

NOORUL ASIN AND OTHER
V.
PODINONA DE ZOYSA AND OTHERS

COURT OF APPEAL
S.B. GOONEWARDENA J. and K. VIKNARAJAH J.
C.A.NO. 119/81 with C.A. 120/81.
D.C. COLOMBO NO. 2957/ZL
MAY 20 and 23, 1988.

Contract — Specific performance — Agreement to sell — Performance by purchaser of her obligations on the agreement — Substituted obligation to pay damages.

In terms of the agreement between them, the vendors as well as the purchaser were entitled to claim specific performance in case of default by either party. There was a fair balance of sanctions.

Held

1. The right to claim specific performance of an agreement to sell immovable property is regulated by Roman-Dutch law and not English law. Under the Roman-Dutch law every party who is ready to carry out his terms of the bargain prima facie enjoys a legal right to demand performance by the other party and this right is subject only to the overriding discretion of the Court to refuse the remedy in the interests of justice in particular cases. But in English law the only common law remedy for breach of an executory contract is damages but the Chancery Court developed the rule whereby specific performance could be ordered in appropriate cases. In the absence of agreement to the contrary the Roman-Dutch law confers on a purchaser ready to fulfil his obligations under an executory contract the right to elect one of two alternative remedies namely, specific performance or damages. The party that has broken his contract does not get the option of purging his default by payment of money. It is against conscience that such a party should have the right of election whether he would perform his contract or only pay damages for breach of it. The election is rather with the injured party subject to the discretion of Court. This is the Roman-Dutch law.
2. The question always is : 'What is the contract ?' The Court must be guided by the primary intention of the parties to be gathered from the instrument embodying the agreement.
3. The agreement P1 in clear and unambiguous terms has given the option to the party who has performed his part of the contract to demand and compel performance by the other party. The plaintiff has performed her part of the obligations under the contract. Therefore, she is entitled to a decree for specific performance.

Cases referred to :

1. *Thaheer v. Abdeen* 57 NLR 1
2. *Abdeen v. Thaheer* 59 NLR 385, 388.
3. *Kanagammah v. Kumarakulasingham* 76 NLR 529.
4. *Hoole v. Natarajan* 76 NLR 484.
5. *Kumaraswamy v. Nagalingam Amirthalingam* CA (SC) 174/71 (F) D.C. Jaffna 2904 — Court of Appeal Minutes of 5.4.1979.

APPEALS from judgment of the District Judge, Colombo (Appeal No. 128/81 was withdrawn).

H.L. de Silva, P.C. with *R. Manickkawasagar* for 2nd Defendant — Appellant in CA 119/81 and for 4 and 5 Defendants-Appellants in CSA 120/81.

Eric Amerasinghe, P.C. with *D.R.P. Goonetilleke* and *C. Ilangakoon* for Plaintiff-Respondent in both appeals.

Cur. adv. vult.

JULY 15, 1988

VIKNARAJAH, J.

Plaintiff-respondent instituted an action against 1st and 3rd defendant-respondents and the 2nd defendant-appellant claiming a decree for specific performance of the agreement to sell the land and premises No. 31, Siripa Road, Colombo 5 described in the schedule to the plaint. The said agreement No. 643 dated 6.3.1975 attested by S. Balakumaran N.P. has been produced marked P1. The 4th and 5th defendants-appellants were added as defendants because in the answer of the 2nd defendant-appellant it was disclosed that the 1st, 2nd and 3rd defendants had sold and transferred the said premises by deed of Transfer No. 184 dated 24th December 1977 to the 4th and 5th defendants.

The learned Trial Judge after trial delivered judgment in favour of the plaintiff ordering and directing the 1st, 2nd and 3rd defendants to execute a decree of transfer in favour of the plaintiff on the plaintiff depositing a sum of Rs. 8000/-.

Appeal No. 119/81 (F) is the appeal by the 2nd defendant-appellant and appeal No. 120/81 (F) is the appeal by the 4th and 5th defendants-appellants.

During the course of the hearing of the appeal learned President's Counsel appearing for the 2nd, 4th and 5th appellants moved to withdraw the appeal of the 4th and 5th defendants-appellants bearing No. 120/81 (F) for the following reasons: (1) the plaintiff sought no relief against the 4th and 5th defendants (2) no issues raised by the plaintiff or any other defendants cast any liability on the 4th and 5th defendants-appellants (3) there is no finding in the judgment by which the 4th and 5th defendants are restrained from doing any act and (4) the judgment does not in any way cast any liability on the 4th and 5th defendants. This Court allowed such withdrawal and the appeal No. 120/81 (F) of the 4th and 5th defendants-appellants was dismissed with costs fixed at Rs. 525/-.

Counsel for 2nd defendant-appellant submitted —

(1) that in terms of the agreement P1 the plaintiff-respondent, who was the purchaser undertook to pay the balance purchase price of Rs. 35,000/- to the 1st defendant before 6th September 1975 and as he had failed to comply with the said condition the agreement P1 is deemed to have been cancelled and of no effect.

(2) that in any event the plaintiff is not entitled to claim specific performance of the agreement P1 as the said agreement P1 provided for the substituted obligation of payment of an agreed amount or sum of Rs. 15,000/- by way of liquidated damages.

I shall deal with the first submission —

The agreement P1 is between the 1st, 2nd and 3rd defendants as vendors and the plaintiff as purchaser.

The owner of the premises in suit was Nasamal Dass the mother of 1st, 2nd and 3rd defendants. Nasamal Dass died on 26.6.72 leaving last will bearing No. 400 dated 3rd February 1972 attested by S. Balakumaran of Colombo Notary Public whereby she gave, devised and bequeathed the said premises unto her son the 1st defendant. The intestate heirs of Nasamal Dass are 1st, 2nd and 3rd defendants.

According to P1 the 1st defendant as owner of the premises in suit along with the 2nd and 3rd defendants agreed to sell and the purchaser (plaintiff) agreed to purchase from the defendants the said premises free from all encumbrances at or for the price of Rs. 50,000/-.

The 2nd and 3rd defendants were joined as vendors in P1, at the request of the plaintiff because the Last Will had not yet been admitted to probate. This is so stated in the recital in the agreement P1.

According to P1, the plaintiff has deposited with the 1st defendant a sum of Rs. 15,000/- by way of deposit which is to be applied by the defendants in part payment of the said sum of Rs. 50,000/-.

The purchase shall be completed by the purchaser i.e. plaintiff

- (a) tendering to the defendants for execution at the office of Mr. John Wilson Attorney at Law and Notary Public within 6 months from date of execution of P1 a deed of conveyance of the said premises in favour of the purchaser a draft of which shall have previously been submitted to and approved by the defendants' lawyer.
- (b) paying to the 1st named vendor (1st defendant) the balance sum of Rs. 35,000/- and all such other moneys (if any) as shall be payable by the purchaser in terms of the provisions of P1 or any other arrangement with the first named vendee (1st defendant).

It was also agreed that the 1st named vendor shall soon after the signing of P1 allow and permit the purchaser (plaintiff) to occupy a part of the downstairs building of the said premises and further undertook to hand over full effectual and vacant possession of the entire premises within the period of six months upon which event the purchaser shall complete the purchase in terms of P1. In the event of the 1st named vendor (1st defendant) being unable to hand over vacant possession of the entirety of the said premises at the end of six months period, the vendees

shall execute the Deed of Transfer in favour of the purchaser subject however that the purchaser shall be entitled to retain a sum of Rs. 6000/- as liquidated damages and not as penalty for the failure to give vacant possession by the first named vendor.

It was further agreed that the first named vendor shall soon after the execution of P1 take steps to have the Last will No. 400 admitted to Probate and pay and settle the estate duty assessed on the said premises and in the event of his failure the purchaser shall be entitled to retain a further sum of Rs. 2500/- to meet the Estate Duty and other Testamentary expenses.

The plaintiff gave evidence. On behalf of the defendant only Thassim Attorney-at-Law for defendant gave evidence. None of the defendants gave evidence. Thassim stated that he knew nothing about the transaction between the plaintiff and the 1st, 2nd and 3rd defendants with regard to the execution of the agreement P1 and the transaction between them thereafter.

At the execution of the agreement P1 plaintiff paid the 1st defendant Rs. 15,000/- By the document P3 dated 18.4.75 the plaintiff has paid a further sum of Rs. 3750/- to 1st defendant. This sum of Rs. 3750/- is made up as follows — Rs. 2100/-, Rs. 600/- and Rs. 1000/- paid on 6.4.75, 8.4.75 and 18.4.75. This document shows that the defendants have been in the habit of getting small sums of money from the plaintiff. These two payments of Rs. 15,000/- and Rs. 3750/- are conceded by the defendants. The plaintiff in evidence stated that she gave a further sum of Rs. 2000/- to 1st defendant on 25.5.75 on the document P4. According to P4 it is stated that the sum of Rs. 2000/- is being paid as a loan for interest, full payment to be made when transfer is settled. Plaintiff stated that she did not know English and the document P4 was given to her. She stated that she did not give a loan but it was payment towards the moneys due on P1. Similarly, a further sum of Rs. 1250/- has been paid by plaintiff to 1st defendant on the document P5. This document also shows that it has been paid as a loan but plaintiff in evidence stated that it was not a loan. Thus after the execution of the agreement P1 the plaintiff paid the 1st defendant Rs. 3750/- Rs. 2000/- and Rs. 1250/- aggregating to Rs. 7000/-. Counsel for 2nd defendant appellant did not dispute these payments.

Plaintiff stated in evidence that the premises in suit was subject to a mortgage by Bond No. 394 dated 21st January 1972 attested by S. Balakumaran Notary Public and there was a sum of Rs. 20,000/- due to the mortgagees. Under the agreement P1 the 1st defendant was obliged to convey the premises in suit to plaintiff free from any encumbrances. Plaintiff stated that at the request of the 1st defendant she paid Rs. 20,000/- to the mortgagees and obtained an assignment of the mortgage in her favour by deed No. 644 dated 12th March 1975 because otherwise the property would be sold in execution. The plaintiff thus became the mortgagee. It was submitted on behalf of the 2nd defendant—appellant that in terms of the agreement P1 the balance purchase price should be paid to the 1st defendant and that therefore the payment of Rs. 20,000/- to the mortgagor on mortgage Bond No. 394 is not payment to 1st defendant.

I do not agree with this submission because under the agreement the 1st defendant was obliged to transfer the premises free from any encumbrances and the purchase price of Rs. 50,000/- was agreed upon on that basis and it was at 1st defendant's request and on his behalf that plaintiff paid Rs. 20,000/- to the mortgagees. This payment of Rs. 20,000/- was made on 12.03.75. The learned trial Judge has correctly held that payment of Rs. 20,000/- by plaintiff to the mortgagees on Bond No. 374 is payment on behalf of debt due by 1st, 2nd and 3rd defendants on the mortgage bond and that plaintiff is entitled to deduct this sum of Rs. 20,000/- from the balance purchase price due on P1. The judge has correctly held that plaintiff has paid Rs. 27,000/- in addition to the sum of Rs. 15,000/- paid at the execution of the agreement P1 both aggregating to Rs. 42,000/-.

In terms of clause 4 of the agreement P1 the 1st defendant is obliged to hand over vacant possession of the entire premises within 6 months upon which the purchaser shall complete the purchase. If vacant possession is not handed over the Deed of Transfer shall be executed subject however that the plaintiff is entitled to retain Rs. 6000/- as liquidated damages.

According to the evidence of plaintiff she got possession of the ground floor only but the top floor was occupied by others and she did not get vacant possession. This evidence is uncontradicted. Thus the plaintiff is entitled to retain Rs. 6000/-.

Again under clause 10 plaintiff is entitled to retain Rs. 2500/- because 1st defendant had not taken steps to obtain probate of the Last Will.

Thus under clauses 4 and 10 the plaintiff was entitled to retain Rs. 8500/- and out of the balance purchase price of Rs. 35,000/- the plaintiff is obliged to pay only Rs. 35,000/- less Rs. 8500/- amounting to Rs. 26,500/-. But the plaintiff has in fact paid Rs. 27,000/-.

Plaintiff stated in evidence that she through her lawyer requested the 1st defendant to sign the deed of Transfer which had been drawn up by Notary John Wilson in terms of agreement P1 but defendant failed to sign the deed of transfer. Thereafter plaintiff through her lawyer sent the letter P6 dated 29.9.75 requesting 1st defendant to sign the deed of transfer. The defendants failed to do so and did not even reply the letter P6.

Thus the plaintiff has performed the terms and conditions of the agreement P1 within the stipulated period of six months but the 1st, 2nd and 3rd defendants have failed and neglected to complete the sale.

The next matter to be considered is whether the plaintiff is entitled to a decree for specific performance.

It will be useful to set out the sanctions which the parties have agreed to in the agreement P1 in case of default of either by the vendors or by the purchaser.

Under clause 7 of P1 if the purchaser shall fail to complete the purchase then in that event

- either** (i) this agreement shall forthwith be deemed to be cancelled and be of no effect and the sum of Rs. 15,000/- deposited with the first named vendor by the purchaser shall thereupon be forfeited to the first named vendor as liquidated and ascertained damages and not as a penalty.
- or** (ii) the first named vendor shall have the right to enforce the specific performance of the agreement entered into by the purchaser and to claim damages (if any) suffered by the first named vendor by reason of the failure of the purchaser to complete the purchase.

Under clause 8 of P1 if upon the purchaser duly observing and performing the terms and conditions set forth in the agreement P1 the vendors shall fail refuse or neglect to complete the sale

- either** the first named vendor shall repay to the purchaser the said sum of Rs. 15,000/- and the purchaser shall be entitled to recover from the first named vendor a like sum of Rs. 15,000/- as and by way of liquidated damages and not as a penalty.
- or** the purchaser shall be entitled to enforce the specific performance of the agreement entered into by the vendors and to claim the damages if any suffered by the purchaser by reason of the vendors to failure complete the purchase.

It will be seen from the above clauses 8 and 9 that the sanction viz. the right to claim specific performance is mutual. The vendors, as well as the purchaser are entitled to claim specific performance in case of default by either of them. There is a fair balance of sanctions.

The law regarding specific performance is now fairly well settled by the decisions of our Courts.

Gratiaen J (with whom Pulle J. and Sansoni J. agreed stated in *Thaheer v. Abdeen* (1)

“ In this country the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch Law and not by the English Law. It is important to bear in mind a fundamental difference between the jurisdiction of a Court to compel performance of contractual obligations under these two legal systems. In England the only common law remedy available to a party complaining of 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 terms of the bargain prima facie enjoys a legal right to demand performance by the other party; and this right is subject only to the overriding discretion of the Court to refuse the remedy in the interests of justice in particular cases.

So much for the distinction between English law and Roman-Dutch Law on this topic. But in either system the terms of a particular contract may expressly or by necessary implication exclude the remedy. For instance in England if the seller had bound himself either to convey the property or *at his discretion* to pay a sum of money by way of substituted performance.

This statement of the law was accepted by Their Lordships of the Judicial Committee of the Privy Council in *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 remedies under the Roman-Dutch Law namely specific performance or damages".

In the case of *Thaheer v. Abdeen* (1) the agreement which came up for interpretation in that case provided inter alia that in the event of the vendees failing, refusing or neglecting to execute and cause to be executed a deed of transfer of the land which was the subject matter of the agreement they shall refund forthwith to the purchaser a sum of Rs. 12,000/-, deposited as against the purchase price and also pay him a sum of Rs. 15,000/- as liquidated damages. In dealing with this provision Gratiaen J. observed: "to my mind, the stipulated return of the deposit being part of the purchase price reasonably implies that the primary obligation to sell is then to be regarded as having come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance".

In the case of *Kanagammah v. Kumarakulasingham* (3) the Court had to interpret an agreement where there was no reference to specific performance but only a reference to

payment of calculable sum of money to cover the purchase price and all the expense incurred in case of default and the Court held that specific performance cannot be claimed under this agreement.

In the case of *Hoole v. Natarajan* (4) the Court had to interpret an agreement where it was 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 of time she should pay the plaintiff a sum of Rs. 2000/- as damages. The Court held on a proper interpretation of the agreement that the plaintiff was entitled to a decree for specific performance compelling the defendant to transfer the land.

In the above cases which I have referred to including the case of *Thaheer v. Abdeen* (1) there was no reference in the contract to specific performance. The contract was silent with regard to specific performance and the Court had recourse to the Roman-Dutch Law for the principles which should guide it to come to a finding whether parties are entitled to specific performance.

In the instant case before us the agreement P1 in clear and unambiguous terms has given the option to the party who has performed his part of the contract to demand and compel performance by the other party. This option is given to vendors as well as to the purchaser. In fact the legal right to specific performance which Gratiaen J. has set out in his judgment has been expressly set out in clauses 8 and 9 of the agreement P1.

In the case of *Thaheer v. Abdeen* (1) Gratiaen J. after setting out the law regarding specific performance states as follows:—

“ So much for the general principles: but it is their application to particular cases which often presents enormous difficulties. The question always is of course *what is the contract?* 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 ”

In the instant case, the intention of the parties is clearly and expressly set out in the agreement P1. The intention is to give the option to the party ready and willing to perform his part of the contract to compel performance by the other party who is in default. This option is mutual.

In Wessels Law of Contract (Second Edition) Section 3103 it is stated as follows :—

“ 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 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 Court ”

In the unreported case of *Kumaraswamy v. Nagalingam Amirthalingam*, (5) Victor Perera J. stated as follows :—

“ The authorities dealing with the right to claim specific performance make it clear that specific performance is, in general, aimed at the doing of some particular act and is therefore sought when damages are not an adequate remedy in cases where it is desired to enforce the observance of a particular contract. According to Weeramentary Law of Contract Vol 2 page 965 “ it is a feature of specific performance that although a plaintiff is entitled at his option to the remedy to claim damages instead, a similar right is not given to the defendant, who cannot therefore elect to pay damages instead of having an order of specific performance entered against him ”. It is thus clear that the option to claim one other of the remedies is entirely with the plaintiff. This position is endorsed by Gratiaen J. in 57 N.L.R. (Supra) at page 3 when he says “ every party who is ready to carry out his terms of the bargain prima facie enjoys a legal right to demand performance by the other party ”. Mr. Renganathan however

contended that 1st defendant (seller) had the right to the option whether to transfer the property or to pay the damages and the right so to elect arose on the tender of the balance consideration. This contention is untenable and the defendant had no right to elect.

This right of election which Victor Perera J. states a plaintiff is entitled to has been expressly given in the agreement P1 to the plaintiff namely either to claim damages or to claim specific performance.

I hold that under the agreement P1 the plaintiff is entitled to a decree for specific performance.

Under the agreement the 1st defendant is the party to whom the moneys were paid and who is entitled to the property under the Last Will. The present appeal is only by the 2nd defendant.

I affirm the judgment of the learned District Judge and I dismiss the appeal No. 119/81 of the 2nd defendant-appellant with costs.

S.B. GOONEWARDENE, J., —I agree.

Appeal dismissed.