therefore the purchaser, the plaintiff, was denied the right to seek specific performance and that the language of clause 5 was not open to the construction placed upon it by the District Judge.

In argument before us, in essence the contention of learned Counsel for the plaintiff Mr. H. L. de Silva was that clause 5 of P1 did not contain alternative modes of performing the contract available to the

defendant. He contended that the mere return of a deposit could not in any sense be considered a performance of the contract.

Conversely, learned Counsel for the defendant Mr. Samarasekera commended the approach of the Court of Appeal and urged us to adopt it as being the correct one, having regard to the provisions of the document P1. He placed strong reliance himself on the judgment of Gratiaen J in *Thaheer* v *Abdeen* (Supra) and emphasised the importance of the following passages (at P 4 and 5):

> "The conclusion which I have reached is that the language of clause 8 is not open to the construction contended for on behalf of the purchaser. The parties must clearly have appreciated on 3rd October, 1947, that failure on the part of the 'vendors' to secure a conveyance of the entire property to the purchaser on or before 31st December, 1947, in terms of the contract could result from a variety of causes. For example.
>
> (1) the sanction of the District Court to the proposed sale might not be obtained or not be obtained in time;
>
> (This was a reference to the agreement to sell inter alia certain undivided rights in the property belonging to minors)
>
> (2) the title of the premises might not be 'deduced to the satisfaction of Mr. John Wilson' - Clause 5;
>
> (3) One or more of the 'vendors' might back out of the transaction during the interval between the date of the contract and the date fixed for completion.
>
> In the first of these contingencies, specific performance of the indivisible obligation to secure the sale of the entire property would in the very nature of things have been impossible, because the 'vendors' could not be compelled to achieve a result which it was beyond their power to bring about. Clause 8 certainly provides the purchaser's only remedy in that particular contingency, namely that the vendors' shall forthwith' (the words are imperative, and exclude the notion of an option being granted to either of the parties) refund the part consideration previously deposited with them and also pay an agreed sum by way of

liquidated damages.

What then if the vendors should, for some other reason equally within the contemplation of the parties, default in the performance of their primary obligation? Clause 8 equally provides that in any such contingency the deposit must 'forthwith' be refunded and a like sum paid to the purchaser by way of compensation.

It follows from this analysis that what was clearly intended to constitute a substituted obligation upon the first contingency referred to must equally have been intended to constitute the sole obligation arising upon a default in any other contemplated contingency. Had it been the intention of the parties that the substituted obligation provided by clause 8 should represent the purchaser's sole remedy in one situation, but that the alternative legal remedy of specific performance (i.e. under the general law) should nevertheless be reserved to him at his option in another, it would have been a simple matter to insert in the contract express terms making separate provisions for each separate contingency".

Counsel referred in this context to certain provisions in P1 which made the transaction in question subject to (a) in the vendor's title being satisfactory (b) vacant possession being granted and (c) the boundaries being properly defined on a plan (clause 4). He pointed to clause 7 of P1 which provided that the vendor shall be entitled if the purchase did not materialise for any reason whatsoever (other than the reasons referred to in clause 4) to appropriate the deposit (without prejudice to his other rights) against damages payable and made further provision to enable the vendor to refund to the purchaser the deposit of Rs. 8000/- in case the requirements of clause 4 were not met. His argument was that if as Gratiaen J held, provision for certain contingencies impliedly excluded specific performance there, likewise specific performance was by contract expressly excluded in the instant case. He adopted the approach of the Court of Appeal that the vendor by the terms of clause 5 had a choice as to whether he should keep the deposit of Rs. 8000/- or else refund it. If the vendor, he contended chose to keep it he was liable to specifically perform the contract. If on the other hand he elected to return it the matter ended there. In other words the effect of what he submitted was that the whole question hinged upon the

decision which the vendor had the right to make under clause 5, whether to refund the deposit or else to retain it.

I think that it is possible to say at this point itself that since by clause 6 which deals with a situation in which the purchaser was in default, there was a clear right of election given to the vendor to demand specific performance to compel the purchaser to buy the property or alternatively to retain the deposit of Rs. 8000 as damages, it would not be correct to consider (as the Court of Appeal in the event did) that by clause 5 which deals with a situation in which the vendor was in default and which also refers to a right to obtain specific performance given to the purchaser, there was once again a right of election given to the vendor to return the deposit or in the alternative to specifically perform the contract of sale. It is neither reasonable nor logical to think that the parties intended that clause 5 as well as clause 6 should both give such a right of election only to the vendor in either instance, that is, whether the default was his or that of the purchaser.

Since the word 'alternative' figures prominently in this case, in the belief that it would serve the purpose of facilitating an understanding of what that word should in this context properly signify, I have reproduced from the texts, provisions (which include the effect of the case law as well) of both the Roman Dutch Law which admittedly is the law applicable in this case and also of the Eglish Law, and if that has been done to an extent that might appear excessive or unnecessary, that was in order to extract the principles comprehensively and to place the problem we are faced with in a correct legal perspective. I have also not been unmindful of the probability that these books are not too readily available and that the reproduction of these passages could therefore also serve a somewhat general useful purpose.

As regards the Roman Dutch Law, Wessels on 'The Law of Contract in South Africa' (2nd Edition 1951) states thus:-

Section 1453 "The object of an obligation may be either a single thing or a single act, or else it may consists of several things or several acts, or of both things and acts. In the former case we say that the object of the obligation is 'simple', in the latter case that it is 'compound'.

If the object of the obligation is compound, the promise may be framed in such a way as to be fulfilled only when all things are delivered or all the acts are performed (conjunctive obligation), or else that the delivery or a single thing or the performance of a single act absolves the debtor (facultative or alternative) . . ."

Section 1454". . .In the facultative obligation there is a promise to deliver some definite things or to perform some definite act, but at the same time the debtor reserves to himself the right to perform his contract by some other prestation, e.g. I promise to deliver A, but I reserve to myself the right of delivering B instead. The primary object of the obligation is A but I have the power (facultas) of substituting B . . .An obligation is said to be alternative when the promise involves two prestations, but in such a way that the debtor is absolved by either prestation, I promise to deliver A or B. Both are equally due until the choice is effected, but after that only the one chosen is due . . .".

Section 1459 "If two things are promised alternatively and one of them at the moment of the clinching of the contract belongs to the creditor, the agreement must be regarded as a simple promise of the other. . .".

Section 1460 "If one of the alternative promises is the performance of an act and the other the payment of money, we must gather from the contract and the circumstances whether the payment of the money is intended merely as a penal clause or whether it is to operate as a liquidated debt. If the clause providing the money payment is a penalty, it is not 'in obligation, for the law will then consider it a mere accessory undertaking and only due if the principal obligation is not executed, and then only to the extent of the actual damage suffered.

If, however, the payment of the money is not construed to be a penal clause, but an alternative prestation, then directly the performance of the act becomes impossible or the promisor refuses to carry it out or cannot do so,

the money is due . . ."

Section 1461 English Law is similar . . .

As regards the English Law in the work 'A Treatise on the Specific Performance of Contracts' by Fry (6th Edition 1985) it is stated thus:

Section 140 "From the principles stated in the last Chapter, it appears that where a contract is substantially performed by the payment of a sum of money, the Common Law remedy being adequate, Equity will not interfere. Hence, in cases where there is added to the contract a clause for the payment of a sum of money in the event of non performance the question arises whether the contract will be satisfied by the payment, or whether it will not. In the former case, Equity will not interfere; in the latter it may".

Section 141 "The question always is, what is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the act, and thus carrying into execution the intention of the parties: If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative".

Section 142 "From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:-

(i) . . .Where the sum mentioned is strictly a penalty - a sum named by way of securing the performance of the contract as the penalty in a bond

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract;

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done. . ."

It will be convenient to consider the three classes of cases separately.

Section 143 (i) "A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced . . .".

Section 146 (ii) "The difference between penalty and liquidated damages is, as regards the Common Law remedy, most material. For according to the Common Law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money. But as regards the equitable remedy the distinction is unimportant; for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the Court from enforcing the contract in specie".

Section 153 (iii) "In the third class of contracts which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these case, the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where money is paid or tendered there is no ground for interference by way of specific performance or injunction".

Section 154 "The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering it 'the Courts

must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation'. Consequently each case depends on its own circumstances . . .".

Section 155 "On this question it is by no means conclusive that the contract may be alternative in its form.For never theless the Court may clearly see that it is essentially a contract to do one of the alternative . . . ".

Section 158 "The fact that the benefit of the contract would result to one person or flow in one channel and the benefit of the sum if paid, in another, is a strong circumstances against considering the contract alternative in its nature . . ."

If these citations bring out anything clearly it is that in every reference to an 'alternative obligation' there is to be found that upon a performance thereof some benefit (generally monetary) passes to the creditor from the debtor, which in the instant case would come from the vendor to the purchaser. This is strongly brought out by an expression often used in this context "an alternative obligation of equal work". As Wessels in his work "The Law of Contract in South Africa" (ibid) points out at section 385 "The object of the obligation to which the contract gives rise in the thing or act which has been promised". In the case of two alternative obligations this must apply to either of such alternatives. Can it be said that one of the obligations in clauses 5 was such that if the vendor defaulted the purchaser should merely get back his deposit? To put it somewhat differently can it reasonably be said that the object of this so called alternative obligation looked at from the purchaser's angle was to get back his own money whereas by contract in the event of the purchaser's default the vendor could claim the alternative of damages. I certainly do not think so.

What then is the true effect of the vendor retaining or endeavouring to return to the purchaser the deposit. Fry in his work on Specific Performance of Contract (ibid) in Chapter VI deals with 'The Deposit', such as is also entered in P1. So much of sections 1477 and 1478

in such chapter as are relevant are reproduced thus:-

Section 1477"It is common on sales of real estate for the purchaser to pay to the vendor at the time of the contract a portion of the purchase money by way of part payment. . . ."

Section 1478"The deposit unless paid on any special terms, is not merely part payment but is an earnest: so that, on the one hand if the contract be performed, it is brought into account as part payment: On the other hand if the purchaser makes default it may be retained by the vendor. The deposit is therefore security for the performance of the purchaser's part of the contract . . . Where without any default on the part of the purchaser the contract fails, the deposit and all other such payments ought to be repaid . . ."

A deposit then, as explained above, being something which has to be paid back to the plaintiff where he was without default it cannot, when so paid back, as I see it, be considered the performance of an alternative obligation under the contract. As I understand section 1459 of Wessels on "The Law of Contract in South Africa" (ibid) the words I earlier referred to "If two things are promised alternatively and one of them at the moment of the clinching of the contract belongs to the creditor the agreement must be regarded as a simple promise of the other", are a pointer in that direction.

Counsel for the respondent read out the dictionary meaning of the word 'alternative' as part of his argument as to the alternatives he claims were available to the defendant under clause 5. In this regard the judgment of the Court of Appeal, as I read it, emphasises an aspect suggesting that the first of the choices was one given to the vendor to refund the deposit of Rs. 8000/- which upon being refunded brought the matter to an end, so that the situation pertaining to the exercise of the right of specific performance said to be available to the purchaser did not arise, and in that way treated then as alternative choice available to the vendor. It seems to me that this way of looking at it, made as it is to depend upon the order in which these claimed alternatives occur in clause 5 can be misleading as I shall endeavour to show. If, as contended, the stipulations in clause 5 are true alternatives, then it should be possible to rearrange

the structure of such clause without in any way distorting its meaning by transposing these two claimed alternatives to read, thus:

> "If upon the purchaser duly observing and performing the terms and conditions set forth in this agreement the vendor shall wilfully or otherwise refuse or fail to execute the deed of transfer as provided for in clause 3 hereof then and in that event the purchaser shall on giving thirty (30) days notice to the vendor have the right to enforce specific performance by the vendor of the agreement herein entered into or alternatively the vendor shall refund to the purchaser the said sum of Eight thousand (Rs. 8000/-) as aforesaid".

Referred in this way one sees that the meaning thereby conveyed suggests a "right of election" available to the purchaser, unlike in the structure of clause 5 as it exists in P1. It seem to me therefore that if they were true alternatives, clause 5 rendered as set out above should not achieve the result of altering the party having the right of election from the vendor to the purchaser. By contrast a like exercise with respect to clause 6 does not bring about such a result. The inference therefore must be that there is no alternative made available to the vendor here as to the mode of performing the contract and I would express my view that the return of the deposit was no alternative in any true sense, despite that use of the word in clause 5 with unfortunate consequences for the plaintiff.

The 'alternative' referred to in clause 5 was not in reality an inference to a performance of an act in any particular way but rather to a non performance or breach. The word 'discharge' when used in relation to a contract can be understood to mean, the contractual obligation being extinguished, and as pointed out in section 2117 of 'The Law of Contracts in South Africa' by Wessels (ibid), the various modes whereby that can be brought about are grouped under three heads namely (1) performance or payment (2) mutual agreement (3) operation of law. The expression 'discharge of a contract' is sometimes used in a sense suggesting a breach, and as Wessels also points out (at section 2912) "English text - books speak of the discharge of a contract by breach" although as he comments (at section 2913) "It is doubtful whether that Civil Law regarded a breach of contract in this light". Therefore when one encounters a provision in a contract which at first glance may take the appearence of an

'alternative' (as here) one can all too easily fall into the error of confusing a 'breach' for a 'performance' in the context of an obligation being discharged or extinguished.

The case of *Thaheer* v *Abdeen* (Supra) as also the later case of *Kanagammah* v *Kumarakulasingham* (2) which purported to follow it must be distinguished. If however the judgment in the latter of these cases is in conflict with the conclusion I reach in the instant case, with respect I would have to disagree with it. As contended by Counsel for the appellant the technique of interpretation used by Gratiaen J in the circumstance of the case before him is inappropriate here. To apply what Gratiaen J said in the former case to the facts of the present one in the manner suggested would be far from taking the correct course. As Gratiaen J himself pointed out there, "it would have been a single matter to insert in the contract express terms making separate provision for each separate contingency". That I think has been done in the document under consideration here. Further, in the instant case the right of seeking specific performance was granted to both parties (thereby conforming to the aspect of mutuality) and thus by express inclusion in the contract, unlike in that case where this right was being claimed only as available under the Roman Dutch Law applicable, and where the contract there made provision for the repayment forthwith by the vendor of the deposit and a further sum by way of liquidated and ascertained damages.

To recapitulate, what then is a contract? What are the legal relations created by it? The striking difference between the position of the vendor and the purchaser is this. In the event of a breach, as an alternative to specific performance the vendor by contract gave himself the right to recover damages, whereas by contract, as an alternative to specific performance the purchaser by contract did not give himself that right and was content to get back his deposit. It seems to me therefore that it is possible to think that at the time the contract was entered into there was a greater anxiety on the part of the vendor to see that the sale went through for it may well be said, to use the words of Fry in specific performance (ibid) already referred to, that 'the sum was annexed by way of damages to secure the performance of this very act'. Analytically what were the rights and duties of the parties? Counsel for the appellant contended that clause 5 created rights in the purchaser with correlative duties on

the part of the vendor, while clause 6 did the reverse. I do agree. In a situation of the vendor's default clause 5 gave the purchaser 'the right' to enforce specific performance placing the vendor under a corresponding duty to comply. If the purchaser chose not to exercise that right, he instead had the right (or entitlement which the common law in any event gave him) to get back his deposit with the corresponding duty cast on the vendor to pay back that deposit. In a situation of the purchaser's default, clause 6 on the other hand gave the vendor 'the right' to enforce specific performance placing the purchaser under the corresponding duty to comply. If the vendor chose not to enforce that right, he instead had the right to retain the deposit as liquidated damages and the purchaser was under a corresponding duty to permit that.

The general position under the Roman Dutch Law is referred to by Wessels in his Law of Contract in South Africa (ibid) thus:-

Section 3102"Prima facie, every party to a binding agreement who is ready to carry out his own obligation under it, had a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze, C.J. in *Thompson* v *Pullinger* (1894 1 O R at 301): 'The right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt'. . . . "

Section 3013"It is therefore part of our law that a defendant who has broken his contract has not got the option of purging his default by the payment of money. For, in the words of Story (Equity Jurisp., S 717 (a): 'It is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it'. The election is rather with the injured party, subject to the discretion of the Court" (per Innes C.J. ibid. See also *Shill* v *Milner* 1937 A D 191; *Nobertson Municipality* v *Jansen* 1944 C.P.d. 526 at p 543)

In the instant case there was an express right available to the plaintiff in the event of the defendant's breach to demand specific performance and there was no alternative mode of performance

made available to the defendant.

I am of the view that the Court of Appeal misdirected itself in regard to the conclusion reached that the plaintiff was not entitled to demand specific performance of the contract as claimed. The contract itself examined against the background of the relevant law gave the plaintiff that right. In the circumstances I would while reversing the judgment of the Court of Appeal restore the judgment of the District Court and accordingly allow this appeal with costs payable here and in both Courts below.

AMARASINGHE, J - I agree.

DHEERARATNE, J - I agree.

Appeal allowed