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Present : Lascelles C.J. and De Sampayo A.J.APPUHAMY *et al.* v. SILVA.

420—D. C. Chilaw, 4,699.

Agreement to re-convey land—Penalty in case of default—Action for specific performance—Refusal to abide by the terms of the agreement—Is formal tender of price necessary ?

An agreement between the plaintiffs and defendant was in these terms: "On the said Appuhamy and Yohanna (plaintiffs) of the second part tendering to me the sum of Rs. 1,715 and demanding a transfer of the lands, I (defendant) shall convey the same to them Should I of the first part be unwilling or neglect to transfer the said lands on their demanding a transfer and tendering the said sum of Rs. 1,715 within two years from the expiry of the said period, a sum of Rs. 450 shall be paid by me as a penalty to the second party, and if we of the second part fail to get a transfer within the said period by paying the said sum of Rs. 1,715 we shall not be allowed to demand a transfer of the said property after the said period, and we shall not so demand."

Held, that plaintiffs were entitled to enforce specific performance of the agreement on tender of the money within the stipulated time, and that defendant had not the option of either conveying the property or of paying Rs. 450 as an alternative.

Held, further, that plaintiffs were not precluded from suing on the contract for specific performance by their failure to make a legal tender of the money, inasmuch as the defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless.

THE facts are set out in full in the judgment.

E. W. Jayewardene, for the plaintiffs, appellants.

Sansoni (with *Bawa, K.C.*), for the respondent.

Cur. adv. vult.

January 22, 1914. LASCELLES C.J.—

The facts which gave rise to this appeal are the following. By deed P 1 dated February 9, 1907, the plaintiffs granted a usufructuary mortgage of the property now in question to the defendants to secure a sum of Rs. 1,275. This deed contained a covenant on the part of the mortgagors that they would not redeem the mortgage for a term of five years, the intention being that the mortgagee should enjoy the rents and profits of the land, which are of considerable value, for at least that period.

In 1908 the plaintiffs fell into trouble. They had remained in occupation of a house on the mortgaged premises, and were arrested on the complaint of the defendant on a charge of stealing coconuts. The plaintiffs then entered into negotiations with the defendant for a settlement of the criminal charge. The matter ended in the agreement which the plaintiffs are now suing to enforce. The substance of the agreement was that the plaintiffs should convey the property to the defendant for a consideration of Rs. 1,715, which was made up of the original mortgage debt of Rs. 1,275, which was discharged, a further advance of Rs. 200, and a balance of Rs. 240 to cover costs and damages in the Police Court and notarial expenses.

The deed of transfer to the defendant was executed on January 7, 1908, when about four years and two months of the defendant's term of possession under the usufructuary mortgage was still to run. On the same day the parties executed the agreement on which the present action is brought.

After reciting the conveyance to the defendant, the agreement declares that the property comprised in the conveyance "shall be possessed by me as I like from this date until the expiration of the four years and two months, and we, the said two parties, hereby bind ourselves that within a period of two years after the expiry of the said four years and two months, on the said Don Hendrick Peris Appuhamy and Yohanna Hamine, who have bound themselves hereto as of the second party, or either of them tendering to me the sum of Rs. 1,715, which was the purchase amount, and demanding a transfer of the said two lands and portion of land, I shall receive the said amount, and I shall convey the same to them upon a transfer, and we of the said second part shall have the same conveyed to us.

"2. Should I of the first part be unwilling or neglect to transfer the said two lands and the portion of land and all things appertaining thereto after possessing them till the expiration of four years and two months on their demanding a transfer and tendering the said sum of Rs. 1,715 within two years from the expiry of the said period as mentioned in the first paragraph, a sum of Rs. 450 shall be paid by me as a penalty to the second party, and if we of the second part fail to get a transfer for the said two lands and the portion of land and all things appertaining thereto within the said period by paying the said sum of Rs. 1,715, we shall not be allowed to demand a transfer of the said property after the said period, and we shall not so demand."

The plaintiffs' case is that soon after March 7, when the term of four years and two months expired, they tendered to the defendant the Rs. 1,715 and demanded a conveyance of the property, which the defendant refused to give. The plaintiffs now sue for specific performance, for Rs. 450 damages, and mesne profits. The defendant denies the tender of the Rs. 1,715, and contends that, on the true construction of the agreement, he had the option of

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either re-conveying the property to the plaintiffs or paying them the penalty of Rs. 450, and that he is not liable even to pay the latter sum, as the plaintiffs had made default in tendering the Rs. 1,715. No issue was fixed on the question of tender, but the question of the defendant's liability under the agreement to re-convey the property was raised in general terms. The issue framed with regard to *enormis latio* was not argued on the appeal.

The plaintiffs now appeal from the dismissal of the action.

Before dealing with the construction of the agreement, I will notice the learned District Judge's finding with regard to the question of tender. In his judgment the District Judge framed an issue. " Was there, as a matter of fact, a tender in law of Rs. 1,715 by the plaintiffs to the defendant? " It is not easy to see what good purpose is served by framing an issue of fact after the trial is closed. But I think the issue may fairly be treated as covered by the general question raised in the second issue. Even if this be not the case, I do not think that the question of tender can be excluded. It was treated by the parties as being in issue, and evidence on the point was adduced by both parties.

The learned District Judge disbelieved the evidence that there had been an actual tender, characterizing it as false and perjured; and on this ground held that the plaintiffs were not entitled even to the penalty of Rs. 450. The result is curious. Accepting the finding of the District Judge as regards the actual tender of the money, there cannot be the slightest doubt that the first plaintiff, at a time when the plaintiffs were entitled to the benefit of the agreement, formally called on the defendant to transfer the property, and that the defendant unequivocally refused to do so. This is admitted by the defendant in paragraph 4 of his answer; it is sworn to by the first plaintiff and the Police Headman Philip Dabrera; and again substantially admitted by the defendant himself in his oral evidence.

The plaintiffs are thus held to have lost their right to sue on the agreement, because they have not gone through the formality of displaying the Rs. 1,715 to the defendant, who had positively announced his refusal to be bound by the agreement to re-convey the property.

There can, I think, be no doubt but that the defendant, by announcing his refusal to accept the money, had waived his right to have a formal legal tender. The principle of law has been thus stated in cases where tender is pleaded as an excuse for non-performance: " If the debtor tells his creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late, or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby dispensed with, and there is a good tender of the amount mentioned by the debtor " (*Halsbury's Laws of England, vol. VII., p. 419*).

The same principle also applies where there is a contract with a condition precedent. The performance of the condition is excused where the other party has intimated that he does not intend to perform the contract. (*Bank of China, Japan, and the Straits v. American Trading Co.*¹) I think it is quite clear that the plaintiffs are not precluded from suing on the contract by failure to make a legal tender of the redemption money, inasmuch as the defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless.

I now pass on to what is the real question in the case, namely, whether, on a true construction of the agreement, the defendant was bound to re-convey the property, the Rs. 450 being merely a penalty to secure compliance with the agreement; or whether, on the other hand, the defendant had the option of either re-conveying the property or paying Rs. 450 as an alternative.

Specific performance is an equitable remedy, and in deciding whether this remedy should be given, the Courts in Ceylon are guided by the same principles as Courts of Equity at home. (*Holmes v. Alia Marikar.*²)

The real question is, what is the true intention of the parties? Was it intended that the plaintiffs should be entitled to a re-conveyance on payment of the agreed sum, a penalty of Rs. 450 being annexed to secure performance? If this is the true construction, the fact of a penalty being annexed will not prevent the Court enforcing performance of what is the real object of the contract. Or, does the contract mean that one of two things has to be done, namely, the re-conveyance of the property or the payment of the penal sum at the election of the defendant? If this is the case, the contract is satisfied by payment of the penalty, and there is no ground for claiming performance of the other alternative.

I have no doubt but that the present agreement falls under the former head, and that the true meaning and purpose of the contract is that the plaintiffs should be entitled to redeem their property on payment of the Rs. 1,715.

The agreement, after reserving to the defendant the right to possess the land for so much of the term of five years as was then outstanding, goes on to provide in very simple language that if the plaintiffs, within a period of two years from the end of the above-mentioned term, should tender to the defendant the sum of Rs. 1,715 and demand a re-conveyance, then the defendant should transfer the property to them.

Here we have a very plain agreement to re-convey on tender of the stipulated sum.

Then the agreement proceeds to provide that if the defendant should be unwilling or neglect to transfer the property on demand and tender of the agreed sum within the stipulated period,

¹ P. C. (1894) A. C. 266.

² 1 N. L. R. 282.

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then " the said sum of Rs. 450 shall be paid by me as a penalty." What is this but an ordinary penal clause to enforce the principal obligation?

It cannot be inferred from the use of the word " unwilling " that the defendant had any option in the matter; for the phrase is " be unwilling or neglect to transfer."

Then the agreement goes on to provide for the case of the plaintiffs failing to get a transfer within the stipulated time. In this case the plaintiffs have no further rights under the agreement. How is this expressed? " We shall not be allowed to demand a transfer after the said period." The right to a transfer is here used to denote the plaintiffs' principal right under the agreement. I can find nothing in this clause or elsewhere in the agreement which points to the defendant being allowed to elect between re-conveying the property and paying Rs. 450. There are several other considerations which point to the same conclusion. The Korale Mudaliyar values the two pieces of land at Rs. 4,370. Making the fullest allowance for the recent appreciation of property, the privilege of redeeming the property for Rs. 1,715 must have been worth much more than Rs. 450 in 1908. It is therefore unlikely that it should have been intended that the defendant could escape the liability to re-convey by paying Rs. 450. Again, the conveyance, coupled with an agreement for re-conveyance on payment of the consideration, suggests that the plaintiffs intended to charge the land with repayment of the Rs. 1,715 rather than to alienate it permanently.

The plaintiffs are, in my opinion, clearly entitled to specific performance. I understand that no claim is made with regard to the penalty, and the question of mesne profits was not discussed on appeal.

The order will be that the judgment of the District Court be set aside, and on the plaintiffs paying into the District Court within one month from the return of the record to the District Court the sum of Rs. 1,715, the defendant is ordered to re-convey the property described in the writ to the plaintiffs. The costs of preparing the conveyance to be borne by the plaintiffs, and the conveyance to be settled by the District Judge.

If the defendant fails to obey the order, the Court will enforce execution in accordance with section 331 and the following sections of the Civil Procedure Code. On the execution of a proper conveyance, whether by the defendant or by the Court, the money in Court will be handed to the defendant and the deed to the plaintiffs.

The plaintiffs will have their costs here and in the Court below.

DE SAMPAYO A.J.—

I entirely agree.

Set aside.