Present: Wood Renton C.J. and De Sampayo J. 1916.

FERNANDO. *v.* PERIS.

422—D. C. Negombo, 11,184.

Specific performance—Agreement to sell land within a specified time—Registration—Subsequent sale to a third party.

A person in whose favour a deed of agreement for sale of a land was executed by its owner is not by the mere registration of such deed in a position to enforce specific performance against a third party, to whom the land was sold subsequent to such registration.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for second defendant, appellant.

Samarawickreme, for plaintiff, respondent.

Cur. adv. vult.

November 20, 1916. DE SAMPAYO J.—

This case raises a point of law under the following circumstances. The first defendant was entitled to an undivided share of a land called Kosgahawatta, which was the subject of the partition action D. C. Negombo, No. 9,092. By deed No. 25,519 dated November 27, 1914, and registered on December 10, 1914, the first defendant agreed, in consideration of a sum of Rs. 500, of which he received Rs. 60 at the execution of the deed, to sell and convey to the plaintiff, within one month of the date of the decree in the partition action, the divided portion which might be allotted to him in the partition. The decree was entered in the action on January 20,

1916.

DE SAMPAYO J.

Fernando v. Peris

1915, but two days later the first defendant, instead of conveying to the plaintiff, in accordance with the agreement, the portion allotted to him, executed in favour of the second defendant the deed of sale No. 9 dated January 22, 1915. The plaintiff impeaches this deed as fraudulent and without consideration and claims specific performance, and in the alternative he prays for judgment for Rs. 60 paid in advance, and a further sum of Rs. 200 as damages against the first defendant. Certain issues relevant to the question of fraud were suggested at the trial, but the District Judge did not inquire into or decide those issues, but disposed of the case on the issue whether the deed of sale No. 9 in favour of the second defendant was void by reason of the registration of the deed of agreement to sell the land to plaintiff. Relying on the decision in *Carimjee Jafferjee v. Theodoris*,[1] he held that the deed No. 9 was void in consequence of the prior registration of the deed of agreement, and gave judgment for the plaintiff in accordance with his prayer for a specific performance. From this judgment the second defendant has appealed.

The facts of the case of *Carimjee Jafferjee v. Theodoris* relied on by the District Judge are somewhat similar to those of the present case, and I think the District Judge correctly states the effect of that decision. The registration of a deed may be notice to the world of the existence of it, but I am not prepared to agree with the holding that such constructive notice of an agreement to sell *ipso facto* makes void a subsequent sale by the owner to a third party, and that specific performance may be claimed as against such third party. In *Mathes Appuhamy v. Raymond*,[2] which does no appear to have been cited or considered in *Carimjee Jafferjee v. Theodoris*, Bonser C.J. and Withers J. doubted whether under our law specific performance could be granted in a case where the vendor had by an actual sale and conveyance to a third person put it out of his power specifically to perform the contract. Mr. Samarawickreme, for the plaintiff, suggested that the learned Judges in that case had misapprehended the Roman-Dutch Law on the subject, and cited *Nathan's Law of South Africa, vol. II., s. 840.* But *Nathan ibid*, and *Kotze's Note to Van Leeuwen, vol. II., p. 141*, show that the Roman-Dutch authorities are not agreed as to the extent to which the Court will grant relief by specific performance in case of breach of contract. In South Africa, where *Van Leeuwen* has been more generally followed, the practice as to specific performance appears to have approximated to the English law. The passage in *Nathan* relevant to this case is: "If after a sale of property, not followed by delivery, the vendor parts with it to a third person who knew of the sale to the first purchaser, the law deems it to be in the vendor's power to make specific performance in favour of the first purchaser, and will order rescission of the sale and delivery by the second purchaser, who knew of the sale, to the first purchaser."

[1] *(1898) 5 Bal. 20.*

[2] *(1897) 2 N. L. R. 270.*

Kotze in his *Note* to *Van Leeuwen*, referring to a South African decision, also says: "Where the vendor having sold to A afterwards sells and delivers the same thing to B, if B knew of the first sale to A, the latter can claim rescission and restitution of the thing sold to B and pray that it be delivered to him." It will be noticed that in both these passages the case stated is that of a complete sale to the first purchaser, only delivery remaining to be made, and I doubt whether even in South Africa the doctrine will be applied, at least without some modification, to a case where the owner has only agreed to sell to one person, and has actually sold and conveyed to another. The text of *Van Leeuwen* himself does not seem to go that length. For he states an exception, thus: "if it be in his power" or "unless it is not in his power to do so, in which case it will suffice if he make good the loss" (*2 Kotze 141*). In harmony with this is the following passage from *Pothier, s. 160*, quoted by *Maasdorp, vol. III., p. 153:* "Where the defendant is merely in default in performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagement, the debtor is liable only for the damages and interest which might have been contemplated at the time of the contract." Neither in *Van Leeuwen* nor, so far as I can see, in any other Roman-Dutch authority, is there anything expressly extending the remedy of specific performance to the case of an actual purchase by a third person, and what is stated in *Nathan* and *Kotze's Note* appears to be a development in South Africa. I do not think that we are obliged to accept that extended doctrine. The learned Judges in *Mathes Appuhamy v. Raymond* refused to do so, and further deprecated the adoption of "the doctrine and practice of the English Court of Chancery with respect to specific performance, with all the subtleties and refinements as to notice which have been evolved by the ingenuity of successive generations of Judges of that Court." This Court has preferred the authority of *Voet 19, 1, 14.* and has been consistent in its refusal to grant specific performance on mere constructive knowledge on the part of a subsequent purchaser, and the only exception allowed has been in cases where there has been fraud. This exception is founded on good reason, inasmuch as, where there is fraud, the former owner still remains the true owner, and is rightly considered to be in a position specifically to perform his contract. I need only refer here to *Wickremesinghe v. Abeyewardene*,[1] with which I may say I entirely agree. I therefore think that the judgment appealed from is erroneous with regard to the specific ground on which it is based, and that before giving judgment against the second defendant the learned District Judge should have inquired into and decided the issues relating to the question of fraud.

[1] *(1914) 17 N. L. R. 171 and 172.*

1916.

DE SAMPAYO J.

Fernando Peris

I would set aside the decree, and remit the case for further trial as above indicated. The plaintiff should pay the costs of the last day of trial and of this appeal, and all other costs should be costs in the cause.

WOOD RENTON C.J.—I agree.

Sent back.