1959 *Present :* **Weerasooriya, J., and T. S. Fernando, J.**

KANAGAMMAH *et al.*, Appellants, *and* KUMARAKULASINGHAM *et al.*, Respondents

S. C. 70A—B—D. C. Point Pedro, 5148/L

Civil Procedure Code—Section 18—Added party—His position as co-plaintiff or co-defendant—Adjudication between defendants inter se*—Effect.*

Vendor and purchaser—Sale of immovable property—Difference between a contract of sale and an agreement to sell—Point of time when title passes to vendee—Prevention of Frauds Ordinance (Cap. 57), s. 2—Specific performance—Principles governing the right to claim it—Prescription.

Where a party is added in terms of section 18 of the Civil Procedure Code, the Court may adjudicate on claims arising between such party and a plaintiff or a defendant. The adjudication on such claims will be *res judicata* between the parties. [*Obiter :* It is open to a Court to adjudicate upon adverse claims set up by defendants *inter se* and unconnected with the claims of the plaintiff. *Kandavanam v. Kandasamy* (57 N. L. R. 241) and *Seneviratne v. Perera* (26 N. L. R. 225) referred to.]

Where a person agrees by notarial deed to sell immovable property to another, the deed does not operate as a sale so as to transfer title, even when delivery of possession of the property and payment of the purchase price have been made. Such a deed is not a deed transferring title but is an agreement relating to the future transfer of title, and title does not pass until a further notarial deed is subsequently executed transferring the title.

Where an agreement to transfer immovable property provides for an alternative mode of performance in lieu of the execution of the transfer, specific performance cannot be insisted upon.

By deed No. 7582 of the 29th September 1942 certain persons (" the first part "), who were expecting a Crown grant in their favour in respect of a land of which they were already in possession upon a permit from the Crown, entered into an agreement entitled " Transfer Agreement " with K (" the second part ") in accordance with the terms of which they gave immediate possession of the land to K and undertook to convey to him the legal title to it soon after obtaining the Crown grant. The purchase price was paid in advance by K. It was agreed that if the parties of the first part failed to convey the title after obtaining the Crown grant, they should pay a calculable sum of money to K to cover the purchase price and all the expenses incurred by him. On the 7th April 1944, K assigned his rights to his daughter, the 2nd defendant.

On the 16th November 1954, the Crown grant was issued to the parties of the first part, among whom were the 1st and 2nd plaintiffs. On the 13th June 1955, the 1st and 2nd plaintiffs, who had become entitled to an undivided two-third share of the land by their own rights under the Crown grant and by gift from one of the grantees, instituted the present action against the 2nd defendant, claiming from her the title and possession in respect of the two-third share. They brought into Court " the two-third share of the money due on deed No. 7582 ". Subsequently, on the motion of the plaintiffs, the Court added the 3rd defendant as a party in terms of section 18 (1) of the Civil Procedure Code, because he was the successor in title of one of the grantees in respect of the remaining undivided one-third share. The 3rd defendant thereupon brought

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into Court " one-third share of the money due on deed No. 7582 " and claimed, as against the 2nd defendant, title and possession in respect of one-third share. No objection was taken to the issues based on the disputes arising between the 2nd defendant and the 3rd defendant.

Held, (i) that the 3rd defendant was really in the position of an " added party ". It was therefore open to the Court to adjudicate on claims between him and the 2nd defendant.

(ii) that deed No. 7582 did not constitute by itself a sale of the land transferring ownership, although vacant possession was given to K and the purchase price was paid by him. It was simply an agreement for the future sale of the land to be effected by a valid deed of transfer once the Crown grant had issued in favour of the parties of the first part.

(iii) that the provision in deed No. 7582 for the payment of money, should the parties of the first part fail to execute a formal conveyance in favour of K, was in the nature of an obligation the performance of which was alternative to the primary obligation to execute the conveyance. Accordingly, the 2nd defendant, who was the assignee of K's rights, was not entitled to insist on specific performance.

(iv) that the possession of the land by K and the 2nd defendant under deed No. 7582 was not adverse to the parties of the first part so as to create prescriptive title.

APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, with *M. Shanmugalingam*, for the 1st and 2nd plaintiffs-appellants in appeal No. 70A.

S. J. V. Chelvanayakam, Q.C., with *C. Manohara*, for the 3rd defendant-appellant in appeal No. 70B.

Walter Jayawardene, with *Nimal Senanayake*, for the 1st and 2nd defendants-respondents in both appeals.

Cur. adv. vult.

May 12, 1959. WEERASOORIYA, J.—

One Velupillai Vallipuram had obtained in 1929 a permit 1D7 from the Crown to clear and bring into cultivation with paddy a certain allotment of land said to be in extent " 23 to 32 acres ". By P1 of the 23rd April, 1941, the Government Agent, acting on behalf of the Crown, offered to him a settlement of 14½ acres out of this land (as representing the extent which had then been brought under cultivation) on payment of a sum of Rs. 363, which amount was paid by him in May 1941. Vallipuram died in August 1941, before the issue of the Crown grant in his favour, leaving as heirs two sons Kulasegaram and Sandirasegaram and a daughter Chellachy who succeeded in equal shares to his interests in the land.

On the 29th September, 1942, Kulasegaram, Sandirasegaram and Chellachy (together with their mother Puthai, the widow of Vallipuram, and Murugesu, the husband of Chellachy) of the first part, entered into a notarially attested agreement No. 7582 with one Nagamuttu Kandiah, of the second part, the subject matter of which was the same extent of 14½ acres of the land referred to in P1. A translation of this agreement is P4. It is entitled "Transfer Agreement". Having recited that Velupillai Vallipuram had paid the purchase price for the land to Government, that the Crown grant had not yet been issued and that a sum of Rs. 1,000 had been received previously from Nagamuttu Kandiah for the purpose of improving the land, the agreement proceeds as follows :—

> "and as it is necessary to sell this land for the payment of the same and for paying and settling the debts incurred by the said Vallipuram we have agreed to sell this land to the second part for a sum of Rs. 3,000 of which amount having deducted a sum of Rs. 1,000 received previously we have this day received the balance amount, that as we have not got with us the legal deed that we ought to get from the Government for the purpose of executing and granting a real transfer deed in favour of the said second part, the second part will have to come down here no sooner we get the said deed and get his deed executed at his expense, that he is entitled to the possession of this land from this day forth, that he will from this day forth have to effect the necessary improvements for the said land i.e., to improve the ground that remains unimproved and cultivate the ground that has been improved and pay the land tax etc. payable to the Government in due course for this ground . . . , that if we fail to execute and grant a legal transfer for the same no sooner we get a deed from the Government we agree to pay jointly and severally the sum of Rs. 3,000 paid to us by him together with the expenses that would be incurred by him for this land from this day forth with interest thereon at the rate of 3 per cent. per annum from the date hereof and had entered into an agreement with him.
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> I Kandiah the second part have consented to all the conditions aforesaid and have accepted the same and further agreed to pay either of them treble the amount of the damage that would be sustained by them in the event of my failing to fulfil any of the aforesaid conditions in the due times and in default of my paying the same the same may be recovered from me by any of them."

This agreement is signed by all the parties to it and by two witnesses and the attesting notary. One of the questions for decision in appeal is whether P4 constitutes by itself a sale of the land or is simply an agreement for the future sale of it to be effected by a valid deed of transfer once the Crown grant had issued in favour of the heirs of Vallipuram.

By deed P5 (also marked 1D6) dated the 7th April, 1944, Nagamuttu Kandiah assigned his rights in P4 in favour of his daughter the 2nd defendant as part of her dowry on the occasion of her marriage to the 1st defendant. P5 provides for the payment by Kandiah of a sum of Rs. 6,000 as liquidated damages in the event of his failing and neglecting or being incapable of executing a transfer of the land in favour of the 2nd defendant within a period of three years from the date of the deed. The value of the land is given in P5 as Rs. 3,000.

After the execution of P4 Chellachy died leaving two daughters, the 1st and 2nd plaintiffs. Sandirasegaram by deed of donation P3 dated the 15th June, 1954, gifted his interests in the land to the 1st and 2nd plaintiffs. On the 16th November, 1954, the Crown grant P2 for the land issued in favour of Kulasegaram and Sandirasegaram, each in respect of an undivided one-third share, and in favour of the 1st and 2nd plaintiffs, each in respect of an undivided one-sixth share. Kulasegaram died subsequently leaving as heir his son the 3rd defendant. The 1st and 2nd plaintiffs thus became entitled to an undivided two-third share of the land and the 3rd defendant to the balance one-third share.

A few months after the issue of the Crown grant P2 Proctor Rajaratnam acting on behalf of the plaintiffs sent to the 1st and 2nd defendants the letter 1D5 dated the 14th February 1955 demanding that they accept the sum of Rs. 4,125 said t be money due in respect of the agreement P4, and deliver to the plaintiffs peaceful possession of the land. As this demand was not complied with the plaintiffs (of whom the 2nd plaintiff, being a minor, is represented by hei next friend) filed this action on the 13tb June, 1955, againt the 1st and 2nd defendants for a declaration that on payment to them of the sum of Rs. 2,765 which the plaintiffs brought into Court as "the two-third share of the money due on deed No. 7582" (P4) the said deed is discharged in respect of that share and that the plaintiffs are entitled to the possession of a two-third share of the land, of which share they prayed that they be quieted in possession.

Subsequently on the motion of the plaintiffs, the Court added the 3rd defendant as a party defendant in terms of section 18 (1) of the Civil Procedure Code. The 3rd defendant is a minor and is represented by his mother as guardian-ad-litem. A sum of Rs. 1,375 has been brought into Court by him as "one-third share of the money due on deed No. 7582", and in the answer filed by him he has prayed that the deed be declared discharged in respect of that share, that he be declared entitled to the possession of a one-third share of the land and that he be quieted in possession thereof. It is clear that this relief is claimed against the 2nd defendant. Issues 15 and 16 which were suggested by the 3rd defendant's proctor are as follows:—

"15. Is the 3rd defendant entitled to take possession of 1/3rd share of the land described in the schedule to the plaint on payment of 1/3rd share of Rs. 3,000 with interest to the 2nd defendant as stated in deed No. 7582?

16. Is the 3rd defendant entitled to a discharge of the agreement entered into on deed No. 7582 on payment of the said sum ? "

The 1st and 2nd defendants filed answer pleading, *inter alia*, that—

(*a*) Nagamuttu Kandiah and the 2nd defendant had spent Rs. 16,500 in improving the land ;

(*b*) the 2nd defendant is entitled to the land and in any event entitled to obtain a conveyance from the plaintiffs and the other heirs of the grantors on deed No. 7582 ;

(*c*) the 2nd defendant and her predecessors in title had acquired " prescriptive right and title " to the land ;

(*d*) in the event of the Court holding that the 2nd defendant had not acquired " prescriptive right and title " to the land she is entitled to obtain an order requiring the plaintiffs to convey to her their " 1/3rd " share of the land ;

and they prayed—

" (1) that the plaintiffs' action be dismissed.

(2) that in the event of the Court holding that the plaintiffs are entitled to any share of the land the plaintiffs' next friend be ordered to execute on their behalf an instrument conveying the said share to the 2nd defendant and in default the Secretary of the Court be ordered to execute such instrument.

(3) that in the event of the Court holding that the plaintiffs are entitled to succeed in their claim the plaintiffs be ordered to pay the 2nd defendant their share of the said sum of Rs. 3,000 and Rs. 16,500 together with interest at 3 per cent. per annum from 29.9.42.

(4) for costs and for such other and further relief as to this Court shall seem meet. "

This answer having been filed before the 3rd defendant was added as a party, no relief was claimed as against him ; nor was the answer subsequently amended to claim such relief. But at the trial the following two issues which affected the 3rd defendant were framed at the instance of counsel for the 1st and 2nd defendants without any objection being taken to them :

" 5. Has the 2nd defendant acquired a prescriptive right and title to the land described in the schedule to the plaint ?

6. Even if issue 5 is answered in the negative is 2nd defendant entitled to claim a conveyance from the next friend of the plaintiffs and the 3rd defendant ? "

The position at the trial, therefore, was that apart from the declarations and relief claimed by the plaintiffs against the 1st and 2nd defendants and counter-claimed by them against the plaintiffs, there was also a contest between the 2nd defendant and the 3rd defendant, each of whom

claimed a declaration and relief against the other. No question was raised either at the trial or in appeal whether it is open to one defendant in an action to prefer a claim for relief in this way against another defendant. But in view of the decision of this Court in *Kandavanam et al. v. Kandasamy et al.* [1] we invited the submissions of counsel on the point at the hearing of the appeal. It was held by Gratiaen, J., in that case (Swan, J., agreeing) that the Civil Procedure Code "does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*". Mr. Chelvanayakam, however, referred us to the case of *Senaratne v. Perera et al.* [2], which is also a decision of a bench of two Judges. That case would appear to be an authority for the view that it is open to a Court to adjudicate upon adverse claims set up by defendants *inter se* and unconnected with the claim of the plaintiff, and an adjudication on such claims will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants. The judgment of Jayewardene, A.J., in that case (with which Bertram, C.J., agreed) does not appear to have been considered in *Kandavanam et al. v. Kandasamy et al.* (*supra*).

In the present case the interests of the plaintiffs and the 3rd defendant are identical. The 3rd defendant could have joined in the action as a co-plaintiff but he was not willing to do so. As I have already stated, some time after the action was filed he was added as a party defendant under section 18(1) of the Civil Procedure Code. Presumably the Court considered that his presence was necessary in order that all the questions involved in the action may be effectually and completely adjudicated upon. No objection was taken to the issues based on the disputes arising between the 2nd defendant and the 3rd defendant. I think that this is essentially a case in which it is in the interests of allthe parties that these disputes, as well as those arising between the plaintiffs and the 2nd defendant, should be adjudicated upon in one and the same action. Although the 3rd defendant has been added as a defendant, if the procedure indicated in section 18 (2) had been followed his correct designation in the action should have been as an "added party". He is, therefore, strictly not in the position of a defendant. Where a party is so added there does not appear to be any reason why the Court should not adjudicate on claims arising between such party and a plaintiff or a defendant. The adjudication on such claims will, in my opinion, be *res judicata* between the parties.

The learned District Judge held that P4 was a contract of sale and not an agreement to sell. He also held that on the execution of P4 Kandiah became the owner of the land, and by his possession and that of his successors, the 1st and 2nd defendant, the latter had acquired prescriptive right and title as over ten years had elapsed from the date of the execution of P4 and the filing of the plaint in this case. These findings were strenuously canvassed by Mr. Renganathan who appeared for the plaintiffs-appellants and Mr. Chelvanayakam who appeared for the 3rd defendant-appellant.

[1] *(1955) 57 N. L. R. 241.* [2] *(1924) 26 N. L. R. 225.*

That P4 is not, nor purports to be, a transfer of title to the land is clear. The recitals in it show that as the title was in the Crown the parties realised that until the Crown grant had issued in favour of the heirs of Vallipuram they would not be in a position to execute " a real transfer deed " in favour of Nagamuttu Kandiah. While, therefore, P4 satisfies the requirements of section 2 of the Prevention of Frauds Ordinance (Cap. 57) as regards the formalities to be observed in the execution of a deed affecting immovable property, it is not a deed transferring title but an agreement relating to the future transfer of title. It seems to me that this alone is decisive of the question whether P4 is a sale or only an agreement to sell. I quote, in this connection, the following passage from the judgment of Lascelles, C.J., in *Fernando v. Perera* [1] : " In Ceylon, since the enactment of Ordinance No. 7 of 1840, the transfer of immovable property can be made only by means of notarial conveyance. The notarial conveyance is thus the ' contract of sale ', and it is by virtue of the effect which the law attributes to a notarial conveyance that the purchaser obtains his right to be placed in possession of the property, and if he is molested in his enjoyment of the property, to call upon his vendor to warrant and defend his title ". In *Jamis v. Suppa Umma* [2], Ennis, J., stated : " In Ceylon also the delivery of possession only does not operate as a valid transfer, for by Ordinance No. 7 of 1840, not only must the contract of sale be in writing notarially executed, but the transfer also must be in writing notarially executed before it has any force or avail in law. The deed transferring title and not the naked delivery of possession is now the essential act of transfer under a contract for the sale of land ".

In my opinion these dicta support the submission of Mr. Renganathan that under our law a notarial conveyance transferring title is essential to a contract of sale of immovable property. I hold, therefore, that although on the execution of P4 vacant possession was given to Nagamuttu Kandiah and the purchase price paid by him, the deed did not operate as a sale and Kandiah did not by virtue of it become the owner of the land.

The District Judge also held that the provision in P4 for the payment of Rs. 3,000 to Kandiah together with the expenses incurred by him for the land is a penalty clause inserted for the benefit of Kandiah should the heirs of Vallipuram fail to execute the formal conveyance after the Crown grant had issued. Mr. Renganathan and Mr. Chelvanayakam contended, however, that this provision is in the nature of an obligation the performance of which is alternative to the primary obligation to execute a formal conveyance of the land in favour of Kandiah. On the other hand, Mr. Jayawardene, who appeared for the 1st and 2nd defendants-respondents pressed on us to take the view that this provision is no more than a pre-estimate of the damages recoverable by Kandiah if he elected not to insist on specific performance.

[1] *(1914) 17 N. L. R. 161.*

[2] *(1913) 17 N. L. R. 33.*

The principles governing the right to claim specific performance of an agreement to sell immovable property were considered by this Court recently in *Thaheer v. Abdeen* [1], and by the Judicial Committee of the Privy Council in *Abdeen v. Thaheer* [2] (being the same case in appeal to Her Majesty in Council). The agreement which came up for interpretation in that case provided *inter alia* that in the event of the " vendors " failing, refusing or neglecting to execute and cause to be executed a deed of transfer of the land which was the subject matter of the agreement they shall refund forthwith to the " purchaser " a sum of Rs. 12,500 deposited as an advance against the purchase price and also pay him a sum of Rs.15,000 as liquidated damages. In dealing with this provision Gratiaen, J., who delivered the judgment of this Court, observed : " To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily implies that the primary obligation to sell is then to be regarded as having come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance ".

It seems to me that those observations apply with equal force in regard to the provision in P4 that if the heirs of Vallipuram fail to execute and grant a legal transfer of the land no sooner they receive the Crown grant they shall refund to Kandiah the sum of Rs. 3,000 previously paid by him as the purchase price, together with all expenses incurred by him for the land and interest at 3 per cent. per annum from the date of the agreement.

With respect, I am unable to agree with the finding of the learned District Judge that this provision was inserted for the benefit of Kandiah and is in the nature of a penalty. A clause providing for a penalty would have been differently worded. Generally it is disguised as one for the payment of liquidated damages. As for Mr. Jayawardene's submission that the provision is a pre-estimate of the damages, it is not stated in P4 that what has to be paid is by way of damages.

The evidence of the witness Kanapathipillai, which appears to have been accepted by the District Judge, is that when P4 was executed the land was worth Rs. 750 to Rs. 800 an acre. On that basis the purchase price of Rs. 3,000 represented only a fraction of the true value of the land. It is not unlikely that in the circumstances the heirs of Vallipuram had the intention to get back possession of the land from Kandiah on refunding to him the purchase price and the expenses incurred by him with interest at 3 per cent. per annum, he having in the meantime the benefit of the produce of the land.

In my opinion the provision in P4 for the refund of the purchase price and of the expenses incurred on the land with interest at 3 per cent. per annum is an alternative mode of performance of the agreement which it was open to the heirs of Vallipuram to adopt in lieu of executing a transfer of the land. As regards the expenses incurred on the land, the District Judge has found that a fair estimate of the value of the

[1] *(1955) 57 N. L. R. 1.* [2] *(1958) 59 N. L R. 385.*

improvements effected by Kandiah and the 1st and 2nd defendants to the land would be Rs. 3,000. We are not disposed to interfere with this finding, as it is on a question of fact and there is evidence to support it. This view we indicated to counsel in the course of the argument in appeal.

On the basis that P4 did not operate as a sale of the land and that the provision in it for the refund of the purchase price and expenses incurred on the land is an alternative mode of performance of the agreement, the answer to the issue of prescription raised by the 1st and 2nd defendants does not present much difficulty. The evidence is that after Kandiah entered into possession of the land in terms of P4, he resided there for some time and thereafter gave it on lease, first to one Govindasamy, and then to one Rengasamy. Even after Kandiah had by P5 assigned to the 2nd defendant his rights under P4, Rengasamy continued to be in occupation of the land as lessee having, presumably, attorned to the 2nd defendant. The 1st defendant in giving evidence stated that he and the 2nd defendant entered into possession of the land in 1944 (when P5 was executed) and that up to the time of the trial they were in undisturbed and uninterrupted possession of the land and that they had acquired "a prescriptive title" to it. But in any event the 1st defendant could not have acquired any such title as he was acting only as agent of the 2nd defendant. As for the 2nd defendant the mere assertion of the 1st defendant that the 2nd defendant had acquired a "prescriptive title" to the land is of little value in deciding that question.

The obligation on the heirs of Vallipuram to execute a transfer of the land depended entirely on their obtaining the Crown grant. P4 is silent as to what should happen if the Crown grant was not obtained. But Vallipuram had duly paid the purchase price of Rs. 363 as requested in the letter P1, which amount represented the unimproved value of the 14½ acres at the rate of Rs. 25 per acre for which he was entitled to have the land sold to him in terms of clause 3 of the permit 1D7. There would have been no ground, therefore, for the Crown to withhold the grant from the heirs of Vallipuram, and the parties appear to have contracted on the basis that it would sooner or later be issued.

Kandiah's possession of the land is, thus, referable to P4 under which he was entitled to possession until such time as the issue of the Crown grant. In the event of the heirs of Vallipuram then executing a transfer of the land his possession would, no doubt, have become enlarged into full ownership. On the other hand, if they decided to adopt the alternative mode of performance by refunding the purchase price and the expenses incurred on the land with interest at 3 per cent. per annum, it would indeed be anomalous if their claim to get back the land were to be defeated on the ground that in the meantime Kandiah had by adverse possession acquired a prescriptive title to the land. The correct view seems to be that Kandiah's possession of the land under P4 was not adverse to the heirs of Vallipuram, and the 2nd defendant, who is the

assignee of Kandiah, cannot be in any better position. In my opinion the claim of the 1st and 2nd defendants to have acquired a title to the land by prescription fails.

On the conclusions reached by me the plaintiffs and the 3rd defendant would be entitled to possession of the land and to a declaration that their obligations on deed No. 7582 (P4) are discharged, subject to the payment to the 2nd defendant of the sum of Rs. 3,000 as representing the purchase price advanced by Kandiah, and the further sum of Rs. 3,000 as representing the value of the improvements effected to the land, together with interest at 3 per cent. per annum from the 29th September, 1942.

The decree appealed from is set aside and the proceedings are remitted to the Court below with the following directions:—

(A) The plaintiffs and the 3rd defendant will pay into Court, within thirty days from the date on which the record is received by the Court, the sum of Rs. 6,000 with interest thereon at 3 per cent. per annum from the 29th September, 1942, till date of payment. In paying the sum of Rs. 6,000 and interest the plaintiffs and the 3rd defendant will be entitled to credit in the sums of Rs. 2,765 and Rs. 1,375 already brought into Court by them.

(B) On payment of the sum of money as directed, decree will be entered—

(i) declaring the plaintiffs and the 3rd defendant entitled to the possession of the land described in the schedule to the plaint in the proportion of a one-third share to each of the plaintiffs and a one-third share to the 3rd defendant;

(ii) requiring the 1st and 2nd defendants forthwith to give up possession of the said land to the plaintiffs and the 3rd defendant; and

(iii) declaring that the obligations of the plaintiffs and the 3rd defendant on deed No. 7582 (P4) have been duly discharged.

(C) On the plaintiffs and the 3rd defendant failing to pay into Court the sum of money as directed, decree will be entered requiring them to execute a valid conveyance of the said land in favour of the 2nd defendant within thirty days from the date of the decree, the expenses of the conveyance to be borne by the 2nd defendant.

The 1st and 2nd defendants will pay to the plaintiffs and the 3rd defendant their costs of appeal. I make no order as regards the costs of trial.

T. S. FERNANDO, J.—I agree.

Decree set aside.