1955 *Present :* Gratiaen, J., and Sansoni, J.

S. THAMBIPILLAI and others, Appellants, *and*
A. MUTHUCUMARASAMY and others, Respondents

S. C. 524—D. C. Jaffna, 5,752

Sale of immovable property—Option of repurchase—Importance of time limit—No room for application of principle "once a mortgage, always a mortgage".

Time is of the essence of the contract in a *pactum de retrovendendo*. In such a contract it is not open to the Court to take the view that the transaction was in reality a mortgage and not a sale.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *A. Nagendra*, for the 1st and 2nd defendants appellants.

C. Ranganathan, with *Balasubramaniam* and *P. Nagueswaran*, for the 3rd, 4th and 5th defendants respondents.

Cur. adv. vult.

March 9, 1955. GRATIAEN, J.—

A woman named Sellammah had at one time been the owner of the land in dispute. On 30th August 1944 she and her husband (the 5th defendant) had apparently conveyed the land to two other persons subject to their right to obtain a reconveyance within three years. Before this period elapsed, a new arrangement was arrived at which is embodied in the notarial conveyance P 2 dated 1st February 1947.

The terms of the written instrument P 2 are clear and unambiguous, and (according to the law of Ceylon) oral evidence of the "surrounding circumstances" cannot be admitted as a guide to its interpretation. P 2 operated as an "absolute sale" of the land by Sellammah, the 5th defendant and their previous vendors (under the deed of 30th August 1944) in favour of the appellants, but subject to two important conditions :—

(1) the appellants were obliged to reconvey the land to Sellammah and the 5th defendant within a period of 2½ years (i.e., before the end of July 1949) for a consideration equivalent to a sum of Rs. 10,000/together with interest thereon calculated at 6 per cent. from 1st February 1947 up to the date of repurchase ;

(2) the appellants' right to enter into occupation of the land as owners was by agreement postponed until the expiry of the 2½ year period; if, however, the option of repurchase was duly exercised, Sellammah and the 5th defendant would of course continue in occupation under the later contract of sale.

Neither of these conditions is in any way inconsistent with the incidence of a contract of sale (as opposed to a contract of mortgage). The first condition constituted a *pactum de retrovendendo* which is well recognised in Roman-Dutch law. *Voet 18–3–7.* The second condition represents an agreed and perfectly permissible departure from the normal right of a purchaser to obtain immediate possession of the property sold to him.

Sellammah died in February 1947 leaving her husband (the 5th defendant) and three children (one of whom is the plaintiff). It would appear that attempts to exercise this option of repurchase for the benefit of the entire family within the stipulated period failed. Eventually the plaintiff, as one of Sellammah's intestate heirs, called upon the appellants to convey the property to him to the exclusion of the other heirs. As I interpret the judgment under appeal, however, the plaintiff did not tender the full consideration stipulated within the stipulated period. The evidence of proctor Karalasingham, which was accepted by the learned trial Judge, shows that at the time of the alleged tender, only Rs. 8,000 was available for payment; no doubt the appellants in their turn claimed slightly more than they were entitled to demand, but this circumstance could not give efficacy to a tender which was itself inadequate. The plaintiff has not affirmatively proved that the proper amount would and could have been available before 31st July, 1949.

In due course, the plaintiff instituted this action claiming a conveyance of the land from the appellants on payment of the purchase price which was not however deposited in Court and is apparently not yet forthcoming. Time is of the essence of the contract in a *pactum de retrovendendo*, and the plaintiff's failure to tender the stipulated consideration within time is therefore fatal to his claim. The learned Judge took the view, however, that the transaction was in reality a mortgage and not a sale. I would reject this conclusion for the same reasons as those recorded in the recent judgments of my brother Sansoni and myself in *Setuwa v. Ukku* [1]. Accordingly, there is no room for the application of the principle " once a mortgage, always a mortgage ".

It is unnecessary to consider whether in any event the plaintiff could alone have exercised the option of repurchase. His claim fails *in limine* owing to his omission to make a valid tender within the time fixed in P 2. I would therefore set aside the judgment under appeal and dismiss the plaintiff's action with costs (in favour of the appellants) in both Courts.

SANSONI, J.—I agree.

Appeal allowed.

[1] *(1955) 56 N. L. R. 337.*