

1948 Present : Wijeyewardene A.C.J. and Basnayake J.

THIDORIS PERERA, *et al.*, Appellants, and ELIZA NONA,  
Respondent

S: C. 293—D. C. Colombo, 127/Z

*Trusts Ordinance—Agreement to sell divided lot under final decree in partition action—Registered—Sale to third party after final decree—Specific performance—Is it existing contract?—Section 93.*

By an agreement duly registered, first and second defendants agreed to sell to the plaintiff within three months of the final decree in a partition action then pending the divided lot that would be allotted to them in the final decree. They however sold this lot to the third defendant. In an action by the plaintiff for specific performance of the agreement—

*Held* that the agreement was an existing contract within the meaning of section 93 of the Trusts Ordinance and that specific performance could be enforced.

**A**PPEAL from a judgment of the District Judge, Colombo.

*H. V. Perera, K.C.*, with *K. Herat*, for third and fourth defendants, appellants.

*C. V. Ranawake*, with *H. A. Kottegoda*, for plaintiff, respondent.

*Cur. adv. vult.*

July 9, 1948. BASNAYAKE J.—

By interlocutory decree entered of record on Ma 20, 1931, in D. C., Colombo, Partition Case No. 32,434, the first and second defendants to the present action (hereinafter referred to as the vendors) were each

declared entitled to an undivided one-twelfth share of an allotment of land called Dawatagahawatta marked lot A in plan No. 2,470 dated December 10, 1929, made by James Rodrigo, Surveyor. By agreement No. 1,022 dated June 8, 1938, which was duly registered, they agreed to sell to the plaintiff-respondent (hereinafter referred to as the purchaser) "the divided lot or lots that may at the final partition in pursuance of the said interlocutory decree of the said lot A of Dawatagahawatta be allotted to them at or for the aggregate price or sum of Rupees One hundred (Rs. 100)". Its conditions are as follows:—

"Now it is hereby agreed—

(i) That in consideration of the sum of Rupees One hundred (Rs. 100) lawful money of Ceylon well and truly paid to the vendors by the said purchaser the said Atukorale Aratchige Sirisena Perera and Atukorale Aratchige Chandrasena Perera shall within three months from the date of the final decree in the said partition case No. 32,434 of the District Court of Colombo by a valid deed assign transfer set over and assure unto the said Jayasinghage Eliza Nona or her heirs or assigns the divided lot or lots or in the event of the said purchaser being allotted one lot in common with the vendors their interest in such lot as may be allotted to them in the scheme of partition from and out of the said land called lot A of Dawatagahawatta fully described in the schedule hereto free from encumbrance with all the right title and interest whatsoever of the said vendors and of each of them in to out of or upon the same.

(ii) That the purchaser shall herself bear the cost of the said deed of transfer and also the *pro rata* costs if any of the said partition action.

(iii) The vendors bind themselves their heirs executors and administrators and purchaser binds herself, her heirs, executors, administrators and assigns for the performance of the foregoing obligation".

The final decree was entered in the partition action on December 16, 1940, and the vendors were declared entitled to the lot marked A4 in plan No. 3,138 dated September 5, 1939, made by James Rodrigo, Surveyor. But the vendors, instead of transferring to the purchaser lot A4 within the stipulated period of three months or thereafter, by deed No. 6,998 dated August 10, 1944, attested by D. R. de S. Abayanayake, Notary, transferred it to the third defendant-appellant, who by deed No. 1,963 dated November 8, 1944, attested by Clive Abeywardene, Notary, mortgaged it to the fourth defendant-appellant.

The purchaser seeks by this action against the vendors and the appellants to enforce specific performance of the agreement by the vendors and to have the sale by the vendors to the third defendant-appellant and the mortgage in favour of the fourth defendant-appellant set aside. The vendors filed no answer. The appellants, who are the third and the fourth defendants, took up the position that the purchaser having failed to obtain a transfer within the stipulated time has lost all her rights under the agreement. They also challenged the allegation of the purchaser that she requested the vendors both within the three months and thereafter to transfer the land to her. The only evidence

in the case is that of the purchaser. The learned District Judge accepts the purchaser's evidence, which is uncontradicted, that she called upon the vendors both before and after the three months to carry out the agreement. He has given judgment for the plaintiff as prayed for, and the third and fourth defendants appeal therefrom.

The main contention of learned counsel for the appellants is that the agreement in question is not an existing contract within the meaning of that expression in section 93 of the Trusts Ordinance. He submits therefore that that section has no application. Learned counsel referred us to the cases of *Paiva v. Marikar et al.*<sup>1</sup>, *Sockalingam Chetty v. Kalimuttu Chetty*<sup>2</sup>, and *Abey Suriya et al. v. Gunawardene et al.*<sup>3</sup>.

The questions that arose for decision in the first of the cases cited were whether the agreement was of such a kind as would entitle the plaintiff to ask for specific performance and whether the agreement can be regarded as an existing contract within the scope of section 93 of the Trusts Ordinance. It was held that the words "if the said amount is not paid, the second party (the plaintiff) can recover the same according to law" in the agreement set out the only remedy that the parties had agreed should be available to the plaintiff in the event of a breach, and that therefore he was not entitled to claim specific performance. In regard to the second question it was held that, as specific performance could not be enforced, section 93 of the Trusts Ordinance had no application.

The second is a case in which, in pursuance of an agreement to sell a land, a conveyance obnoxious to section 17 of the Partition Ordinance was executed pending partition proceedings in respect of that land. The trial Judge held that, although the conveyance with all the covenants therein was void and of no avail in law, the covenants in the agreement to sell were unaffected. This Court held that the agreement was performed within the period stipulated therein by the execution of the conveyance which turned out to be void, and that it was discharged by performance and that there was no existing contract.

In the third case the first defendant in a partition action entered, pending the partition proceedings, into an agreement to convey within a month of the entering of the final decree the divided portion that may be allotted to him under that decree. The other covenants in the agreement were that the purchaser should pay the *pro rata* costs and that, in the event of a breach of the agreement, the vendor shall be liable to refund the purchase price of Rs. 750, which was paid at the execution of the agreement, together with Rs. 500 as liquidated damages. The vendor died pending the action and the District Judge in entering the interlocutory decree declared that the share allotted to the intestate heirs of the vendor was subject to the agreement. This Court modified the decree by omitting all reference to the agreement.

These cases have no application to the question that arises for decision here. Not one of them is in respect of a contract of which specific performance could be enforced. If the instant case had not been complicated by

<sup>1</sup> (1936) 39 N. L. R. 255.

<sup>2</sup> (1943) 44 N. L. R. 330.

<sup>3</sup> (1946) 47 N. L. R. 397.

the sale to a third party there is no doubt that it is a contract of which specific performance could be enforced. This Court has held, in a number of cases<sup>1</sup>, decided before the enactment of the Trusts Ordinance, that specific performance of a contract to sell a land cannot be enforced against a third party to whom the land has been sold in violation of the contract, except in the case of fraud, even though the agreement had been registered. That view is based on a reading of *Voet* 19.1.14, which according to Nathan<sup>2</sup> is not an authority for the proposition that a sale to a third party purchaser with notice of a prior contract to sell cannot be rescinded in an action for specific performance. But in view of section 93 of the Trusts Ordinance the question is now of only academic interest. That section declares the right to claim specific performance against a person who acquires property with notice that another person has entered into an existing contract affecting that property. It has been held in the case of *Silva v. Salo Nona et al.*<sup>3</sup> that registration of the instrument of agreement under the Registration of Documents Ordinance is by itself notice and satisfies the requirement of that section as to notice.

The only question that arises for decision on this appeal is whether the contract "A" is an existing contract. A thing is said to exist when it is alive and not dead. The word "exist" means "to be, to have actual being, to live, to continue to be". An existing contract is therefore a contract that is in being, alive, and not at an end. In the present case we have a contract of which there has been a breach. Can it therefore be said that it is at an end? I think not. The contract is not extinguished by the breach; for no one may discharge himself from his contract by breaking it; and the other party may enforce the contract after the breach<sup>4</sup>. As the learned author of *Anson on Contract* observes—

"A breach does not of itself alter the obligations of either party under the contract; what it may do is to justify the injured party, if he chooses, in regarding himself as absolved or discharged from the further performance of his side of the contract. But even if he does so choose, that again does not mean that the contract itself is discharged or rescinded, if those terms are taken to imply that it is thereupon brought to an end and ceases to exist for all purposes; the contract still survives, though only, as it has been said, 'for the purpose of measuring the claims arising out of the breach'."<sup>5</sup>

A contract does not come to an end until the *vinculum juris* established by a contract has been loosened and the parties restored to their former freedom of action.

The term "existing contract" is, in my view, used in section 93 of the Trusts Ordinance in the sense of a contract in which the

<sup>1</sup> *Carimjee Jafferjee v. Theodoris et al.* (1898) 5 Bal. 20. *Matthes Appukamy v. Raymond et al.* (1897) 2 N. L. R. 270. *Wickramanayake v. Abeywardene et al.* (1914) 17 N. L. R. 169 at 171 and 172. *Fernando v. Peris* (1916) 19 N. L. R. 281.

<sup>2</sup> *Nathan's Common Law of South Africa, Vol. II. p. 675, sec. 840.*

<sup>3</sup> (1930) 32 N. L. R. 81.

<sup>4</sup> *Williams on Vendor and Purchaser (4th Edn.), Vol. II., p. 993.*

<sup>5</sup> *Anson on Contracts (19th Edn.), p. 318.*

*vinculum juris* still remains unloosened at the time of action. The *vinculum juris* is loosened in the generality of cases by performance or payment, mutual agreement or operation of law. Wessels states<sup>1</sup> :

“ Until the contract has been performed or mutually cancelled or set aside by a competent court, the bond which unites the contracting parties remains intact ”.

On a breach of contract to sell land the injured party may rescind the contract and sue for restitution to his former position, or affirm the contract and sue either for damages for the breach or for the specific performance of the agreement. The plaintiff in the present case has chosen to affirm the contract and sue for specific performance. As I have indicated above, the contract which the plaintiff seeks to enforce is alive and may correctly be described as an existing contract for the purpose of section 93 of the Trusts Ordinance.

The words “ existing contract ” occur in section 91 of the Indian Trust Act, 1882, which is word for word the same as our section 93 except for the proviso which is not in the Indian section. The Indian decisions which I have examined show that those words have been given by the Indian courts the meaning I have indicated above. The case of *Himalal Motilal and others v. Vasudev Gamesh Mhaskar*<sup>2</sup> appears to be on all fours with the present case. The right to obtain specific performance of a contract of this nature is the same in England. The law is thus stated in *Dart on Vendors and Purchasers*<sup>3</sup> :

“ Equity will enforce specific performance of the contract for sale, against the vendor himself, and against all persons claiming under him by a title arising subsequently to the contract, except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract ”.

An examination of the contract before us reveals that as far as the purchaser is concerned she has performed all her obligations thereunder. She has paid the purchase price. She has paid, as agreed, the *pro rata* costs of the vendor in the partition action. From the date of the final decree she entered into possession of the lot A4 which the vendors had contracted to sell. It was only when the third defendant-appellant entered on the land and began to clear it that her possession was disturbed. What remained was only the performance of the obligation of the vendors, to execute a valid transfer in terms of the agreement. This they failed to do though requested by the purchaser many times both before and after the period of three months. I am clearly of opinion that the contract is an existing contract the performance of which could be enforced.

The plaintiff in my view is entitled to succeed in her action. The appeal is dismissed with costs.

WIJEYEWARDENE A.C.J.—I agree.

*Appeal dismissed.*

<sup>1</sup> *Wessels' Law of Contract in South Africa, Vol. II., p. 912, sec. 3152.*

<sup>2</sup> *I. L. R. 36 Bombay 447.*

<sup>3</sup> *Dart on Vendors and Purchasers (8th Edn.), Vol. II., p. 883.*