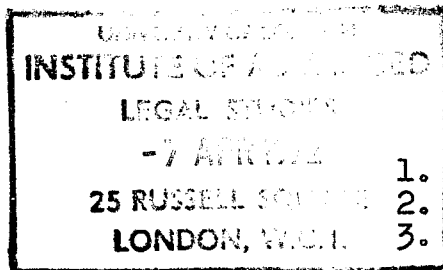


1.

IN THE PRIVY COUNCILNo.33 of 1969ON APPEAL FROMTHE SUPREME COURT OF CEYLONB E T W E E N :

CARUPPIAH SANDANAM (Plaintiff-Respondent)
Appellant

- and -

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1. MOHAMED ISAMIL MOHAMED JAMALDEEN
2. MOHAMED ISMAIL MOHAMED HANIFFA
3. UMMU RAZEENA wife of S.M.M.Mohideen
(Defendants-Appellants)
Respondents

CASE FOR THE RESPONDENTSRecord

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1. This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 14th day of February 1967, and 12th day of May 1967, allowing an Appeal from the Judgment and Decree of the District Court of Kandy, dated the 10th day of May 1963, whereby, in an action instituted by the Appellant, the said District Court ordered and decreed that the Respondents should execute a deed of transfer in favour of the Appellant for certain land described in the Plaint, at the Appellant's expense, and that they should pay his costs of the action as taxed by the Court. The said Supreme Court ordered that the Appellant's action should be dismissed with costs in both Courts and declared that the Respondents were entitled to a declaration of title to the said land and to a decree for the ejectment of the Appellant therefrom.

pp. 34, 42

pp. 26, 30

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2. It was held by both Courts below, following the Judgment of the Privy Council in the case of Abdeen v. Thahir 59 N.L.R. 385, that the agreement (P.1) upon which the Appellant sued, excluded the right of the purchaser to specific performance.

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The principal questions which arise for determination in this appeal are:

- (i) whether, as was held by the District Court, but rejected by the Supreme Court, specific performance could nevertheless be claimed because of the subsequent transactions between the parties and their legal consequences;
- (ii) whether the agreement P.1 was ever validly modified or varied by subsequent agreement; 10
- (iii) whether, upon the evidence, the Respondents were estopped from contending that they were not liable to execute a conveyance;
- (iv) whether, the Appellant had ever exercised his right of calling for a conveyance within the period specified and agreed on between the parties; 20
- (v) whether, accordingly, the Respondents were in breach of agreement at all in not having conveyed to the Appellant;
- (vi) whether, the Respondents were entitled to a declaration of title to the land described in the Plaint and to a decree for the ejection of the Appellant therefrom.

p.57

- 3. The Appellant sued upon a notarial agreement No. 7052 of the 18th day of July 1956. By this agreement the three Respondents (and their late mother Natchia Umma) agreed to sell and transfer to the Appellant, by a valid and effectual deed of conveyance, which should be prepared and executed at the cost and expense of the Appellant, the divided share of land to be allotted to them in a pending partition action No. P.1119 of the District Court of Kandy, such conveyance to be made within three months of the entering of the Final Decree in that suit. 30 40

10 The said agreement provided that the purchase price for the said divided share of land was to be Rs. 3000/-, of which Rs. 2000/- had already been paid by the Appellant to the Respondents. The balance of Rs. 1,000/- was to be paid at the time of executing the Deed of conveyance in favour of the Appellant. The Appellant was the plaintiff in the said partition action and the three Respondents were among the parties thereto.

Clauses 3 and 4 of the said Agreement provided as follows :-

p.58,
11.18-27

20 "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. 2000/-) paid as advance this day shall be forfeited to the Vendors as liquidated damages and not as a penalty.

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.2000/-) as liquidated damages and not as a penalty."

30 4. By Plaint, dated the 8th day of December 1961, the Appellant brought an action against the Respondents in the District Court of Kandy, praying

p. 7

"(a) for a declaration by Court that Plaintiff is entitled to claim specific performance of the agreement No.7052 of 18.7.56 by Defendants executing a transfer of the said land to Plaintiff at Plaintiff's expenses.

40 (b) That a date be fixed for Defendants to sign the said transfer in favour of Plaintiff and in the event of Defendants failing to do so that the Secretary of the District Court be authorised to

Record

sign the said transfer which should be valid as though Defendants had signed the same.

(c) For costs."

5. In the said Plaint, as amended on the 23rd day of August 1962, the Appellant pleaded as follows :-

- p.14, l.36 "2.By Final Partition Decree dated 18th December, 1957 Defendants and their mother, who were the 11th to 14th Defendants in D.C. Kandy Holden at Gampola No. 1119 (P) were declared entitled to the divided lot marked "E" in partition Plan No.2285A dated 31st October, 1957 made by H.D.G.Rodrigo Licensed Surveyor more fully described in the Schedule at foot, hereof, subject to Plaintiff's right to repurchase the same on the said agreement No. 7052. 10
- p.15, l.24 3.Defendant's mother died in 1958 leaving Defendants her children as her heirs-at-law and entitled to the said property subject to the terms of Deed No. 7052. 20
- 4.At Defendants' special request Plaintiff paid to them the balance sum of Rs. 1,000/- and Defendants also acquiesced in Plaintiff constructing buildings on the said land at considerable expenses from 1959-1960.
- 5.Defendants thus rendered themselves liable to transfer to Plaintiff the land described in the Schedule to the Plaint when called upon to do so, the whole consideration having been paid and the conditions to claim liquidated damages by Plaintiff having become inoperative in view of Plaintiff having built on the land with Defendants' acquiescence on the footing that the land would be transferred to Plaintiff. 30
- 6.Plaintiff called on Defendants to attend the office of Plaintiff's Proctors (Messrs. Beven and Beven) on 9th November, 40

1961 between 9 and 10 a.m. to sign the transfer of the land described in the Schedule hereof in favour of Plaintiff; but Defendants failed and neglected to do so.

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10 6A. As a matter of law Plaintiff states that Final Decree in D.C Kandy Holden at Gampola case No. 119 having been entered and Plaintiff having paid the full consideration for the execution of the transfer of lot "E" in Partition Decree and plan by defendants to plaintiff as stipulated in the said deed of agreement defendants must be decreed under the Trusts Ordinance to be holding title thereto in trust for Plaintiff, and are liable in law to execute the transfer of the said lot to Plaintiff and Defendants not entitled to maintain that Plaintiff's
20 action is barred by prescription."

6. In their Answer, dated the 23rd day of May 1962, the Respondents admitted the execution of the said agreement No. 7052 but pleaded that it had become inoperative and discharged by reason of the Appellant's failure to pay the balance consideration and purchase the said premises within three months of the Final Decree in the said case No. P.1119 in accordance with the terms of the said agreement, and that the action was not maintainable in view of the provisions of Clauses 3 and 4 of the said agreement, and further that the Appellant's claim, if any, was prescribed.

p. 9

7. In their said Answer the Respondents further pleaded that the Appellant "having failed to obtain the Conveyance in terms of the said agreement No. 7052 since 30th April, 1958 wrongfully disputing defendants' title to the said premises described in the schedule to the plaint is in wrongful possession of same to defendants' loss and damage in a sum of Rs. 2,800/-".

p.11,
11. 14-18

8. In their said Answer the Respondents prayed that the Appellant's action be dismissed, that they be "declared entitled to the said land and premises described in the said schedule to the

p.11, 11.24-33

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plaint" and that the Appellant be ejected therefrom, for judgment against the Appellant in a sum of Rs. 2,800/- being damages already sustained with further damages at Rs.50/- per month from the date thereof until the Appellant should be ejected and for costs.

p. 16

9. The Appellant in his Amended Replication, dated the 4th day of June 1962, pleaded inter alia as follows :-

p. 17,
ll. 7-25

"3. Plaintiff states that in view of the allegations in the Plaint and the terms of the deed, Defendants are legally bound to carry out specific performance as claimed in the plaint. Plaintiff further states that defendant having acquiesced in the construction of buildings at considerable expense by Plaintiff are estopped from denying Plaintiff's right to specific performance, and in no event are Defendants entitled to make any claim to the land without

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(a) refund the consideration paid to by Plaintiff

(b) compensating Plaintiff in full for the buildings he has constructed, which right Plaintiff reserves in alternative.

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4. Plaintiff further states that Defendants on several occasions during 1958 to 1961 requested Plaintiff to defer the execution of the transfer to Plaintiff, and finally in November 1961 Plaintiff's Proctors wrote to Defendants to execute the same and therefore Plaintiff's claim is not barred by prescription.

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Wherefore Plaintiff prays that Defendants claims in reconvention be dismissed with costs, that Plaintiff be given Judgment as prayed for in the Plaint, in the alternative that Plaintiff is entitled to a refund of the consideration paid (Rs.3,000/-) and payment of the sum of Rs.3,000/- and payment of the sum of Rs.2,000/- liquidated damages and for such other relief as to the Court shall seem meet."

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10. Issues were framed on the 21st day of February 1963, on which day counsel for the Appellant stated that in the event of the Court not granting the Appellant specific performance of the agreement, he reserved to himself the right to claim compensation for improvements in a separate action. The learned District Judge held that the Appellant was entitled to reserve the right to make that claim in separate proceedings.

Record
pp, 19-21

11. The case was heard on the 21st day of February 1963 and the 9th day of April 1963.

The Appellant gave evidence in support of his case testifying that he paid the Respondents and their mother Rs.2,000/- at the time of the execution of the agreement (P.l.) and the remaining Rs. 1,000/- in two instalments before the conclusion of the Partition action. He had been the Plaintiff in that action, and at the surveys and partition he had represented the Respondents and their mother (who had been the 11th to the 14th Defendants). When the surveyor had staked out and divided the land into the separate lots, the Appellant had taken possession of his own lot and also of the portion that was allotted to the Respondents and their mother, i.e. the land the subject matter of the suit. After the final decree was entered on the 18th December 1957, he put up buildings on this land, to the value of Rs. 30,000/-.

pp. 21-25

In support of his claim for specific performance the Appellant relied upon letters written by his lawyers on the 30th October 1961 to each of the Respondents calling upon them to attend the lawyers' office on the 9th November 1961 to execute the transfer to the Appellant of the land the subject matter of the suit. He added that prior to instructing his lawyers, he had written to the Respondents calling upon them to come and execute the conveyance. He had also met the 2nd Respondent and had spoken to him about the conveyance. The 2nd Respondent had said that he would come, but had failed to do so, whereupon the Appellant had written through his lawyers. The Appellant did not say how long before the 30th October 1961 it was

Record

that he had thus communicated with the Respondents, and did not identify any specific occasion prior to the 30th October 1961 when he had called upon the Respondents to execute the transfer.

p.25, l.34
p.19, l.9

No evidence was called by the Respondents. It was admitted that Natchia Umma died in 1958 and that the Respondents were her heirs.

p.26

12. On the 10th day of May 1963 the District Court gave judgment in favour of the Appellant. The Court held that it is settled law in Ceylon that 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. The Court nevertheless held that the Respondents were estopped from contending that they were not liable to execute a conveyance in favour of the Appellant and from asserting that their only obligation was the substituted obligation contained in Clause 4 of the said agreement by reason of their conduct after it was executed. There was no finding that after entry of the final decree in case No. P.1119 the Respondents held on trust for the Appellant, this contention not having been raised in argument.

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P.29, l.23

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pp.19-21
p.29, l.16-
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13. The issues framed in the case and the answers given thereto by the learned District Court Judge were as follows :-

(1) Did the plaintiff pay to the defendants a sum of Rs. 1,000/- balance consideration due on agreement 7052 prior to the entering of the final decree P.1119? Yes.

(2) Did the defendants become liable after the entering of the said final decree, to effect a conveyance in favour of the plaintiff when called upon to do so by the plaintiff? Yes.

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Record

- (3) If issues 1 and 2 are answered in favour of the plaintiff, is the plaintiff entitled to the reliefs prayed for in prayers (a) and (b) of the amended plaint? Yes.
- 10 (4) After the entering of the final decree, has the plaintiff been in possession of and built on the said lot referred to in the Partition decree? Yes.
- (5) Did the plaintiff do so with the knowledge and acquiescence of the defendants? Yes.
- (6) Does the conduct of the defendants in acquiescing in the plaintiff's possession and erecting buildings estop the defendants from denying the plaintiff's right to have a conveyance of the said property? Yes.
- 20 (7) In the event of the Court not granting specific performance to the plaintiff, is the plaintiff entitled -
- (a) to the return of the full consideration paid by the plaintiff to the defendants;
- (b) to liquidated damages in a sum of Rs. 2,000/-?
- Does not arise.
- 30 (8) After the entering of the final decree in P.1119, did the defendants hold the property in trust for the plaintiff?
- Though the question of a trust was raised in these issues, it was not argued at the trial.
- (9) If so, is the plaintiff entitled to the reliefs claimed in paragraphs (a) and (b) of the prayer to the amended plaint?

Ditto.

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(10) Does the said agreement No.7052 provide for the payment of a sum of Rs.4,000/- by the defendants by way of substituted performance?

Yes; but the provision became inapplicable by reason of the subsequent circumstances.

(11) If so, is the plaintiff entitled to claim specific performance? 10

Does not arise.

(12) Has the plaintiff failed to obtain the conveyance in respect of the said land within three months of the entering of the final decree in the Partition case No. P.1119?

The obligation was on the defendants to effect the transfer within a period of three months of the decree. 20

(13) If so, can the plaintiff have and maintain this action? Does not arise.

(14) Is the plaintiff in wrongful and unlawful possession of the said land since April, 1958. No.

(15) If so, are the defendants entitled to-

- (a) a declaration of title to the said land;
- (b) an order for ejection; and
- (c) damages? 30

Does not arise.

(16) If so, what damages?

Does not arise.

14. The District Court gave judgment for the Appellant as prayed for with costs and directed the Respondents to execute a deed of transfer in favour of the Appellant at the Appellant's expense.

15. Being aggrieved by the said judgment, the Respondents appealed to the Supreme Court of Ceylon. Record
pp. 31-34
16. The Supreme Court gave judgment on the 14th day of February 1967 allowing the Respondents' appeal and dismissing the Appellant's action with costs in both Courts, and further on the 12th day of May 1967 granting the Respondents relief on their counterclaim by declaring them entitled to a declaration of title to the land described in the plaint and to a decree for the ejectment of the Appellant therefrom. p. 34
p. 39
17. The Supreme Court held, it is submitted correctly, that:
- (1) the said agreement dated the 18th day of July 1956 clearly excluded the right of the Purchaser to specific performance, and the only obligation of the vendor, in default of his conveying the property, was the substituted obligation to refund the advance payment and to pay Rs. 2,000/- as liquidated damages: p. 35
- (b) this agreement had not been validly modified or varied by subsequent agreement: pp. 36-37
- (c) the Appellant had never exercised his right under the said agreement to demand a conveyance within the specified period of three months succeeding the entry of the Partition Decree i.e. by the 18th day of March, 1958: p. 38
- (d) upon the evidence the Respondents were not estopped from contending that they were not liable to execute a conveyance: pp. 37-38
- (e) upon the termination of the specified period of three months the Appellant had no right to seek performance of the agreement, either from the Respondents directly or through the Court: p. 38, 1.42
- (f) The Appellant had no cause of action, depending upon any refusal of the Respondents to perform their obligation under the agreement, either for a decree of specific performance or for the recovery of liquidated damages: p.38, 1.45

Record

pp. 40-41

(g) The Appellant had not set up as against the Respondents' claim in reconvention the defences of compensation for improvements and of the ius retentionis. On the contrary he had expressly reserved his claim to compensation for a future action. Accordingly the Respondents, having established their title and the fact of wrongful possession, were entitled to a declaration of title and a decree for the ejectment of the Appellant.

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p. 44

p. 50

18. By a Judgment, dated the 19th day of September 1968, and an Order, dated the 10th day of October 1968, the Supreme Court of Ceylon granted the Appellant Conditional Leave to Appeal to the Privy Council from its said Judgment of the 14th day of February 1967.

p. 53

19. On the 20th day of January 1969 the Supreme Court granted the Appellant Final Leave to Appeal.

20. By Order in Council of the 26th day of June 1970 the Respondents were granted leave to contest this appeal in forma pauperis

21. The Respondents humbly submit that this Appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the Appellant did not prove his case.

(2) BECAUSE the Respondents were not in default under the agreement P.1.

(3) BECAUSE the agreement P.1. excluded any right of the purchaser to specific performance and the exclusion of that remedy was, in the circumstances disclosed by the evidence, fatal to the Appellant's case.

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(4) BECAUSE it was for the Appellant to call on the Respondents to convey, as was conceded by the Appellant in his pleading.

(5) BECAUSE the Appellant did not call on the Respondents to convey within the time stipulated by the agreement P.1.

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- (6) BECAUSE the Appellant in his pleading and evidence relied upon the letters written by his lawyers on the 30th October 1961 to show that he had called on the Respondents to convey and he failed to show that he had called upon them so to do at any earlier date.
- (7) BECAUSE the agreement P.1 was never validly modified or varied.
- 10 (8) BECAUSE the Respondents were not estopped from contending that they were not liable to execute a conveyance.
- (9) BECAUSE the Appellant's entitlement to compensation for improvements was expressly reserved by him for a separate action and accordingly did not rise for determination in the present proceedings.
- 20 (10) BECAUSE the Appellant had no right to remain upon the land and the Respondents were entitled to a declaration of title thereto.
- (11) BECAUSE the Judgment of the Supreme Court was right for the reasons therein stated.

~~MONTAGUE CORONON~~
DAVID HANDS

No. 33 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

BETWEEN:

CARUPPIAH SANDANAM (Plaintiff)
Appellant

- v -

MOHAMED ISMAIL
MOHAMED JAMALDEEN
and OTHERS (Defendants)
Respondents

CASE FOR THE RESPONDENTS

T.L. WILSON & CO.,
6/8 Westminster Palace Gardens,
LONDON, S.W.1.