Privy Council Appeal No. 20 of 1956

Abdul Cader Abdeen – – – – – – – *Appellant*

v.

Abdul Careem Mohamed Thaheer and others – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11th FEBRUARY, 1958

Present at the Hearing:

LORD OAKSEY

LORD MORTON OF HENRYTON

LORD KEITH OF AVONHOLM

LORD BIRKETT

MR. L. M. D. DE SILVA

[*Delivered by* LORD KEITH OF AVONHOLM]

This is an appeal from a judgment of the Supreme Court of Ceylon (Gratiaen, J., Pulle, J. and Sansoni, J.) reversing the judgment of the District Court (Sinnethamby, D.J.). The respondents were not represented before their Lordships' Board.

The case arises out of a contract of purchase and sale dated 3rd October, 1947, of certain house property in Colombo. The appellant is the purchaser. The vendors were seven joint owners of 151 shares out of 192 undivided shares of this land. The joint owners of the other 41 shares were four minors who were not parties to the contract. Their curators were subsequently authorised by the Court to sell their shares. Of the seven part joint owners, parties to the contract, five executed, on 2nd January, 1948, an appropriate deed of conveyance in the appellant's favour. The other two refused to execute any conveyance and give vacant possession because they could not get another house. On 17th March, 1948, the appellant commenced proceedings in the District Court of Colombo seeking a decree against these two vendors to execute in his favour a conveyance of their share of the premises in question. Before these proceedings were taken one of the recusant vendors had transferred his share to his minor children without valuable consideration and they were accordingly made parties to the proceedings. The District Judge held that this transfer was ineffective to interfere with the purchaser's rights. This is not now in question in the case.

The only question before the Board is whether the appellant is entitled to enforce specific performance against the recusant defendants. The District Court held he was. The Supreme Court held he was not. The question falls to be determined on the language of the contract considered in the light of the Roman-Dutch law ruling in Ceylon in the matter of specific performance.

The contract, which should be quoted substantially in full, is as follows:—

"This Agreement is made Third day of October, One thousand Nine hundred and Forty-seven between Abdul Careem Mohamed Thaheer [and six others] all of No. 43, Barnes Place, in Colombo, in the Island of Ceylon (hereinafter called and referred to as 'the said vendors' which term as herein used shall where the context so requires or admits mean and include the said Abdul Careem Mohamed Thaheer [and the six others], their and each of their respective heirs, executors and administrators) of the one part and Abdul Cader Abdeen of Colombo aforesaid (hereinafter called and referred to as 'the said Purchaser' which term as herein used shall where the context so requires or admits mean and include the said Abdul Cader Abdeen, his heirs, executors and administrators) of the other part.

Whereas the vendors are seised and possessed of or otherwise well and sufficiently entitled jointly to an undivided One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares from and out of all those premises in the Schedule hereto particularly described.

And whereas Zainul Abdeen, Umma Faiza, Hussain Lafir and Abdul Careem Mohamed Abdul Cader, (minors,) all of No. 43, Barnes Place aforesaid are jointly entitled to the remaining Forty-one upon One-hundred and Ninety-two (41/192) parts or shares from and out of the said premises in the said schedule hereto particularly described.

And whereas the vendors have agreed to sell and to cause to be sold and the Purchaser has agreed to buy the said premises in the said Schedule hereto particularly described at the price and upon the terms and conditions hereinafter set forth.

Now this Agreement witnesseth as follows:—

1. The vendors will sell and cause to be sold and the Purchaser will subject expressly to the provisions of clauses 4 and 5 hereof buy the said premises in the said Schedule hereto particularly described together with all and singular the rights, privileges, easements, servitudes and appurtenances whatsoever thereto belonging or appurtenant thereto or used or enjoyed therewith.

2. The price shall be the sum of Rupees Ninety-two Thousand (Rs. 92,000/-) of which a sum of Rupees Twelve thousand Five hundred (Rs. 12,500/-) by way of deposit has been paid to the vendors by the purchaser (the receipt whereof the said vendors do hereby admit and acknowledge) and the balance shall be paid on the date the purchase is completed.

3. The sale shall be completed on or before the 31st day of December, 1947, by the Purchaser:

(*a*) tendering to the Vendors for execution at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, Colombo, a transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominee's Notary. The Vendors in and by the said Deed of Transfer shall warrant and defend the title to the said One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares of the said premises in the said Schedule hereto particularly described and enter into other usual covenants.

(*b*) paying to the Vendors and depositing to the credit of curatorship proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rupees Seventy-nine thousand Five-hundred

(Rs. 79,500/-) and thereupon the vendors shall execute and cause to be executed at the cost and expense of the Purchaser the Deed of Transfer in favour of the Purchaser or his nominee or nominees as aforesaid.

4. Vacant possession of the said premises in the said schedule hereto particularly described shall be given by the Vendors to the Purchaser at least one day prior to the execution of the said Deed of Transfer.

5. The Vendors shall deduce to the satisfaction of the said Mr. John Wilson a good and indefeasible title to the said premises in the said schedule hereto particularly described.

6. The Purchaser shall give to the Vendors at least 7 days' notice of the date on which the Purchaser intends to complete the sale so as to enable the Vendors to give to the Purchaser vacant possession as aforesaid of the said premises in the said schedule hereto particularly described.

7. In the event of the Purchaser dying prior to the said 31st day of December, 1947, these presents shall stand cancelled and determined and the Vendors shall forthwith pay to the legal representatives of the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-).

8. In the event of the Purchaser being ready and willing to complete the said sale in terms hereof and the Vendors failing, refusing or neglecting to execute and cause to be executed the said Deed of Transfer as aforesaid then and in such case the Vendors shall repay forthwith to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the Purchaser a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty.

9. In the event of the Vendors deducing a good and indefeasible title to the satisfaction of the said Mr. John Wilson and being ready and willing to execute or cause to be executed prior to the 31st day of December, 1947, the said Transfer and to give vacant possession as aforesaid and the Purchaser failing, refusing or neglecting to complete the purchase as aforesaid the Purchaser shall pay to the Vendors a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty and the Vendors shall refund to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-)."

In the admirable judgment of Mr. Justice Gratiaen, there appears this passage, which their Lordships entirely accept:

"In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases."

Proceeding from this starting point the learned judge reaches the conclusion that the *prima facie* right of the purchaser to demand specific

performance is excluded by the terms of the contract between the parties, particularly by clause 8, which he holds constitutes a substituted obligation and the sole obligation upon the vendors in the event of the failure to secure a conveyance of the whole property to the purchaser by reason of any of the contingencies contemplated by the parties in clause 8. He continues in a further passage which their Lordships would again quote in full:

> " It is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to select one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance or damages. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. 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 is also significant that, when one considers the relevant issue of mutuality, clause 9 provides that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit. Clause 9 equally denies to the ' vendors ' by necessary implication the alternative legal remedy of specific performance."

In his very full and able argument for the appellant Mr. Chapman urged that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of the contract and that this was no bar to a decree for specific performance. For reasons, however, which do not materially differ from those which found favour with Mr. Justice Gratiaen their Lordships are unable to accept the contention for the appellant. Their Lordships will state these reasons shortly under four heads.

First where the right in general of a party to insist on specific performance of his contract or to claim damages is so clear under the Roman-Dutch law, their Lordships have difficulty in appreciating why the parties should introduce into the contract the detailed and meticulous provisions of clauses 8 and 9 merely to fix the amount of damages in the event of the Court finding itself unable or unprepared to give decree of specific performance.

Secondly the general framework of the contract suggests that clauses 7, 8 and 9 were designed to introduce modifications of what would otherwise be, subject to certain minor conditions, the unqualified obligation to sell or cause to be sold the property in question. Clause 7 is a clear modification of the legal consequences ordinarily following on a contract of sale, and clauses 8 and 9 are capable of a similar interpretation. Each of the clauses relates to a specific event or events which may follow the signing of the contract and provides for the consequences to follow thereon.

Thirdly clause 8 makes no distinction between failure, refusal, or neglect to execute or cause to be executed the deed of transfer. The same consequences are to follow from any of these events. Failure might have proceeded, though in this case it did not, from the refusal of the Court to sanction and authorise a sale by the curators of the minor part-owners. In such an event the purchaser's only remedy would be under clause 8. The view of the Supreme Court was that this was a substituted obligation on the vendors who having undertaken to cause a transfer to be executed would be liable to pay to the purchaser the agreed sum of damages. Their Lordships see no reason to dissent from this view and it is impossible in their opinion to differentiate between such a failure and a refusal of one of the parties to execute a transfer which it is to be noted again results in a failure of the other vendors to cause a transfer to be executed.

Lastly clause 8 provides that on the occurrence of any of the events contemplated the vendors shall repay "forthwith" to the purchaser the deposited sum with interest at the rate of five per centum per annum. This in their Lordships' view points strongly to the construction that in the events contemplated the bargain for a sale has come to an end and has been replaced by the pecuniary stipulations in the clause. It is further significant, as Mr. Justice Gratiaen points out, that there is a corresponding mutuality of obligation on the purchaser in clause 9 in the event of his failing, refusing or neglecting to complete the purchase.

It remains to notice a contention which may not have been submitted to the Supreme Court but which was pressed before their Lordships' Board. It is expressed in the sixth ground of appeal as follows:

> "Because even if Clause 8 be so construed as to mean that the purchaser's sole remedy upon default by the vendors was the recovery of the sum named therein as liquidated damages yet the default contemplated and, indeed, so expressed, was a default by all the vendors rendering them all jointly and severally liable, and not by only some of them for which all the vendors (i.e. those in default and those who were not) were to be liable."

In their Lordships' view this point fails at the outset because in fact there was a failure on the part of all the vendors, as has already been indicated, either to execute or "to cause to be executed" the deed of transfer. But their Lordships think that in any event a refusal or failure by one vendor would be sufficient to bring the clause into operation.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

(39279) Wt. 8075—17 100 2/58 D.L.

In the Privy Council

ABDUL CADER ABDEEN

v.

ABDUL CAREEM MOHAMED THAHEER AND OTHERS

DELIVERED BY LORD KEITH OF AVONHOLM

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