

1928.

Present : Dalton and Lyall Grant JJ.

SAPARAMADU APPUHAMY v. ANTHONY PULLE *et al.*

281—D. C. Kurunegala, 9,335.

Planting agreement—Claim to land—Specific performance—Damages.

Where a contract cannot be completely performed, the party in default may be ordered to specifically perform his part of the contract as far as possible.

A PPEAL from a judgment of the District Judge of Kurunegala.

Hayley, K.C. (with *R. F. P. Jayatilleke* and *H. K. P. de Silva*), for appellant.

H. V. Perera (with *Rajapakse*), for respondents.

May 8, 1928. LYALL GRANT J.—

When this case was last before this Court, an action was pending, taken at the instance of the defendants by the plaintiffs against one Jotihamy who claimed one-sixth of the land.

It was agreed that Jotihamy should be made a party to this action and that the plaintiff should be responsible for the payment to the defendants of any damages which after inquiry might be awarded to the defendants under the conditions of the planting agreement. Jotihamy was added and the District Judge found him entitled to one-sixth of the land.

The plaintiff had undertaken under the planting agreement to give the defendants half of the land, and if his title were proved defective to pay damages in so far as the defendants were prevented by such defect from planting. The defendants have planted as much of the land as they could, but they were prevented from completing the planting by Jotihamy. In respect of this failure they have been awarded damages by the District Judge.

He has also found them entitled to a half of the planted area. It is only in respect of the latter part of this order that the present appeal is brought.

I do not agree with the argument advanced on appeal that where a contract cannot be completely performed the only remedy is damages. The party in default can be ordered to perform his part of the contract so far as that is possible. See *Fry on Specific Performance*, p. 491, and *Walter Pereira's Laws of Ceylon*, p. 578.

The respondents contend that pecuniary compensation is not an adequate equivalent. They want the land they have planted.

The District Judge's order is for half the planted land, and if this were a possible order, I agree that the plaintiff would have no cause of complaint.

Unfortunately the plaintiff does not possess any specific part of the land, and I do not see how in these circumstances such an order could be carried into effect. Jotihamy is entitled to a one-sixth undivided share, and until a partition is carried through it is not possible for the plaintiff to give the defendants clear title to any specific part of the land.

As the plaintiff has a five-sixth share of the land, however, it is quite possible to make an order giving to the defendants an undivided share of the land. This seems to me to be sufficiently near the original contract. It leaves the one-sixth share of Jotihamy unaffected; and on a partition the defendants will be entitled to a specific half share.

The only difficulty is that on a partition the question of planting will again have to be taken into account. I do not, however, think that this is a serious difficulty. The defendants will, it seems to me be entitled to a half share which is fully planted, Jotihamy to an unplanted one-eighth, and the plaintiff to the remainder.

In order to secure this result I would vary the order by directing the plaintiff to execute a conveyance to the defendants of a three-sixth undivided share in the land and declaring them entitled to such a number of trees actually planted as may be found to correspond to the number which could be planted on half of the land according to the terms of their lease. I would delete the reference to damages. Until such a deed is executed and a partition taken and completed, I would allow the defendants to remain in possession of the whole planted area.

DALTON J.—I agree.

Order varied.

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LYALL
GRANT J.

*Saparamadu
Appuhamy
v. Anthony
Pulle*