

THAMEL
v.
FERNANDO AND OTHERS

COURT OF APPEAL.
WEERASURIYA, J.
DISSANAYAKE, J.
C.A. 448/91 (F)
D.C. MARAWILA 25/L
26th APRIL, 2000
20th MAY, 2000

Specific performance - Promise to sell - When agreement did not provide that remedy - Is there a discretion on Court - Intentions of parties - Damages an adequate remedy.

Plaintiff - Respondent instituted action for specific performance of conditions contained in the Agreement; and was successful.

Held :

(i) Court must always look for the intention of the parties to ascertain the object of the obligations of their agreement.

(ii) On the perusal of the Agreement it is seen that in the event of default on the part of the vendor there is no provision in the Agreement to compel the sale.

(iii) Specific performance is a discretionary remedy and court is not at liberty to grant or withhold the remedy capriciously.

(iv) Specific performance will not be granted where damages are an adequate remedy.

APPEAL from the Judgment of the District Court of Marawila.

Cases referred to :

1. *Thakeer v. Abdeen* - 57 NLR at 4 para 2
2. *Thakeer vs Abdeen* - 59 NLR 385 (PC)
3. *Sunderam v. Jamaldeen* - 74 NLR 145
4. *Nona Sumathi Kanaka and another v. Don Rupasinghe Arachchige Sirisena* - 1986 CALR 286
5. *Natarajan v. Hoole* - 66 NLR 489

P. A. D. Samarasekera, P.C., with Kithsiri Gunawardena, for Substituted Defendant appellant.

C.J. Ladduwahetty for substituted Plaintiff - Respondent.

Cur. adv. vult.

October 31, 2000.

NIMAL DISSANAYAKE, J.

The deceased plaintiff - respondent filed this action in the District Court of Marawila for specific performance of conditions contained in the Agreement No. 1543 attested by C.A.S. Rajapaksa, Notary Public and for damages in a sum of Rs. 1000/-.

The Original defendant - appellant, by his answer dated 19. 01. 1998 denied the averments in the plaint and prayed for dismissal of the action.

The case proceeded to trial on 15 issues and the learned District Judge by her judgment dated 16. 05. 1991 entered judgment for the deceased plaintiff - respondent as prayed for in the plaint.

It is from the aforesaid judgment that this appeal has been preferred. Counsel for the substituted defendant - appellant contended that the learned District Judge was in error when she ordered specific performance of the promise to sell when the agreement did not provide that remedy and in such circumstances the Court did not have a discretion to order specific performance.

The deceased plaintiff - respondent by deed No. 1543 (P1) dated 28. 05. 1980 entered into an agreement to purchase a land called Galmoragaha Owita or Talgahawatte, morefully described in the schedule to the plaint from the original defendant - appellant for a consideration of Rs. 40,000/- of which Rs. 20,000/- was paid as an advance at the time of entering into the agreement and it was agreed that the balance

sum of Rs. 20,000/- would be paid at the time the deed of sale was executed.

According to the agreement P1, the original defendant - appellant agreed to transfer the said land on or before the 31st of October, 1980 on his accepting the balance sum of Rs. 20,000/-.

I set down below the clause contained in the body of the agreement P1 which is applicable in the event of a default of either party to the agreement.

“In the event of default on the part of the purchaser to pay the balance sum of Rs. 20,000/- and obtain a deed of transfer, executed by the vendor on being so requested by the vendor the purchaser has agreed to forego his right to ask for a refund of the Rs. 20,000/- paid as an advance and in addition he has agreed to pay an additional sum of Rs. 20,000/- to the vendor. In the event of the default on the part of the vendor by not executing the deed of transfer on the purchaser paying the balance sum of Rs. 20,000/- and requesting him to execute a deed of transfer, the vendor has undertaken not only to refund the Rs. 20,000/- obtained as an advance but also to pay an additional sum of Rs. 20,000/- as damages.”

Thereafter the deceased defendant - appellant sought to annul the said agreement to sell by letter dated 16th July 1980 (P2) sent by his Attorney-at-law K.E.J. Perera and requested the deceased plaintiff - respondent to collect the Rs. 16,000/- alleged to have been paid as an advance, which was in deposit with his Attorney-at-law.

The deceased plaintiff - respondent by his letter (P3) and letters (P4) and (P5) sent through his Attorney-at-law sought performance of the agreement to sell which were not heeded by the deceased defendant - appellant.

These facts led the deceased plaintiff - respondent to institute action in the District Court requesting specific performance.

In cases of this nature Courts must always look for the intention of the parties to ascertain the object of the obligation of their agreement. This position is clearly explained by Justice Gratiaen in the Divisional bench case of *Thakeer v. Abdeen*⁽¹⁾ at 4 paragraph. "The Courts 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 Agreement (P1), paragraph 4 deals with the consequences the parties intended to happen in the event of default of either on the part of the purchaser or the vendor.

In the event of default by the purchaser to pay the balance sum of Rs. 20,000/- and obtain a deed of transfer from the vendor, on being so requested by the vendor, the purchaser foregoes his right to ask for a refund of the sum of Rs. 20,000/- paid as an advance and in addition he has agreed to pay additional sum of Rs. 20,000/- to the vendor.

In the event of default on the part of the vendor by not executing a deed of transfer on the purchaser paying the balance sum of Rs. 20,000/- and requesting him to execute a deed of transfer, the vendor has undertaken to refund the sum of Rs. 20,000/- received as an advance and also has undertaken to pay an additional sum of Rs. 20,000/- to the purchaser as damages.

There is no other consequences which will follow in terms of the agreement.

In the event of default on the part of the vendor there is certainly no provision in the agreement to compel the sale.

The facts in *Thakeer v. Abdeen*(*supra*) were similar to the facts in the instant case. In the above case, Clause 8 of the agreement which dealt with the situation where the seller was in default or in breach of contract provided that in the event of default -

“the vendors shall repay forthwith the said deposit of Rs. 12,500/- together with interest . . . And shall also pay the purchaser a sum of Rs. 15,000/- as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of Rs. 12,500/-.

Justice Greatiaen dealing with the effect of such a clause from the middle of page 4 in the Judgment having analyzed the legal effect of that paragraph concludes at the bottom of page 5 as follows :-

“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. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily 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.”

The Judgment of the above case was approved by the Privy Council Judgment⁽²⁾ where at 5189 it has been held that the stipulated return of the deposit being part of the purchase price, necessarily implies that the primary obligation to sell is

then regarded as having come to an end and that this negatives an intention that the purchaser could still demand, if he so chose, specific performance.

Learned counsel for the plaintiff - respondent cited the cases of *Sunderam v. Jamaldeen*⁽³⁾ and *Nana Sumathi Kanaka and another v. Don Rupasinghe Aratchige Sirisena*⁽⁴⁾ and the case of *Natarajan v. Hoole*⁽⁵⁾.

The facts of the cases cited by the counsel for the plaintiff - respondent were different to the facts of the instant case.

In the case of *Sunderam v. Jamaldeen*(*supra*) the intention of the parties implied by their conduct where the vendor accepted the final instalment was that they were under a duty to complete the bargain and the payment of liquidated damages of Rs. 2,000/- would no longer be adequate according to the agreement.

In the case of *Nona Sumathi Kanaka v. Don Rupasinghe Aratchige Sirisena*(*supra*) where the plaintiff was put into possession of the land by the defendant and the defendant did not take the availability of the alternative remedy in his answer, this conduct of the parties did not give the impression that they intended payment of damages was an alternative to specific performance.

In the case of *Natarajan v. Hoole*(*supra*), it was held that the payment of Rs 2000/- damages in the event the defendant refuses to convey the land on payment of the balance consideration on a fixed date, on a proper interpretation of the entire agreement that Clause 8 which provided for the said damages was not an alternative or substituted obligation. It was held to be accessory to the principal obligation, viz, the obligation to transfer the land.

In all the above three cases the Court examined the evidence relating to the conduct of the parties to find out

exactly what they intended in the agreement and once the intention of the parties was found, the Courts interpreted the agreements accordingly.

C. G. Weeramantry in his book on "The Law of Contract", vol 2 at page 977, paragraph 977 under the heading "Principles Governing Specific Performance" has said that specific performance is a discretionary remedy and has stated that a Court is not at liberty to grant or withhold the remedy capriciously and has laid down certain principles which will guide the Courts in the exercise of their discretion.

One principle is that specific performance will not be granted where damages are an adequate remedy.

In the instant case, in the event of default on the part of the vendor by not executing a deed of transfer on the balance money being offered, the clause in the Agreement (P1) provides that the vendor shall refund the advance of Rs. 20,000/- accepted by him and also pay an additional sum of Rs. 20,000/- as damages.

Therefore, it is relevant to observe that the parties have fixed the purchase price at Rs. 40,000/- and thereby valued the property at Rs. 40,000/- According to the said clause in the agreement (P1) which provides that the vendor shall pay half the purchase price of Rs. 20,000/- as damages in addition to the refund of the advance payment of Rs. 20,000/- is a substantial payment of damages, which appears to be an adequate remedy considering the purchase price of the property.

Since in the event of default by the vendor, the damages specified in the Agreement (P1) is substantial and is contemplated a substitute obligation to specific performance and applying the principles laid down by C. G. Weeramantry in his book "The Law of Contracts" and the decision of Justice

Gratiaen, approved by the Privy Council, in *Thaheer v. Abdeen*(*supra*), the circumstances did not empower the Court to use its discretion to order specific performance.

According to the Clause in the Agreement (P1), which provides for the return of the advance deposit being part of the purchase price, necessarily implies that the primary obligation to sell is then regarded having come to an end and that this negatives an intention that the purchaser could still demand, if he so chose, specific performance.

For the above reasons I am of the view that the learned District Judge was in error when she ordered specific performance which she declared to meet the ends of justice when the parties did not intend specific performance in their agreement (P1) and by their conduct.

I set aside the Judgment of the learned District Judge and enter Judgment for the plaintiff in a sum of Rs. 20,000/- being refund of the advance deposit and a payment by the Defendant, an additional sum of Rs. 20,000/-. The appeal is allowed with costs.

WEERASURIYA, J. - I agree.

Appeal allowed