

1944

*Present: de Kretser and Wijeyewardene JJ.*GUNAWARDENE HAMINEY, Appellant, *and* CHARLES
APPUHAMY, Respondent.

305—D. C. Matara, 14,598.

Penalty—Sale of property subject to a right to re-transfer—Subsequent agreement to forfeit right to re-transfer—Relief against forfeiture.

Plaintiff transferred certain fields to the defendant subject to a right of re-transfer on repayment of the purchase money.

By a subsequent agreement, the defendant leased the fields to the plaintiff, the latter undertaking to deliver a certain quantity of paddy in lieu of rent. It was also provided by the agreement that on failure to deliver the paddy the plaintiff should forfeit the right to re-transfer.

Held (in an action brought by the plaintiff for re-transfer) that the plaintiff is entitled to relief against the forfeiture of his right to re-transfer.

¹ 12 T. C. at 742.

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

H. V. Perera, K.C. (with him *L. A. Rajapakse, K.C.*), for defendant, appellant.

N. E. Weerasooria, K.C. (with him *S. W. Jayasuriya*), for plaintiff, respondent.

Cur. adv. pult.

July, 7, 1944. WIJEYEWARDENE J.—

By deed 9462 of July 23, 1941 (P 1), the plaintiff transferred his interests in five fields to the defendant for Rs. 850, reserving to himself the right to repurchase these interests on payment of Rs. 850 to the defendant. By an earlier deed 9461 of the same date the plaintiff's son transferred to the defendant certain small interests he had in some of these fields for Rs. 100, subject to a reservation similar to that in P 1. By deed 9462 of the same date (D 1) the defendant leased to the plaintiff and his son for 1 year from September 1, 1941, the lands conveyed to him under the two earlier deeds. The rent due under the lease was given as Rs. 170, but it was agreed that, in lieu of the sum of Rs. 170, the lessees should deliver to the lessor 10 amunams of paddy from the Maha crop and 7 amunams from Yala crop. The lease then went on to provide—
“ In the event of the lessees not delivering unto the lessor the paddy as agreed upon, the right vested in the lessees to obtain re-transfer of these premises, upon the two deeds Nos. 9461 and 9462 attested by me today, shall be forfeited, consequent on such default or failure ”.

The plaintiff tendered to the defendant Rs. 850 on August 18, 1942, and requested her to execute a transfer in terms of P 1. On the defendant's failure to comply with his request, the plaintiff instituted this action on September 1, 1942, to obtain a re-transfer of his properties.

The defendant pleaded, *inter alia*, that the plaintiff “ has forfeited the right to obtain a transfer ” by his failure to deliver to her the seven amunams of the Yala crop.

The learned District Judge held that the plaintiff had failed to deliver 7 amunams of paddy but declared the plaintiff entitled to a re-transfer on his paying, in addition to the sum of Rs. 850, a sum of Rs. 160 by way of damages for the non-delivery of the 7 amunams of paddy. The defendant has appealed from that judgment.

The deed P 1 has not been signed by the defendant, but in view of the decision in *Jonga v. Nanduwa*¹—which is an authority binding on us—I am unable to accept the contention of the defendant's Counsel that the condition with regard to the re-transfer is not binding on the defendant. The question then for consideration is whether, in the circumstances of this case, the defendant is entitled to resist the plaintiff's claim by the plea of forfeiture. The law on the subject is stated in *Pothier on Obligations*, section, 346 as follows:—

“ It remains to be observed, that if the penalty which is stipulated in lieu of ordinary damages, is reducible when excessive, *a fortiori* ought the penalties stipulated in default of a payment of a sum of

¹ (1944) 45 N. L. R. 128.

money, or other thing which is consumed by use, to be reduced to the legitimate rate of interest, or even entirely rejected, in cases where it is not allowed to stipulate for interest”.

In the present case, the plaintiff's primary obligation was to deliver 17 amunams valued at Rs. 170. In order to ensure the due discharge of the primary obligation, the plaintiff bound himself by the accessory obligation to forfeit the right which he had to repurchase the lands for Rs. 850. The plaintiff has stated in his evidence that those lands were worth Rs. 2,000 at the execution of P 1 and were worth more at the institution of this action. That valuation has not been challenged. It is now sought to enforce this accessory obligation because the plaintiff failed to deliver 7 out of the 17 amunams which he had to deliver.

Having regard to the facts of this case, I hold that there is an “extravagant disproportion” between the benefit resulting to the defendant from an enforcement of the accessory obligation and any possible amount of damages that could have been contemplated by the parties at the time of the lease as likely to accrue to the defendant from the failure of the plaintiff to deliver the paddy. Moreover, in this case the defendant is seeking to enforce the clause of forfeiture though the plaintiff has discharged his principle obligation to a large extent. In these circumstances, it is not possible for a Court to permit the enforcement of the accessory obligation which is highly penal in nature (see *Dunlop Pneumatic Tyre Company Limited v. New Garage & Motor Company, Limited* ¹).

I would dismiss the appeal with costs.

DE KRETZER J.—I agree.

Appeal dismissed.

