

IN THE PRIVY COUNCIL

No.33 of 1969

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

BETWEEN

CARUPPIAH SANDANAM

Plaintiff/
Appellant

- and -

- 1. MOHAMED ISMAIL MOHAMED JAMALDEEN
- 2. MOHAMED ISMAIL MOHAMED HANIFFA
- 3. UMMU RAZEENA

Defendants/
Respondents

HUGH JACKSON ADVOCATES
 LEONARD SILVERMAN
 - / 11 / 1971
 25 RUSSELL SQUARE
 LONDON, W.C.1.

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CASE FOR THE APPELLANT

1. This is an appeal from a Judgment of the Supreme Court of Ceylon (H.N.G.Fernando, C.J. & G.P.A.Silva, J.) dated the 14th day of February 1967 and the 12th day of May 1967 which allowed the Respondents' appeal from a Judgment of the District Court of Kandy dated the 10th day of May 1963 which granted the Plaintiff/Appellant a declaration that he is entitled to claim specific performance of an agreement for the sale of land by the Defendants/Respondents to him, and ordering the latter to execute a deed of transfer of the said land to the Plaintiff/Appellant.

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2. The principal matter for determination in this appeal is whether the Respondents are estopped from contending that they are not liable to convey the land to the Appellant in view of their conduct, namely in accepting the full purchase price for the land and in acquiescing in the Appellant's

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possession of the land and his erecting buildings thereon.

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3. By a notarial agreement No.7052 dated 18th July, 1956, (Pl) the Respondents and their mother, one Natchia Umma, agreed to sell to the Appellant and the Appellant agreed to purchase whatever divided share or shares in a certain land which was or were allotted to them in Partition Case No.1119, then pending.

4. The relevant clauses of the said agreement read as follows :- 10

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"1. The Vendor shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the Purchaser sell and transfer unto the Purchaser whatever divided share or shares (together with the buildings plantations and everything thereon) the Vendors will be allotted in the said partition action together with all and singular the rights ways easements advantages servitudes and appurtenances whatsoever thereto belonging or in any wise appertaining or usually held occupied used or enjoyed therewith or reputed as known as part and parcel thereof together with any compensation costs and all other benefits and privileges that will be awarded or may accrue to the Vendors in the said partition action and together with all the estate right title interest property claim and demand whatsoever of the Vendors in to upon or out of the said premises and every part thereof, for the price or sum of Rupees Three Thousand (Rs.3,000/-) at any time within three months of the entering of the Final Decree in the said partition action No.P.1119 of the District Court of Kandy holden at Gampola. 20 30 40

2. Out of the purchase price of Rupees Three Thousand (Rs.3,000/-) a sum of Rupees Two Thousand (Rs.2,000/-) shall be

paid by the Purchaser to the Vendors at or before the execution of these presents (the receipt whereof is hereby admitted and acknowledged by the Vendors) and the balance sum of Rupees One Thousand (Rs.1,000/-) shall be paid at the time of executing the Deed of conveyance in favour of the Purchaser.

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3. In the event of the Purchaser failing or neglecting to complete the said purchase in terms of these presents the Vendors being ready and willing to perform their part of the contract in these presents contained the sum of Rupees Two Thousand (Rs.2,000/-) paid as advance this day shall be forfeited to the Vendors as liquidated damages and not as a penalty.

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4. In the event of the Vendors failing or neglecting to complete the conveyance in terms of these presents the Vendors shall refund to the Purchasers the sum of Rupees Two Thousand (Rs.2,000/-) paid as advance as aforesaid together with a further sum of Rupees Two Thousand (Rs.2,000/-) as liquidated damages and not as a penalty."

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5. By a Final Partition Decree dated 18th December, 1957, the Respondents and their mother, were jointly declared entitled to the divided lot depicted as E on plan No.2285A of 31st October, 1957 (P2A). Natchia Umma died in 1958 leaving as her heirs the three Respondents who became entitled to the said lot E subject to the Appellant's rights under the agreement Pl.

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6. In October 1961, the Appellant called on the Respondents to execute a conveyance in his favour in accordance with the agreement, but the Respondents failed to do so.

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71 1.7

7. The principal defence set up by the

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Respondents was that the Appellant's right to demand specific performance is excluded by Clause 4 of the agreement which constitutes a substituted obligation and the sole obligation upon them in the event of the failure to execute a deed of conveyance.

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8. Both the District Court and the Supreme Court held that as a matter of construction, where a contract entered into between two parties provides for a transfer of property by one to the other, and in default, for a substituted obligation to pay a specified sum of money as damages, specific performance cannot be enforced against the recusant party, and the only relief which the other party can obtain is to enforce his claim for damages (Abdeen v. Thahir 59 N.L.R.385) 10

9. The Appellant sought to enforce his claim for specific performance on the ground that subsequent to the deed of agreement (P.1), further events have occurred which have modified the contract in so far as the provision for a substituted obligation is concerned, and that the Respondents are estopped from contending that the only obligation enforceable against them is the substituted one. 20

10. The said events upon which the Appellant relied were :-

(a) that at the Respondents' request the balance of the purchase price for the land i.e. the sum of Rs.1,000/-, was paid by the Appellant to the Respondents before the Final Partition Decree; and 30

(b) that after the Final Partition Decree, the Respondents allowed the Appellant to take possession of the land and that they acquiesced in his putting up buildings thereon at a cost of over Rs.25,000/-. 40

11. The learned District Judge, rightly it is

submitted, held as follows :-

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10 "While the partition action was still pending the defendants and Natchia Umma applied for and obtained from the plaintiff on 28th August, 1956 a sum of Rs.500/- out of the balance consideration of Rs.1,000/- which would have been payable by the plaintiff to them on the execution of the deed of transfer. Natchia Umma and the 1st and 3rd defendants executed a promissory note (P3) in favour of the 2nd defendant in a sum of Rs.500/- and the 2nd defendant endorsed that note in favour of the plaintiff and handed it to him as security for the sum of Rs.500/- received by them. On 5th February, 1957 the defendants, through their Proctor Mr. M.W.R. de Silva, applied to the plaintiff for a further sum of money as they were in urgent need of money to meet the wedding expenses of the 2nd defendant. In the course of the letter (P4) sent by Mr. De Silva to the plaintiff he stated "You might arrange to give them the money. The deed of Transfer in your favour would be signed as soon as the final decree is entered. As you know we are not contesting the case." The letter of the 1st defendant addressed to Mr. De Silva in that connection stated inter alia, "Therefore I most kindly request your good self to be so good as to kindly influence Mr. Sandanam Pillai to pay Haniffa the balance amount due on the deed. A Pro Note could be furnished to Mr. Sandanam Pillai if necessary". The plaintiff complied with the request of the defendants and paid them the balance sum of Rs.500/- that would have been payable to the defendants on the execution of the deed. The receipt granted by the 2nd defendant Haniffa on behalf of himself and the other defendants dated 10th February, 1957 (P6) was in the following terms :-

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"Received the sum of Rs.500/- being balance due to us for land referred to in the agreement dated 8th July, 1956 attested by Mr. M.W.R. de Silva of Gampola. We undertake to give a transfer to Mr. Sandanam the 1/6th share of the land named Konakkahena as per partition case No.1119 D.C. Gampola without any consideration as we received the full consideration of Rs.3,000/-". 10

The uncontradicted evidence of the plaintiff, which I accept, is that after the sum of Rs.3,000/-, which was the full consideration payable for the transfer, was received by the Defendants they took no further interest in the partition action and they requested him to represent them at the final partition and he did so. In fact, the final partition decree (P2) expressly states that the final partition was effected in the presence, inter alia, of the plaintiff representing himself as well as the 11th to 14th defendants. The decree also expressly refers to the fact that the share allotted to the 11th to 14th defendants was subject to plaintiff's right to purchase their share on deed P.1. The plaintiff also stated that the defendants informed him after the final partition, to take possession of the lot and to do whatever he liked with it, and accordingly he took possession of that lot and, with the knowledge and acquiescence of the defendants, he put up buildings thereon at a cost of over Rs.25,000/-. The evidence of the plaintiff that he took possession of the divided lot allotted to the defendants at the request of the defendants and that he put up buildings thereon at a cost of over Rs.25,000/- with the knowledge and acquiescence of the defendants has not been contradicted by the defendants..I 20 30 40

accept that evidence of the plaintiff. In my opinion, the defendants by reason of their conduct referred to, are now estopped from contending that they are not liable to execute a conveyance in favour of the plaintiff of the title to the divided lot E, and that the only obligation which they are bound to perform is the substituted obligation contained in Clause 4 of the agreement Pl. Under Clause 4 the defendants are liable to refund to the plaintiff only a sum of Rs.2,000/- which they had received prior to the date of that agreement in addition to the payment of damages assessed at Rs.2,000/-. That clause does not refer to the refund of any sum received by them subsequent to the date of the agreement, and if that clause is to be given effect to, the defendants would be liable to refund only Rs.2,000/- although they have in fact received Rs.3,000/- from the plaintiff. That, certainly, could not have been the intention of the parties. For the above reasons, I hold that the substituted obligation contained in Clause 4 has become inapplicable, and the plaintiff is entitled to enforce specific performance of the obligation on the defendants to execute a transfer of the property.

It was also submitted on behalf of the defendants that the plaintiff should have obtained a transfer within three months of the date of the final decree, and having failed to do so he is not entitled to ask for a transfer thereafter. Under the agreement the obligation was on the part of the defendants to execute a transfer within a period of three months of the final decree, and the plaintiff's right to enforce that obligation was not limited to the period of three months."

12. The Supreme Court, it is submitted wrongly, reversed the finding of the District

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Judge, on the ground that it was the duty of the Appellant to demand a conveyance at the proper time. H.N.G.Fernando, C.J. said :-

"I pass now to consider the conclusion of the trial Judge that "the defendants are estopped from contending that they are not liable to execute a conveyance".

A summary of the evidence as to the conduct of the defendants upon which the plea of estoppel rests is here necessary. 10
Firstly there is the evidence (already mentioned) that the defendants did in February 1957 agree that they would execute a conveyance of the land. They took no active part thereafter in the Partition Action and acquiesced in the plaintiff taking all steps to secure that the decree would entitle them to their proper divided share of the land. After the decree was entered, they permitted the plaintiff to possess their divided share, 20
and they acquiesced in the erection and letting of buildings by the plaintiff. These facts can well justify a finding that the plaintiff was induced to his actual course of action in the belief that the defendants would not refuse to execute a conveyance of the land.

But there is one important circumstance which does not appear to have been 30
considered in the trial Court. The principal clause in the Agreement P1 provided that "the Vendor shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the purchaser sell and transfer (the divided share) at any time within three months of the entering of the Final Decree in the Partition Action No.1119". 40

The documents bear out the plaintiff's evidence that requests for the conveyance were made in writing in October 1961.

10 But there is neither evidence, nor even a bare allegation in the plaint that any request was made in terms of clause 1 of the Agreement, namely within the specified period of three months. That being so, it would be wrong to read the plaintiff's statement, that he had orally asked one of the defendants for a conveyance, as establishing that a formal request had been made within the specified period and that a deed had then been duly tendered for signature.

20 The simple fact which thus emerges is that the plaintiff did not exercise his right under the Agreement to demand a conveyance. If such demand had been made and refused, the plaintiff could not have regarded the defendants' acquiescence in his occupation and development of the land as being a representation that they would execute a conveyance at some later time. The plaintiff cannot now claim that his failure to demand a conveyance at the proper time must be turned to his advantage.

30 This action is quite clearly one for the enforcement of the Agreement Pl, and that is made obvious in the plaint. The failure of the plaintiff to demand performance of the Agreement in terms of Clause 1 disentitled him from maintaining the action unless he could show that the failure on his part had been induced by the conduct of the defendants. That has not been the position taken in the issues, nor is that position supported in any way by the evidence. Indeed the plaintiff made no attempt in his evidence to
40 relate his failure to demand a conveyance within the stipulated period to any conduct of the defendants.

The resulting position in law is that upon the termination of the period of

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three months succeeding the entry of the Partition Decree, i.e. on the 18th March 1958, the plaintiff had no right to seek performance of the Agreement, either from the defendants directly or through the Court. He had no cause of action, depending upon any refusal of the defendants to perform their obligation under the Agreement, either for a decree of specific performance or for the recovery of liquidated damages."

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13. The Appellant respectfully submits that the Supreme Court was wrong in holding that Clause 1 of the agreement imposes an obligation on the Appellant to demand or make a formal request for a conveyance. It is submitted that the obligation imposed in Clause 1 is clearly upon the Vendor i.e. the Respondents, to prepare and execute a conveyance, and that the only obligation imposed on the Purchaser i.e. the Appellant is to pay for the cost of that conveyance.

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14. It is submitted further that according to the Roman-Dutch law which applies in Ceylon, all contracts must be performed according to the requirements of good faith and apart from express provision, a contract cannot be discharged by unilateral renunciation. In this case, the Respondents (sellers) seek to rely on a term of the contract which they allege mean that a claim for liquidated damages is the only remedy for the breach. The Respondents themselves, however, requested the Appellant to perform his obligation to pay the price before it was due and the Appellant acceded to this request. It is submitted therefore that to allow the Respondents to rely on this defence would involve great inequity and unconscionable conduct.

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15. In any case, it is submitted that the letter P.6 amounted to a variation of the original contract by which in consideration of the balance of the purchase price being paid in advance, the Respondents agreed to

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10 give transfer in specie and waived any reliance on clause 4 of the contract. On its true construction clause 1 of the contract referred to a period of three months after the Final Decree in the partition action in order that the sellers should not be left in uncertainty whether the buyer intended to pay the balance of the purchase price and to claim transfer of the land or to forfeit the 2000 rupees already paid under clause 2. It was not intended to apply to the situation in which the uncertainty had been solved, at the Vendors' request, by the payment of the full price before the Decree. Equally clauses 3 and 4 are not intended to apply to the situation in which the full purchase price has been paid, as is shown by the fact that it provides for the repayment of 2,000 rupees only and not of the full 3,000.

20 16. Having allowed the appeal and dismissed the Plaintiff's claim for specific performance on the 14th February, 1967, the matter was re-opened on the ground that

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30 "After our judgment in this appeal was delivered on 14th February, 1967, the Defendants-Appellants' counsel brought to our notice our omission to deal with the counter-claim of the Defendants for a declaration of title to the land which is the subject of the action, and for the ejection of the Plaintiffs from the land. We thereupon heard further argument on this matter."

40 17. The Supreme Court held, wrongly it is submitted, that as the Plaintiff/Appellant had not, in his Replication, set up a claim of a ius retentionis, nor a claim for compensation for improvements, but had reserved his claim for compensation, the Defendants/Respondents were entitled to a declaration of title and to a decree for ejection of the Plaintiff/Appellant.

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18. The Appellant respectfully submits that the Supreme Court was wrong in holding that the omission to claim a ius retentionis in the Replication and a reservation of the claim for compensation, entitled the Respondents to succeed on their counterclaim. It is submitted that an improver has, in law and in equity, the right to retain the land in which the improvement stood, until compensation is paid. It is submitted further that it is implied in a contract of sale in Roman-Dutch law that the seller will give and allow the buyer vacant possession of the thing sold and the buyer will not be evicted by the act of the seller himself or of any third party. The pursuing of a claim for eviction and damages is therefore itself a breach of the sellers' (Respondents') obligations under the contract of sale. 10

19. It is respectfully submitted that this appeal should be allowed with costs for the following, among other 20

R E A S O N S

1. BECAUSE the Respondents are estopped from contending that they are not liable to convey the land to the Appellant in view of their conduct, namely in accepting the full purchase price and in acquiescing in the Appellant's possession of the land and his erecting buildings thereon.
2. BECAUSE there was no duty on the Appellant to demand a conveyance or make a formal request therefor. 30
3. BECAUSE to allow the Respondents to rely on a Defence based on Clause 4 of the Agreement would involve great inequity and unconscionable conduct under Roman-Dutch law.
4. BECAUSE, in any case, the relevant Clauses of the original Agreement have been varied by the Respondents' acceptance of the full purchase price before the Final Partition Decree. 40

5. BECAUSE the Supreme Court was wrong in holding that the Respondents are entitled to succeed on their counterclaim merely because the Appellant had not, in his Replication, set up a claim for ius retentionis and had reserved his right to claim compensation.
- 10 6. BECAUSE, in the circumstances of this case, the Appellant was not in wrongful possession of the land, and the Appellant cannot, in Roman-Dutch law, be evicted by the Respondents, and consequently the latter's counterclaim must fail.
7. BECAUSE the judgment of the Supreme Court was wrong and the judgment of the District Court was right for the reasons stated herein.

E.F.N. GRATIAEN

EUGENE COTRAN

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CASE FOR THE APPELLANT

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