FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1945

Present at the Hearing:

LORD SIMONDS
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the Supreme Court of Ceylon dated 9th July, 1942, which affirmed a decree of the District Court of Colombo dated 21st March, 1941, by which the plaintiffs' suit was dismissed with costs.

The appellants before the Board are the plaintiffs. The appeal arises out of a suit instituted by the appellants for specific performance of an agreement entered into by the respondent and appellant No. 1 relating to the transfer of certain leasehold interests by the respondent to appellant No. 1.

The question for determination in this appeal is whether or not the appellants are entitled in the circumstances of the case to the specific performance of the said agreement.

Appellant No. 1 was the leaseholder for a term of 99 years from 5th April, 1919, of certain lands in Ceylon known as "Pallebadde Nindagama"—which will hereafter be referred to as "the estate"—under certain deeds dated 26th January, 1906, 15th November, 1907, and 5th April, 1919. The respondent purchased the interests of appellant No. 1 on 20th November, 1937, at a sale under a mortgage decree in case No. 5027 in the District Court of Colombo. By deed No. 811 made on 9th February, 1938, by the respondent and appellant No. 1 it was agreed *inter alia* that the respondent would assign his rights in "the estate" to appellant No. 1 or his nominee, on being paid Rs.6,325.0.0 with interest at 7 per cent. per annum provided the money was paid to him in two years from 9th February, 1938. Under the deed, the respondent reserved the right to himself of planting papaw to any extent up to 2,000 acres of the estate for his own benefit on payment of Rs.1,000 per annum in the manner provided for in the deed, and agreed that within the said period of two years he would decide the exact location of the said 2,000 acres so that they might be defined in the deed of conveyance to appellant No. 1 or his nominee. It was also agreed that the respondent should allow the "timber rights" in the property to appellant No. 1 in the meantime.

On 12th October, 1939, the two appellants entered into a partnership for the exploitation of the interests of appellant No. 1 in "the estate" including the recovery of "all claims for damages, compensation and rights" that had accrued, were accruing, or would thereafter accrue. Appellant No. 2 thus became legally entitled to enforce the agreement as a partner of appellant No. 1.

The last day for the performance of the suit agreement was 8th February, 1940. On 7th February, the appellants filed the suit out of which this appeal arises claiming retransfer of the leasehold interests in " the estate ", i.e. specific performance of the suit contract, alleging that the respondent, contrary to the agreement, had cut and appropriated to his own use, timber of the value of Rs.25,040, and that they had set off the sum of Rs.6,325 which appellant No. 1 had agreed to pay for the retransfer of " the estate ", stating that the balance of the damages would be claimed in a separate action. Alternatively, the appellants also alleged that on 6th February, 1940, they tendered to the respondent the sum of Rs.6,325 in cash which the respondent did not receive.

The respondent denied the allegations of the appellants and pleaded that he granted to the appellants an extension of time for payment to the 26th February, 1940, and that despite the extension of time thus given, the appellants failed to comply with the terms of the suit agreement. On 23rd January, 1941, the day before the date fixed for the hearing of the suit, the appellants deposited the sum of Rs.6,325.0.0. in Court.

At the hearing, the appellants abandoned all the grounds upon which they had claimed specific performance of the suit contract save the alleged tender of Rs.6,325.0.0 in cash on 6th February, 1940. The scope of the suit thus became much reduced. At the trial the three following issues were framed:

(1) Did the plaintiffs tender the sum of Rs.6,325.0.0. to the defendant on 6th February, 1940?

(2) If so, are the plaintiffs entitled to a transfer in their favour by the defendant of the property set out in Deed No. 811, dated 9th February, 1938?

(3) Is the tender alleged to have been made by the plaintiffs a good and valid tender?

The third issue was suggested by the respondent's Counsel, but it was objected to by the appellants' Counsel as it had not been pleaded. It is now agreed that the question raised in this issue does not arise, and the case has to be decided on the other issues.

At the trial both oral and documentary evidence was given by the parties.

The oral evidence consisted of the testimony of appellant No. 2, of Mr. Mack, proctor for the respondent, and of the respondent himself. The documentary evidence consisted chiefly of the correspondence that passed between the proctors who acted for the parties.

The trial Court found all the issues in favour of the respondent and dismissed the suit. At the conclusion of the judgment the learned District Judge noted: " I should add that I was not favourably impressed by the conduct of the second plaintiff in the course of this transaction as shown by the letters written by his proctor or his evidence in the witness box ". The learned Judges of the Supreme Court affirmed the decree made by the District Court and dismissed the appeal, but without giving any judgment. Their Lordships have to deal with this appeal without the benefit of the reasoning that led the learned Judges to their conclusion.

It is not disputed that the only question which their Lordships have to decide in this appeal is whether the appellants made a tender of Rs.6,325.0.0 on 6th February, 1940, to the respondent as alleged by them. In the earlier correspondence carried on by the proctor of appellant No. 2 with the respondent, appellant No. 2 was mainly concerned with getting a conveyance of " the estate " from the respondent on the basis of a set-off, alleging that he had a claim against him for damages for Rs.25,040.0.0 in respect of timber said to have been unlawfully cut and carried away by him. Though the claim for the set-off has now been abandoned, the correspondence relating to it throws some light on the conduct of the appellants, and on the question whether at the material time appellant No. 2 really had money with him to pay to the respondent. On 7th November, 1939, the proctor of appellant No. 2 wrote to the respondent that appellant No. 2 had received " information which he considers reliable " to the effect that the respondent had taken over 16,000 cubic feet

of sawn timber and 20,000 fence posts and that the matter should be adjusted. In reply, the proctor of the respondent called for the assignment deeds made in favour of appellant No. 2 by appellant No. 1 which he had already called for, and told him not to write any more letters until the deeds were sent for reference. Instead of sending the deeds which were never sent at any time, in the letter dated 14th November, 1939, addressed to the respondent, a claim was made for Rs.25,040 in respect of timber already referred to, and it was alleged that a sum of Rs.18,715.0.0. was due to appellant No. 2 after setting-off the sum of Rs.6,325.0.0 due under agreement No. 811. This letter was followed by another in which a demand for a conveyance in the terms of the deed was made, and when no reply was sent to this, a draft deed was sent to the respondent by the proctor of appellant No. 2; and when no reply was sent to this also, the proctor wrote suggesting an amicable settlement without going to Court, and also an extension of time for the period of conveyance to 9th August, 1940, in case the suggestion of a settlement appealed to the respondent. From now onwards, a change seems to have come over the attitude of the appellants. Their conduct, evidenced by the correspondence, appears to their Lordships to be inconsistent with an intention on their part to pay any money in cash to the respondent in connection with the transaction. This part of the correspondence, read as a whole, makes their Lordships doubt whether appellant No. 2 was not urging a false claim with a view to get the conveyance without actually paying the amount mentioned in the agreement. Mr. Rewcastle, the learned Counsel for the appellants, relies strongly on the letter dated 19th December, 1939, which the proctor of appellant No. 2 wrote to the respondent, enclosing the draft deed already referred to. The draft assumes that the amount of Rs.6,325.0.0 would be set-off against the damages claimed. As already stated, no reply was sent to this letter. In this connection, it must be remembered that the respondent was the owner of the property and though pending the transfer appellant No. 1 had "timber rights", the respondent's rights to cut timber as he may require has not been negatived in the deed. Further, beyond stating vaguely that reliable information had been received that timber had been cut by the respondent, no specific proofs had been brought forward by the appellants in respect of their claim as to damages. In the circumstances, the respondent may well have thought that a reply was not called for, as the claim appeared to be entirely unfounded. The letter suggesting amicable settlement and extension of time for the conveyance was written on 3rd February, 1940, three days before the date of the alleged tender, namely 6th February, 1940. By letter dated 5th February, 1940, the proctor of the respondent replied to the above letter as follows: " . . . . We write to inform you that our client, Mr. Theobald, is out of Colombo and will not be back until Sunday the 11th instant. In the meantime we should like to place it on record that when you called at this office on Friday last we made it quite plain to you that all that our client was prepared to consider was to give you some further time to make the payment due to him in case Mr. Tirimanne wished to take advantage of the terms of deed No. 811" (the suit agreement). This letter, addressed to the proctor of appellant No. 2, was admittedly received at 2 p.m. on 6th February, 1940. It will be observed that up to 5th February, 1940, there had been no suggestion that the appellants were prepared to pay the amount of Rs.6,325.0.0. and obtain a conveyance. The alleged tender of the amount was made in letter dated 6th February, 1940, written by the proctor of appellant No. 2. In this it is stated that the sum of Rs.6,325.0.0 will be paid in Ceylon currency at the office of appellant No. 2 between 1.30 and 4 p.m. on the same date. No draft deed had been enclosed with the letter. According to the evidence of appellant No. 2 this letter was posted about 12 noon by registered post. It was addressed to the respondent but there is no evidence as to when it was received by him. It is clear that on the receipt of the letter dated 5th February, 1940, at 2 p.m. the proctor of appellant No. 2 would have known that the respondent was not in Colombo and would not be back in Colombo until the 11th. It was impossible for him, therefore, to receive the money from the office of appellant No. 2 at the specified time

on 6th February, 1940, as required by the letter of that date. Their Lordships think that if the appellants had genuinely wanted to pay the respondent the amount, the proctor of appellant No. 2 would have got either into touch with Mr. Mack whom he knew was acting on behalf of the respondent and whose office was next door to his own, or informed appellant No. 2 that the respondent had gone out of Colombo, so that he might change the time fixed for the payment of the money. Neither of these courses was followed. Appellant No. 2 says he stayed in his office until about 5 p.m. with the amount in cash. In the circumstances, it is difficult to believe that the appellant had the amount with him for paying the respondent. If he had the money ready with him his conduct would certainly have been different. It is true that he was not cross-examined as to whether he had the amount with him, but it appears to their Lordships that the question has to be considered in the light of the entire conduct of the appellants in the case. As was pointed out by the District Judge, appellant No. 2 did not state from where he got the money, nor produce any evidence to show he drew it from the bank or received it from any other source, or that he was in a position to pay such a sum on that date. The suit was instituted on 7th February, 1940, within the time allowed by the agreement for the performance of the contract. If appellant No. 2 had the money ready with him to make the payment to the respondent, nothing was easier for him than to bring it into Court with the plaint and claim a reconveyance of " the estate ". But that was not done. No explanation has been given by the appellants for this omission on their part, which their Lordships consider to be very serious. As has already been mentioned, the money was brought into Court only on 23rd January, 1941.

In their Lordships view, the appellants had no intention of paying the amount of Rs.6,325.0.0 to the respondent at any time on 6th February, and they did not have the amount with them on that date. The conduct of appellant No. 2 with reference to this transaction, considered as a whole, supports this view; it is also a matter for notice in this connection that the learned District Judge was not favourably impressed by his evidence in the witness box.

After carefully considering the evidence, their Lordships have come to the conclusion that the appellants are not entitled to succeed in this appeal. They would humbly advise His Majesty that the appeal fails and should be dismissed with costs.

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In the Privy Council

DON JAMES ALEXANDER TIRIMANNE AND ANOTHER

v.

FREDERICK CHARLES THEOBALD

DELIVERED BY SIR MADHAVAN NAIR

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