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SUPREME COURT OF MAURITIUS

RECORD OF PROCEEDINGS

APPEAL IN THE PRIVY COUNCIL

Between :

CHORAMUN JHOBOO

Applicant

v/s

ELIAS IBRAHIM COOWAR

Respondent

SUPREME COURT OF MAURITIUS

RECORD OF PROCEEDINGS

APPEAL IN THE PRIVY COUNCIL

Between :

CHORAMUN JHOOB

Applicant

v/s

ELIAS IBRAHIM COOWAR

Respondent

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IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

In re :

Chooramun JHOOB, of N. De

Passin

Applicant

v/s

Elias Ibrahim COOWAR,

Respondent

RECORD OF PROCEEDINGS

PART I

IN THE SUPREME COURT OF MAURITIUS

In the matter of :-

Elias Ibrahim Coowar, a Proprietor.

Plaintiff

v/s

Chooramun Jhoboo, a Proprietor, of N. Decotter Street, Beau-Bassin, an employee of the Life Insurance Corporation of India, Port-Louis.

Defendant

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STATEMENT OF CLAIM

10. In virtue of a deed under private signatures dated the 29th August 1973, the defendant sold to the plaintiff :

- (i) a portion of land situate in the District of Plaines Wilhems, place called Curepipe, Lees Street, of the superficial extent of 64 $\frac{3}{4}$ perches bounded as per memorandum of survey with plan thereto annexed drawn up by Mr. A. E. Tyack, Sworn Land Surveyor, dated the 6th March, 1953 duly registered in Reg : L. S. 19 No. 1962, as follows :- On one side by the land of Mrs. W. Griffiths on a line broken in two parts measuring respectively 94 $\frac{1}{2}$ feet and 88 feet, on the second side by the land of Mr. Serge Henry, on 152 feet between two boundaries stones G.A., on the third side by a private exit road of 162 $\frac{1}{4}$ feet and on the fourth and last side partly by the surplus of the land of the vendors and partly by an

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exit of 18 feet large on 147 feet 3 inches;

- (ii) a portion of land of the extent of 42 square perches situate in the District of Plaines Wilhems place called Curepipe and bounded as per memorandum with plan thereto annexed drawn up by Mr. Leon L. Michel Ange Siou, a Sworn Land Surveyor dated the 5th March, 1953 duly registered in Reg : L.S. 19 No. 1922 as follows :- on one side by the Chemin Beugeard, now Lees Street, on 140 feet, on the second side by the surplus of the land of Mrs Willy Griffiths on 116 feet 6 inches, from a boundary stone marked G.H to be found at 2 feet 8 inches from the border of Lees Street, on the third side by the portion which Mrs. Michel Pougnet intends to purchase on 147 feet 3 inches and on the fourth side by a private road (chemin réservé) on 120 feet together with the building of eight rooms in wood under shingles and corrugated iron sheets with a glazed verandah in front the said building is to be found on the first portion of land, together with the installation for a share of the water of the Mare Aux Vacoas, and the electric installations and all its appurtenances and dependencies thereof generally whatsoever without any exception or reserve.

20. The said sale was made for and in consideration of an agreed price of Rs. 85,000 out of which the Plaintiff paid to the defendant the sum of Rs. 20,000 and undertook to pay the balance i.e. Rs. 65,000 on the 15th

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October, 1973.

3o. It was further agreed that the above sum shall be paid upon proof that the said properties are not leased and are not under proceedings of real seizure, and is free from any encumbrances including fixed and/or floating charges.

4o. It was further agreed that the transfer of ownership shall take place on the signature of the authentic deed which was to be drawn by Mr. Notary B. Maigrot.

5o. Prior to and on the 15th October, 1973, the plaintiff was ready
10 and willing to sign the authentic deed and to pay the balance of the sale price.

6o. On the 21st December, 1973 the defendant caused the following
mise en demeure to be served on the Plaintiff :-

MAURITIUS TO WIT :- At the suit instance and request of Mr. Chooramun Jhoboo, a proprietor electing his legal domicile in the office of the undersigned attorney at Law, situate at No. 4 Sir Virgil Naz Street, Port-Louis, take notice for that :-

1. On the 29th day of August, 1973, you the undersigned party agreed to purchase from the abovenamed party the following portions of land, viz : FIRST : a land of the extent of 64 3/4 perches situate at Curepipe,
20 Lees Street, Plaines Wilhems, and the second a land of the extent of 42 sq. perches situate at Curepipe, Plaines Wilhems, the whole morefully described as per deeds transcribed in Vol : No. 2 and Vol. 940 No. 1, for and in consideration of the sum of Rs. 85,000.

2. It was further agreed that the authentic deed witnessing the

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sale will be drawn up when the whole amount would have been paid.

3. NOW TAKE FURTHER NOTICE THAT you are hereby required, called upon and summoned to be and appear before Mr. Bertrand MAIGROT at his office situate at Jules Kœnig Street, Port-Louis, on MONDAY the 14th day of January, 1974 at 11 a.m. then and there to pay all sum or sums still due to the abovenamed party, if any, and to sign the authentic deed or deeds witnessing the said sale.

WARNING you that in case you fail to comply with the requirements and exigencies of this present notice Mise en demeure and to pay the costs 10 thereof amounting to Rs. 300.— (subject to taxation) the abovenamed shall take against you such legal steps as he may be advised especially of claiming such damages as he may have incurred as a result of your non-compliance with these presents.

Dated at Port-Louis, this 17th December 1973.

sd.) N. Abbasakoor, Of No. 4 Sir Virgile Naz Street, Port-Louis,
Plaintiff's Attorney

To/ ELIAS IBRAHIM COOWAR, of Higginson Street, Curepipe.

The foregoing Notice mise en demeure was duly served by me the 20 undersigned Usher on the abovenamed Elias Ibrahim Coowar by leaving a true and certified copy thereof with him in person found at Curepipe Road.

On Friday the 21st December, 1973.

(sd.) S. BEEHARRY.

Usher District Court of Curepipe.

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Registered at Mauritius on the 28th December, 1973 Reg. A 386
No. 10854. Received one rupee and five cents — fixed duty + 5% Surcharge.

(sd.) F. JEAN-PIERRE.

7o. On the 14th January, 1974, the plaintiff appeared before Mr. Notary Bertrand Maigrot ready and willing to pay the balance of the sale price and to sign : the authentic deed but the defendant failed to appear before the notary. A memorandum of non appearance was drawn up a copy of which is annexed to the said statement of claim.

8o. The plaintiff avers that he has always been ready and willing
10 to sign the authentic deed of sale and that the defendant has so far failed to sign the said deed of sale.

9o. Through defendant's failure to sign the deed the plaintiff has suffered prejudice valued at Rs. 5,000.—

10o. The plaintiff therefore prays from this Honourable court for a judgment :-

A. Declaring that the plaintiff is the lawful owner of the property under reference;

B. Prohibiting the defendant from selling the said property to any third party, and

20 C. Condemning and ordering the defendant :-

(a) to appear before Mr. Notary Bertrand Maigrot on a date to be fixed by the Honourable Court then and there to cash the balance of his sale price and to sign the authentic deed of the sale of the above properties to the plaintiff.

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- (b) Decreeing that in default of the defendant appearing before the notary within the delay fixed by the Court, the plaintiff shall be entitled to transcribe the judgment of the above Court and deposit; the balance of the sale price with the cashier of the Supreme Court such judgment duly transcribed to be a good and valid title to the Plaintiff.
- (c) condemning and ordering the defendant to pay to the plaintiff the sum of Rs. 5,000 as damages. With Costs.

YOU the abovenamed and styled Defendant are hereby required,
10 called upon and summoned to cause an appearance to be entered for you in the Supreme Court of Mauritius by siling in the Registry of the said Court within five DAYS from the service hereof upon you a statement of Defence & in answer to the present statement of Claim.

Issued by the abovenamed plaintiff electing his legal domicile in the office of the undersigned attorney at law situate at No. 50 Sir William Newton Street, Port-Louis.

Nota :- If the above claim is admitted and the costs thereof valued at Rs. 1,000 (subject to taxation) is admitted within the delay of four days from the service hereof upon you all further proceedings shall be stayed.

20 Dated at Port-Louis, this 26th day of January, 1974.

(sd.) S. Veerasamy

Of No. 50 Sir William Newton Street, Port Louis, Plaintiff's Attorney.

To/

Chooramun Jhoboo, an Insurance Agent, of N. Decotter Street,

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Beau-Bassin or at Life Insurance Corporation of India, Port-Louis.

No service on 2.3.74 by usher A. Nandoo.

Personal Service by Usher G. Poon on 4.3.74.

Reg : DH 387 No. 2900 & Reg : DH 387 No. 2901.

ANNEXURE TO STATEMENT OF CLAIM :

L'AN Mil neuf cent soixante quatorze, le lundi quatorze janvier
à onze heures du matin, en l'étude du notaire soussigné.

Et pardevant Me. Bertrand Maigrot, notaire au Port-Louis, Ile
Maurice, soussigné.

A COMPARU

Monsieur Elias Ibrahim Coowar, majeur, propriétaire, demeurant
à Curepipe rue Higginson.

Lequel a dit ce qui suit :-

Suivant exploit de Monsieur S. Beeharry, Huissier à la Cour Suprême
de cette île en date du vingt et un Décembre mil neuf cent soixante treize,
enregistré au Reg : A 386 No. 10854, et qui est demeuré annexe aux présentes
après due mention par le notaire soussigné Monsieur CHOORAMUN JHO-
BOO ayant fait élection de domicile en L'Etude de Me. O. N. Abbasakoor,
avoué, 4 rue Sir Virgile Naz, Port-Louis, à ces jour, heure et Lieu en L'Etude
du notaire soussigné à l'effet de 1o) signer un contrat authentique constatant
vente par Monsieur CHOORAMUN JHOBOO sus nommé à Monsieur
Elias Ibrahim Coowar de deux portions de terrain le premier de la contenance
de soixante quatre perches trois quarts située à Curepipe Rue Lees, et le
second de la contenance de quarante deux perches située aussi à Curepipe

1974
Le 14 Janvier
Procès-verbal
non-comparution
dressé à la
requête de
Monsieur
Elias Ibrahim
Coowar

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plus amplement désignée suivant titres transcrits au Vol. 940 No. 2 et au Vol. 940 No. 1, moyennant un prix de quatre vingt cinq mille roupies et 2o) de payer toute somme restant due sur le dit prix de vente.

En conséquence ledit Monsieur Elias Ibrahim Coowar a requis le notaire soussigné de lui donner acte de sa comparution et de prononcer défaut contre ledit Monsieur Chooramun Jhoboo dans le cas où ce dernier ne comparaitrait pas.

Et après lecture faite le comparant a signé avec le notaire, sd.) I. Coowar & B. Maigrot.

10 Et attendu qu'il est midi et quarante cinq minutes et que ledit Monsieur CHOORAMUN JHOBOO n'a point comparu et ne s'est pas fait représenter, le notaire soussigné a prononcé défaut contre lui et a donné acte audit Monsieur ELIAS IBRAHIM COOWAR de ses dires et de sa comparution.

De tout ce qui précède, il a été dressé le présent procès verbal.

Et après lecture faite, le comparant a signé avec le notaire.

sd.) E. I. Coowar et Bertrand Maigrot

Reg. A 386 No. 1220.

ANNEXURE

20 Notice Mise en demeure served upon the plaintiff at the request of the Defendant : not copied, it being the same as the one already copied at page 3 under paragraph 6 of the Statement Of Claim.

STATEMENT OF DEFENCE

1o. The Defendant admits paragraphs 1, 2, 3, 4 and 6 of the State-

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ment Of Claim and avers that :

- a. that one of the conditions was to the effect that should the defendant refuse to sign the said deed, he would have to refund to the plaintiff the sum paid on the purchase price together with a sum of Rs. 20,000 as damages and to which the defendant is ready and willing to comply. The plaintiff is therefore called upon forthwith to inform the defendant of his intention as to whether he is prepared to accept such refund, damage and costs as at this date.
- 10 b. that on the 14th January, 1974, the defendant being bed ridden could not call on the notary public.

2o. The defendant denies paragraphs 5 and 9 and avers that in view of the averment contained in sub-paragraph (a) of paragraph 1 above, the plaintiff is not entitled to the prayer and moves that the plaintiff's action be otherwise dismissed with costs.

Under all legal reservations.

Dated at Port-Louis this 12th day of August, 1974.

(sd.) O. N. Abbasakoor.

Defendant's Attorney.

20 To the Plaintiff abovenamed...

Acknowledgement of service of the foregoing statement of defence by Mr. Attorney S. Veerasamy on the 5th September, 1974.

Reg. A 388 No. 3781.

PART I**REPLY.**

10. The Plaintiff refuses to admit the averments mentioned in para. 2 of the Statement of Defence and put the defendant to the proof thereof.

In any event :

- a) the sale of the property by defendant to plaintiff has become perfect and is valid to all intents and purposes, any clause in the deed notwithstanding.
- b) the plaintiff is also entitled by law to move in terms of the prayers of the statement of claim.
- 10 c) further, the defendant having himself summoned the plaintiff to appear before the notary to sign the authentic deed of sale, is estopped now from (1) invoking his own turpitude, and (2) asking for the cancellation of the sale upon payment of the sum of Rs. 20,000.

20. The plaintiff denies para. 2 of the statement of defence.

30. On the whole plaintiff maintains all the facts, matters and things as set out in the statement of claim and moves for judgment in terms of this prayer.

Under all legal reservations.

20 Dated at Port Louis this 9th day of December, 1974.

(sd.) S. Veerasamy.

Plaintiff's attorney.

To Mr. O. N. Abbasakoor, attorney at Law.

Acknowledgment of service by Mr. O. N. Abbasakoor, defendant's

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Attorney on the 10th of December, 1974.

Reg. A 390 No. 6279.

NOTICE OF TRIAL, dated 10th December, 1974, Reg. A. 390
No. 6281. duly served on Mr. O. N. Abbasakoor — not copied.

Cause List dated 10.12.74 Reg. A. 390 No. 6280, not copied.

Court Circular fixing case to 31.5.76 for mention.

10

Case called on 31.5.76 for mention and fixed to 9, 10 and 11 Nov. 76
for hearing on merits.

Court Circular changing hearing from 9, 10 and 11 Nov. 76 to 16,
17 and 18 November, 1976 for hearing on merits.

PLAINTIFF'S NOTICE OF FACTS :

TAKE NOTICE THAT the plaintiff shall at the hearing of the
above matter prove the following facts by oral evidence unless the same
20 be admitted by you in due course of Law.

1o. Prior to and on the 15th October, 1973, the plaintiff was ready
and willing to sign the authentic deed of sale and to pay the balance of the
sale price.

2o. Complying with the requirements of a Notice mise en demeure

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(reg. A 386 No. 10854) served on the plaintiff the latter appeared before Mr. Notary Bertrand Maigrot, ready and willing to pay the balance of the sale price and to sign the authentic deed, but the defendant failed to appear before the Notary. A memorandum of non appearance was drawn, a copy of which is annexed to the statement of claim.

3o. The plaintiff has always been ready and willing to sign the authentic deed of sale and the defendant has failed to sign the deed of sale.

4o. The plaintiff has suffered damages which he values at Rs. 5,000.

5o. The sale of the property by the defendant to plaintiff has
10 become perfect and is valid to all intents and purposes, any clause in the deed notwithstanding.

6o. The plaintiff is entitled to move in terms of the prayers of the statement of claim.

7o. The defendant having himself summoned the plaintiff to appear before the Notary to sign the authentic deed of sale is estopped now from :

(1) invoking his own turpitude.

(2) asking for the cancellation of the sale upon payment of the sum of Rs. 20,000.—.

20 **AND TAKE FURTHER NOTICE** that the plaintiff shall at the hearing of the above matter call the following witnesses to prove the above facts and to disprove those intended to be proved by you, viz :-

1o. Plaintiff himself,

2o. Mr. Notary Bertrand Maigrot.

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Under all legal reservations, especially of calling other witnesses if need be.

Dated at Port-Louis this 4th November, 1976.

(sd.) S. Veerasamy.

Plaintiff's Attorney.

To the defendant abovenamed.....

Acknowledgment of service of the foregoing By Mr. Attorney O. N. Abbasakoor on 4.11.76.

Reg. A. 400 No. 4688.

10

DEFENDANT'S NOTICE OF FACTS

TAKE NOTICE that the defendant shall at the hearing of the above matter prove the following facts by oral evidence unless same be admitted by you within the delay prescribed by law and to disprove those intended to be proved by the plaintiff.

10. That one of the conditions was to the effect that, should the defendant, refuse to sign the said deed, he would have to refund to the plaintiff the sum paid on the purchase price together with a sum of Rs. 20,000.— as damages and to which the defendant is ready and willing to comply. The plaintiff is therefore called upon forthwith to inform the defendant of his intention as to : whether he is prepared to accept such refund damages and Costs.

20. That on the 14th day of January, 1974, defendant being ill could not call on the Notary Public.

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3o. That in view of the averment contained in sub-paragraph (a) of paragraph 1 of the statement of claim the plaintiff is not entitled to the prayer.

TAKE FURTHER NOTICE that the witness whom the defendant intends calling at the hearing of the above matter in order to prove the facts set out above and to disprove those intended to be proved by the plaintiff are the following :-

1o. Defendant himself.

Under all legal reservations especially of calling other witnesses if need be.

10 Dated at Port-Louis, this 5th November, 1976.

sd.) O. N. Abbasakoor.

Defendant's Attorney.

To the Plaintiff abovenamed.....

Acknowledgment of service of the foregoing by Mr. Attorney S. Veerasamy on the 5.11.76.

Reg. A 401 No. 605.

TENDER OF EVIDENCE

By Plaintiff : of a deed under private signature dated 29.8.73
20 Reg. C. 269 No. 5760.

**DOCUMENT «A» PRODUCED IN COURT on 16th November, 1976
by Plaintiff**

LES SOUSSIGNÉS : Monsieur CHOORAMUN JHOBOO, ma-

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jeur, employé à la Compagnie « The Life Insurance Corporation of India », demeurant au quartier des Plaines Wilhems, lieu dit Beau Bassin, *D'UNE PART* et Monsieur ELIAS IBRAHIM COOWAR, Majeur, propriétaire demeurant à Curepipe, Rue Higginson, *D'AUTRE PART*. ONT DIT ARRETÉ ET CONVENU DE CE QUI SUIT : Monsieur Chooramun Jhoboo susnommées est disposé à vendre sous les conditions ci-après rapportées au sieur Elias Ibrahim Coowar soussigné d'autre part qui l'accepte et qui s'oblige d'acquérir

1o. Une portion de terrain située au quartier des Plaines Wilhems lieu dit Curepipe Rue Lees de la contenance de soixante quatre perches trois quarts et bornée d'après un procès verbal d'arpentage avec plan figuratif y joint dressé par Monsieur A. A. Tyack, arpenteur juré, le six mars mil neuf cent cinquante trois enregistré au Reg : L. S. 19 No. 1962 comme suit : d'un côté par le terrain de Madame W. Griffiths sur une ligne brisée en deux parties mesurant respectivement quatre vingt quatorze pieds et demi, et quatre vingt huit pieds, du second côté par le terrain de Monsieur Serge Henry sur cent cinquante deux pieds entre deux bornes G.A., du troisième côté par un chemin de sortie réservé sur cent soixante deux pieds et quart, et du quatrième côté, partie par le surplus du terrain de vendeur et partie par une sortie de dix huit pieds de large sur cent quarante sept pieds

20 trois pouces. Et 2o. Une portion de terrain de la contenance de quarante deux pieds carrés située au quartier des Plaines Wilhems lieu dit Curepipe et bornée d'après un procès verbal d'arpentage avec plan figuratif y joint dressé par Monsieur Léon L. Michel Siou, arpenteur juré le cinq mars mil neuf cent cinquante trois enregistré au Reg. L. S. 19 No. 1922 comme suit :

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d'un côté par le chemin Beugeard aujourd'hui Rue Lees sur cent quarante pieds, du second côté par le surplus du terrain de Madame Willy Griffiths sur cent seize pieds six pouces, d'une borne marquée G. H. se trouvant à à deux pieds huit pouces du bord de la rue Lees, du troisième côté par la portion de Madame Michel Pougnet à dessein d'acquérir sur cent quarante sept pieds trois pouces et du quatrième côté par un chemin réservé sur cent vingt pieds. Ensemble une maison de huit pièces en bois sous bardeaux appentis sous tôle avec varangue vitrée devant sous tôle y existant sur le terrain ci-dessus décrit sous le titre 1o. ainsi que les installations faites pour l'eau

10 de la Mare aux Vacoas et pour la lumière électrique y attachées et généralement tout ce qui peut en dépendre ou faire partie sans aucune exception ni réserve et sans plus ample désignation l'acquéreur déclarant bien connaître l'objet de son acquisition et en être satisfait. Le soussigné d'autre part aura la jouissance dudit bien à compter du jour de la signature du contrat authentique régularisant ces présentes, mais la dite vente étant faite sous la condition suspensive du paiement intégral du prix ci-après stipulée dans le délai ci-après fixé, la transmission de propriétés subordonné au paiement intégral ce prix dans ledit délai et à la passation d'un contrat authentique comme ci-après stipulé : **PROPRIETE :**

20 Le comparant d'une part est propriétaire du bien ci-dessus décrit et présentement vendu suivant titre transcrit au Vol. 940 No. 2 et Vol. 940 No. 1 respectivement.

PRIX. La vente dont s'agit sera faite pour et moyennant le prix principal de quatre vingt cinq mille roupies sur lequel le soussigné d'une part

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déclare et reconnaît avoir à l'instant reçu et touché du soussigné d'autre part la somme de vingt mille roupies. DONT D'AUTANT QUITTANCE. Quant au solde du dit prix de vente s'élevant à la somme de soixante cinq mille roupies, le soussigné d'autre part s'engage et s'oblige à le payer au soussigné d'autre part, qui l'accepte ou à ceux de ses droits ou fondés de ses pouvoirs en un seul terme le quinze octobre mil neuf cent soixante treize en la demeure du dit vendeur domicile élu à cet effet et ce sans intérêts, étant bien convenu entre les parties que le solde dudit prix de vente sera payable sur la preuve de la régularité du titre de Monsieur Choramun Jhoboo et sur justification
10 de ce que le susdit bien n'est pas loué à bail, n'est sous le coup d'aucune saisie et est franc et quitte de toutes charges (floating ou fixed) et inscription généralement quelconque ou sur main levée de toutes celles pouvant le grever.

CONDITIONS.

1o. Qu'aucune partie du prix ne pourra être payé moyennant subrogation au profit du tiers quelconques.

2o. que le soussigné d'autre part à moins qu'il ne se soit entièrement libéré de son prix d'acquisition en capital ne pourra passer vente de dit bien ou de céder son droit de l'acquérir à quiconque sans le consentement exprès et part écrit du soussigné d'Une part et dans ce cas le nouvel acquéreur sera
20 soumis à toutes les conditions énoncées aux présentes.

3o. Qu'en cas d'inexécution ou de violation par le soussigné d'autre part d'une des conditions ci-dessus énoncées comme aussi en cas de non paiement du susdit solde de prix à l'échéance sus fixé, les présentes seront considérées comme nulles de plein droit et ce par le seul défaut de paiement

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dudit solde de prix ou d'inexécution ou de violation de l'une quelconque des dites conditions si bon semble au soussigné d'une part et huit jours après une simple mise en demeure adressée au soussigné d'autre part aux frais de ce dernier et restée sans effet. En ce cas le soussigné d'autre part devra livrer immédiatement ledit bien au soussigné d'une part qui en cas de difficultés de la part du soussigné d'autre part en reprendre possession au moyen d'un writ Habere Facias possessionem délivré aux frais de soussigné d'autre part par l'un des juges de la Cour Suprême de cette Ile en Chambre. Toutes sommes versées par le soussigné d'autre part au soussigné d'une part resteront acquise
10 au dit soussigné d'une part à titre d'indemnité sans qu'il soit tenu à restitution de toutes sommes encourues par le soussigné d'autre part sur le dit bien.

40. Que lorsque le soussigné d'autre part aura intégralement payé le dit solde de prix en capital, il sera dressé un contrat authentique par les soins de Me. Bertrand Maigrot, notaire choisi d'un commun accord par les parties qui déclarent entendre subordonné au paiement intégral du prix d'acquisition et à la passation du dit contrat de vente, la perfection du contrat et la transmission de propriété. Et en cas de refus par le soussigné d'une part de signer le dit contrat de vente, le dit soussigné d'une part aura à rembourser au soussigné d'autre part toutes sommes versées par ce dernier et il aura à
20 payer une somme de vingt mille roupies comme dommage et intérêts. Que le solde du dit prix de vente sera indivisible entre les héritiers ou ayants droits ou autres représentants de l'acquéreur ainsi que l'autorise l'article 1221 du Code Civil.

Déclarent les soussignés bien connaître la loi sur l'enregistrement

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(ordonnance No. 26 de 1852) et que le prix sus fixé représente la valeur actuelle et réelle du bien ici vendu et se bien connaître et certifier leur identité reciproque.

Déclare le soussigné d'une part qu'il n'est pas et n'a jamais été marié civilement, qu'il n'est pas tuteur et que le bien ici vendu est loué à bail pour une période de cinq années consécutives avec faculté de renouvellement pour cinq ans et pour un loyer mensuel de cent cinquante roupies à Mr. B. Ramphul et arrive à l'expiration le trente avril mil neuf cent soixante quatorze, n'est sous le coup d'aucune saisie et n'est grevé d'aucune inscription et que les taxes et autres impositions incombant au dit bien ont été acquittés
10 jusqu'au trente juin mil neuf cent soixante quatorze.

Pour l'exécution des présentes les parties élisent domicile en leurs sus dites demeures.

Fait triple et de bonne foi à Port-Louis, Ile Maurice ce vingt neuf août mil neuf cent soixante treize.

Approuvé (sd.) E. I. COOWAR

Approuvé (sd.) C. JHOBOO

Reg. C. 269 No. 5760, Transcribed in Vol. 122 No. 50.

DOCUMENT « B » Not copied it being the same as the annexure to the statement of claim i.e. Record of default to appear before Mr. Notary B.
20 Maigrot.

Before the Hon. W. H. Garrioch, Senior Puisne Judge.

H. Moollan, Q.C., for Plaintiff in first case and appellant in 2nd Case.

P. Dabee for defendant in 1st Case and Respondent in 2nd Case.

Moollan, Q.C., states that after a conversation he had with his

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friend Dabee it is agreed that the facts as set out in the statement of claim are not contested and that these facts which are not admitted are not relevant to the point of law in issue.

Dabee confirms the above statement.

Moollan, Q.C., makes a summary of the case in the course of which he produces a deed, a procès verbal de non comparution (docs. A & B respectively).

Moollan, Q.C., argues :

One has to go to the basic principle in order to be able to find out
 10 the rights of the parties. He Quotes Encyclopédie Dalloz, Verbe Promesse de Vente — 1951. Edn., wherein the author analyses the different types of « promesses de vente », the principle was applied in the case of Azumtalby v/s Gauhee, M. R. 1959 p. 18. He submits that in our system of law in so far as the contracts are concerned, the society and our law want that contracts should be fulfilled and that in so far as it is materially and legally possible, the endeavour of all persons and even the Court of Law is to obtain the fulfilment of the contract.

Gaffoor v. Desbro S.C.R. 15173. Judgt. delivered on 20.8.71.

Lalou — Responsabilités Civiles — 1962 — 6th Edn. Note 64 p. 36.

20 Mazeaud — Vol. III 5th Edn. p. 433 onwards Notes 2302-2315.

Bearing in mind the cardinal principle of the whole law of contracts and in so far as it is materially and legally possible it is the execution of the contract which should be applied in a case of this nature wherein the intention of the parties is a sale.

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He further submits that by looking at the contract and its purport, unless and until it is shown that it is impossible by reason of an objection, of « d'ordre public » or « d'ordre moral » is the execution en nature which should apply.

He goes on to submit that ex-facie the Statement of Claim of the Plaintiff is entitled to judgment in terms of his statement of claim.

He also submits that there is no factor to the notice of the Court which would change that particular state of things and compel the plaintiff to accept a « réparation par équivalence ».

10 Even if he were to interpret the clause invoked in the sense most favourable to the defendant, there are two unsurmountable difficulties in his way, viz :- 1) factual and 2) legal.

FACTUAL : He submits that if that particular clause gave to the defendant an option to opt out of the contract, by refusing to sign, the moment he caused a mise en demeure to be served he realised his option and he cannot go back on it. Had the plaintiff failed to turn up before the notary, the contract would have been annulled and the Defendant would have forfeited the sum of Rs. 20,000.— paid in by the plaintiff.

(1) **The effect of such a clause :-**

20 Quotes : Répertoire Pratique, Verbe Obligation notes, 88 to 100.

There is a valid promesse de vente and one of the parties says that if he decides not to sign he will pay back, it is an event which depends simply and purely on the will of that party, he submits that the condition is in itself

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Dalloz Code Annoté — Nouveau Code Civil — art. 1152, notes 3, 9, 10 & 18. Art 1654 note 201.

He finally submits that the defence is raised from within document “A” and that the sum of Rs. 20.000.— as damages is offered as provided for in the document and he moves that Case be dismissed with Costs.

Moollan, Q.C., rejoins :

No money has been tendered, there has been only an offer as per statement of defence.

The plaintiff’s submission is that it is a « promesse de vente soumis
10 à des modalités ». He submits that the fact that document “A” speaks of « disposé à vendre » does not make any difference at all as it has not been made an issue, para. 1 of the statement of claim has been admitted.

Refers to note 2 of the art. 1152 and submits that the parties having determined the amount of « dommages par équivalence » it does not change the basic principle of law that the execution must be « en nature ».

Fuzier-Hermann, Code Annoté—1930 Edn. art. 1228. No. 7.

To a question from Court, Moollan, Q.C., states that the damages claimed in the statement of claim are in the nature of damages «supplémentaires à l’exécution en nature ».

20 As far as the application for appointment of a judicial sequestrator Moollan, Q.C., states that there has been an undertaking by defendant that he will not dispose of the properties until the case is over so that the Court will have to adjudicate only on the question of costs in that case. If the Court finds that judgment should go in favour of the plaintiff then the Costs

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in that case will be awarded against defendant. If the Court finds that judgment should go in favour of defendant then the Court will have to find out whether the application was unjustified.

Court reserves judgment.

(sd.) O. A. KHODADIN

for Master and Registrar.

Minutes of Proceedings in Court for Wednesday the 2nd February

Before Hon. W. H. Garrioch, Senior Puisne Judge.

10 18331 E. J. Coowar v. C. Jhoboo.

 19093 E. J. Coowar v. C. Jhoboo

H. Moollan, Q.C., appears for Plaintiff in the first Case and applicant in the second Case.

His Lordship reads the judgment of the Court (filed of record) in favour of the plaintiff in terms of the order made. Defendant to pay the costs of the main case; the court makes no order as to the costs of the motion (2nd Case).

(sd.) F. D. FRANCIS

For Master and Registrar.

20

JUDGMENT

The parties have at the hearing stated that they were not calling any witness as the facts which were not admitted were not relevant to the issues which they proposed to submit for the decision of the Court. The

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success or failure of this action has, as a consequence been made to depend essentially upon the construction which the Court will place on a deed under private signatures signed by the parties on August, 29th 1973, and upon the effect which the Court will find should be ascribed to it, in the light of the undisputed facts.

In view of their importance, the terms of that deed must be set out in same detail. First, the opening part which reads :-

Les soussignés : Monsieur Chooramun Jhoboo d'une part; et Monsieur Elias Ibrahim Coowar ... d'autre part; ont dit arrêté et convenu
10 de ce qui suit; Monsieur Chooramun Jhoboo sus-nommé est disposé à vendre sous les conditions ci-après apportées au sieur Elias Ibrahim Coowar, soussigné d'autre part qui l'accepte et qui s'oblige d'acquérir.

1o.

There follows the description of certain immovable properties subject matter of the agreement, « et généralement tout ce qui peut en dépendre ou faire partie sans aucune exception ni réserve et sans plus ample désignation, l'acquéreur déclarant bien connaître l'objet de son acquisition et en être satisfait ». The deed then proceeds.

Le soussigné d'autre part aura la jouissance dudit bien à compter
20 du jour de la signature du contrat authentique régularisant ces présentes, mais ladite vente étant faite sous la condition suspensive de paiement intégral du prix ci-après stipulée dans le délai ci-après fixé, la transmission de propriété est subordonnée au paiement intégral de ce prix dans ledit délai et à la passation d'un contrat authentique ci-après stipulé...

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Prix. La vente dont il s'agit sera faite pour et moyennant le prix principal de quatre vingt cinq mille roupies, sur lequel le soussigné d'une part déclare et reconnaît avoir à l'instant reçu et touché du soussigné d'autre part, la somme de vingt mille roupies.

The deed next makes provision for the payment of the balance of the sale price on October, 15, 1973, and sets forth certain conditions which are imposed on the purchaser and then goes on :-

40. Que lorsque le soussigné d'autre part aura intégralement payé ledit solde de prix en capital, il sera dressé un contrat authentique par les soins de Me. Bertrand Maigrot, notaire choisi d'un commun accord par les parties qui déclarent entendre subordonner au paiement intégral du prix d'acquisition et à la passation dudit contrat de vente, la perfection du contrat et la transmission de propriété. Et en cas de refus par le soussigné d'une part de signer ledit contrat de vente, ledit soussigné d'une part aura à rembourser au soussigné d'autre part toutes sommes versées par ce dernier et il aura à payer une somme de vingt mille roupies comme dommages et intérêts.

It is not contested that at the time the payment of the balance of sale price was due to be made the plaintiff was ready to comply with his obligation under the deed. On December, 21, 1973, the defendant caused a notice to be served on the plaintiff requiring him to appear before Mr. Notary Maigrot on January, 14, 1974, to pay the balance of the sale price and to sign the authentic deed of sale as covenanted by him. On the appointed date, the plaintiff duly appeared before the notary, ready and willing

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to conclude the sale, but the defendant failed to attend. (he avers that he was bed-ridden on that date). The notary drew up a memorandum recording the presence of the plaintiff and the non-appearance of the defendant.

Subsequently, the plaintiff entered the action praying the Court (1) to declare that he is the lawful owner of the properties in suit (2) to prohibit the defendant from selling the properties to a third party, (3) to order the defendant to appear before notary Maigrot on a specified date for the purpose of cashing the balance of his sale price and signing the authentic deed of sale, and, in case of non-compliance with that order to decree that the plaintiff
10 is entitled to transcribe the judgment of the Court and deposit the balance of the sale price with the cashier of the Court, such judgment duly transcribed to be a good and valid title to the plaintiff, and (4) to condemn the defendant to pay Rs. 500.— as damages.

The defendant takes his stand on the clause of the agreement providing for the possibility of his refusing to sign the authentic deed of sale. His contention is that all the plaintiff is entitled to obtain in such an event is the reimbursement of the sums paid by him and Rs. 20,000.— as damages, which moneys the defendant has offered and is ready and willing to pay to the plaintiff.

20 The plaintiff's case is that the contract entered into by the parties is in its nature and effect a promise of sale (« promesse de vente ») and that, as promisee, he has the right, in law, to elect between insisting on the performance of the promise and claiming damages for breach of contract. He submits that the clause relied upon by the defendant has in no way affected

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that right.

The questions which arise for decision are, in the order in which I propose to consider them : (1) what is the proper qualification to be attributed to the contract entered into by the parties ? (2) what is the effect of such a contract and the rights of the parties under it ? (3) what is the nature of the clause relied upon by the defendant ? and (4) how are the rights of the plaintiff affected by that clause ?

I may note here, by way of preamble, that the first three questions depend upon what the Court will find was the true intention of the parties
10 to the deed produced, and that it is for the Judge to determine the true nature of the covenant independently of any name by which the parties may have chosen to designate it.

Question (1) offers no difficulty. It results plainly from the expressions used in the first extract quoted from the deed that the agreement is what is called (perhaps misnamed) a « promesse synallagmatique de vendre et d'acheter » of the kind described in these notes from Dalloz, Encyclopédie Juridique, Répertoire de droit civil, 2ème edn. Vo. Promesse de vente :-

166.— La promesse réciproque de vente et d'achat est celle par laquelle les parties s'engagent toutes deux à la réalisation d'un autre acte :
20 l'acte de vente qui aura celui-ci un caractère définitif. De ce point de vue, elle a comme la promesse unilatérale le caractère d'une convention préliminaire et elle est très répandue sous l'appellation de *compromis*, lorsque l'objet de la convention est un fonds de commerce ou un bien immobilier.

167.— La promesse réciproque de vente et d'achat se caractérise

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par le fait qu'à la différence de ce qui existe au cas de pacte d'option, les parties sont toutes deux engagées en vue de la réalisation du contrat définitif; on rappellera, à cet égard, qu'il ne suffit pas pour qu'il y ait promesse synallagmatique (au sens généralement donné ici à ce terme), que l'avant-contrat ait engendré des obligations à la charge de chacune des parties (ainsi par le fait d'une indemnité d'immobilisation, Cf. *supra*. no. 18) il faut encore que ces obligations aient un caractère *symétrique* et engagent les assujettis à la réalisation de la vente.

This is the sort of promise to sell which article 1589 C. Nap. has in
10 contemplation and the effect of which [question (2)] is, according to that article equivalent to a sale. —

La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et le prix.

But the promise will not have the effect of a sale if the parties have had in mind to delay the transfer of the ownership of the subject property until the accomplishment of a specified condition (« condition suspensive ») as explained in the following notes from Dalloz, *op. cit*, ec. vo.—

170.— Mais, dans de nombreux autres cas, la promesse réciproque ne peut être ramenée à une vente pure et simple :- (a) D'abord, lorsque la
20 vente est présentement impossible parce que telle autorisation administrative doit être obtenue, telle formalité légale accomplie; ce n'est qu'après l'une ou l'autre que la vente pourra exister. (b) Ensuite lorsque ce sont les parties elles-mêmes qui, en introduisant dans la vente un élément de formalisme conventionnel, subordonnent la réalisation de celle-ci à tel ou tel fait à venir;

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ainsi bien souvent à la rédaction d'un acte authentique, au paiement total du prix, au départ d'un occupant... etc... Dans un tel cas — qui peut d'ailleurs se combiner parfaitement avec l'hypothèse précédente (l'acte notarié ne devant être passé qu'une fois telle autorisation obtenue) il faut avant tout s'interroger sur le contenu exact de la volonté commune : celle-ci a fort bien pu ne voir dans la passation de l'acte authentique qu'un élément de l'exécution d'une vente déjà parfaite (Paris, 21 mai 1927, Gas. Pal. 30 oct. 1927; Civ. 4 nov. 1953, Bull. civ. no. 250; 13 juin 1956, Bull. civ. I, no. 238) et telle doit bien être, semble-t-il, en cas de doute l'interprétation normale — ceci en égard au caractère consensuel du contrat de vente (Cf. *Morin*, Le compromis, p. 209 et 272), s'il n'y a pas d'indication contraire. Mais si les juges du fond interprètent différemment la volonté des parties (sur leur appréciation souveraine en cette matière: Cf. civ. 18 nov. 1965, Bull. civ. I, no. 630; 9 juin 1971, Bull. civ. III, no. 364) on s'accorde pour reconnaître que la vente n'est pas parfaite jusqu'à la réalisation de l'évènement considéré.

171.— Seulement, dans de tels cas, il est très généralement admis que l'élément dont l'absence empêche la perfection de la vente n'affecte que les effets de celle-ci, laquelle existe déjà en tant que telle (Cf. not. *Planiol et Ripert*. t. 10 par *Hamel*, no. 175; *Aubry et Rau*. t. 5, para. 769; *Calia, Canitant et Julliot de la Morandière*, t. 2, no. 834; *Ripert et Boulanger*, t. 2, no. 2414; *Morin*, Le compromis, p. 254 et s.); la promesse synallagmatique de vente ne serait ici qu'une vente affectée d'un terme suspensif (Cf. par ex. Civ. 5 dec. 1934, S. 1935.1.68) ou d'une condition suspensive (Cf. par ex. pour le cas où une autorisation administrative est nécessaire : Civ. 15 janv. 1946,

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D. 1946. 131; 25 févr. 1946, D. 1946, 341, note P. Hebraud; et pour le cas d'une clause subordonnant la vente à la passation d'un acte notarié, Cos. 18 dec. 1962, Bull. civ. III, no. 522; 11 dec. 1965, D. 1965.198; 18 nov. 1965, J.C.P. 1965, II. 1450 ; rappr. Civ. 9 juin 1971, Bull, civ. III, nos. 364 et 365), les juges du fond appréciant souverainement s'il y a terme ou condition (Reg. 20 oct. 1908, D. P. 1912.1.61; 26 juin 1935, D.H. 1935. 414; Comp. Morin, op. cit., p. 321, selon lequel il faudrait, en cas de doute préférer l'idée de terme).

In the present instance, I find that the realisation of the reciprocal promise to sell and purchase witnessed by the deed and the transfer of ownership
10 of the property concerned have been conditioned on the fulfilment of two requirements, which are : the payment in full of the purchase price at the time stipulated and the signing of an authentic deed.

The rights of the parties under the deed would, if not otherwise restricted by some special reservation, be those vested in contracting parties generally under article 1184 C. Nap. which provides that in the event of one of them failing to perform his part of the obligation —

Le contrat n'est pas résolu de plein droit. La partie
20 envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages-intérêts.

The frustrated party here is the plaintiff. As already said, the defendant had himself first taken steps to complete the sale by calling upon the plaintiff to carry out his part of the bargain, but later backed out. It is not suggested that the agreement has been or is impossible of performance.

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The principle laid down in article 1184 C. Nap. is applicable in the case of a promise to sell as shown by this note from Dalloz op. cit. eo. vo.—

203. La non réalisation du contrat définitif peut résulter d'un refus direct d'une des parties d'exécuter sa promesse (sur l'hypothèse d'une aliénation consentie à un tiers. (Cf. supra, nos. 153 et 194), le plus souvent de passer l'acte authentique réitérant l'accord initial. On se trouve alors dans un cas particulier relevant de l'hypothèse précédente : celle où, par sa faute, l'une des parties empêche la formation du contrat promis. Aussi, hors le cas où ce refus ne constitue que la mise en œuvre d'une stipulation du dédit (Cf. 10 sur ce point, supra, no. 190, les solutions indiquées pour le cas d'une promesse unilatérale et qui sont ici encore applicables), le contractant est-il en droit de considérer la vente comme existante et d'en demander l'exécution (Cf. *Bonnel*, Du refus d'exécuter, p. 283), à moins qu'il ne préfère se contenter d'une indemnité compensatrice.

There would thus be no impediment to the plaintiff's right to have the sale executed except if debarred by some restrictive clause. The defendant contends that such a clause has been inserted in the deed. This leads us to question (3).

The clause upon which the defence rests is in the form of what is 20 termed a « clause pénale » by the Civil Code and is dealt with in articles 1226 and following. (It is indeed so described by the defendant himself in an affidavit affirmed by him for the purpose of an application for the appointment of a judicial sequestrator to which I shall later refer). The relevant articles are —

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1226.— La clause pénale est celle par laquelle une personne, pour assurer l'exécution d'une convention, s'engage à quelque chose en cas d'inexécution.

1228.— Le créancier, au lieu de demander la peine stipulée contre le débiteur qui est en demeure, peut poursuivre l'exécution de l'obligation principale.

1229.— La clause pénale est la compensation des dommages et intérêts que le créancier souffre de l'inexécution de l'obligation principale.

Il ne peut demander en même temps le principal et la peine, à moins
10 qu'elle n'ait été stipulée pour le simple retard.

It would follow from article 1228 that the plaintiff is, despite the clause referred to, entitled to sue for the performance of the promise of sale by the defendant. It has, however, been urged on behalf of the defendant that those articles of the Civil Code in no way prevent a clause like the one which he invokes from excluding all other remedy than that for which it provides if such has been the intention of the parties. Counsel has referred to Dalloz, Nouveau Code Civil annoté, article 1152 notes 1 to 4. The article itself reads —

20 Lorsque la convention porte que celui qui manquera de l'exécuter payera une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte, ni moindre.
And the notes —

1.— La clause que vise l'art. 1152 est une sorte de clause pénale, J.C. Obligat., 838,

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2. De là il suit que, dans le cas prévu par l'art. 1152, le créancier peut, comme le pourrait le créancier d'une obligation avec clause pénale, demander l'exécution de l'obligation principale, au lieu de la somme.— J. C. Obligat., 838, 1591. V. infra, art. 1228.

3. Toutefois, cette faculté cesse, si, au lieu d'avoir voulu seulement, par la fixation d'une somme, traiter à forfait des dommages-intérêts en cas d'inexécution de l'obligation principale, les parties ont entendu convertir l'obligation principale en une obligation de payer la somme, dans le cas où l'obligation principale ne serait pas exécutée; alors, le choix appartient au débiteur, qui peut se libérer en payant la somme promise. J. C. Obligat., 838.

4.— Cette espèce de novation dépend des termes de l'acte et des circonstances; s'il y a doute, la conversion de l'obligation *de faire* doit se présumer plus facilement; dans les obligations *de donner*, la convention sera, de préférence, considérée comme une clause pénale.— J. C. Obligat., 838.

The position is more clearly explained in Fuzier-Herman, Code civil annoté, article 1228, n. 4.—

4.— Cependant le créancier ne pourrait plus exiger l'exécution de l'obligation principale, s'il était établi que l'intention vraie des parties était de stipuler une novation conditionnel pour le cas où le débiteur, après mise en demeure, n'exécutera pas l'obligation première. Alors, il n'y aurait point dérogation au principe. Car l'on ne se trouverait pas en face d'une convention principale

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affectée d'une clause pénale, mais bien de deux obligations principales, l'une sous condition résolutoire et l'autre sous condition suspensive, celle-ci devant éventuellement remplacer la première. Si l'intention des parties demeurait douteuse, l'on devrait admettre la clause pénale, car la novation ne se présume point (art.1273).—Baudray-Lacantinerie et Barde, loc., cit., n., 1347. Case. req., 21 juill. 1885 (D. 86.1.32).

What remains to be determined is,—[and this will answer question (4)]—, what was the true intention of the parties concerning the purpose of the litigious clause. After carefully considering the terms of the deed and
 10 the surrounding circumstances in the light of the principles laid down by the authorities cited, I must decide that it was not the common wish of the parties that the plaintiff should by that clause be deprived of his legal right to insist on the performance of the contract and that the clause was in essence truly penal in that it simply fixed beforehand as a lump sum the damages claimable by the plaintiff in the event of the defendant's default. I have taken special note of the fact that the defendant, who argues to the contrary, has availed himself of his own right to have the agreement carried through. Even if one were prepared to assume for the sake of argument that the clause under examination could be construed as constituting a « stipulation de dédit »
 20 [Daloz, Répertoire de droit civil, eo. vo. no. 203 (supra)] or a covenant of the kind mentioned in note 3 to Daloz, Nouveau code civil annoté, art. 1152 (supra), that is to say, in either case one which had for consequence to leave the defendant with a choice between perfecting the sale and retracting his undertaking, the result would still be the same. By calling upon the plaintiff

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to stand by his own pledge the defendant would have manifested an unequivocal intention to proceed with the first of the two courses open to him and to sign the authentic deed. By complying with the defendant's notice the plaintiff would on his part have crystallized the reciprocal promise to sell and purchase from which neither party could then withdraw. I find support for that view in a decision of the Court of Cassation of the 18th October, 1968, which is referred to in a note to another « arrêt » of that Court (civ., 3e. 28 janv. — 1971 — D. 1971. Somm. 152) and according to which —

Les juges du fond qui relèvent que le vendeur d'un immeuble
10 a manifesté d'une manière non équivoque sa volonté de signer l'acte
authentique de vente, peuvent en déduire qu'il a renoncé à user
de la faculté de dédit stipulée au contrat sous seing privé.

I, for those reasons, hold that the parties are now irrevocably bound and that the plaintiff is entitled to sue for the regularisation of the sale under reference. The rest is a matter of procedure. It is settled law in France that, where the perfection of a sale depends upon the drawing up of an authentic deed, a judgment of the Court may be substituted for the wanting deed. (Dalloz, Encyclopédie juridique, Répertoire de droit civil, 2e. edn.— Vo Promesse de vente, no. 204). That, in my view, is the correct solution. I
20 consequently order the defendant to appear before Mr. Notary Bertrand
Maigrot within one month from the date of this judgment to cash the balance
of the sale price and to sign the authentic deed of sale of the properties in
suit to the plaintiff. In default of the defendant complying with this order
within the time fixed, the present judgment shall stand in lieu and stead of

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the authentic deed of sale and the plaintiff shall be entitled to have it transcribed and to deposit the balance of the sale price with the cashier of this Court, and the judgment so transcribed shall be a good and valid title to the plaintiff. The defendant is in the meantime prohibited from selling the properties to any third party.

The plaintiff has also claimed a sum of Rs. 5000.— as damages from the defendant. The claim is objected to on the ground that under article 1229 C. Nap. the plaintiff cannot insist on the performance of the agreement and on the payment of damages at the same time. For the plaintiff
 10 it is submitted that the compensation prayed for has no relation to the non-fulfilment of the agreement but is due for the prejudice suffered by the plaintiff as a result of the delay in obtaining satisfaction from the defendant. There is indeed a distinction to be drawn in that connection between the indemnity payable under a « clause pénale » for non-performance and that demandable for delay. This is hortly but clearly explained in Planiol et Ripert, *Traité Pratique de droit civil français*, 2e edn.t.7, n. 868, p. 201.

Mais il va de soi que la clause pénale n'exclut les dommages-intérêts judiciaires que dans l'éventualité pour laquelle elle a été
 20 convenue. Si elle a en vue le simple retard et se tait sur l'inexécution, ou inversement, le préjudice résultant de celle des hypothèses qui n'a pas été prévue ne se trouve pas soumis à la clause et donne lieu à une indemnité librement appréciée par les tribunaux.

In support of that view the learned authors refer, among others, to a decision of the Court of Cassation of the 13th July, 1899. (D. 99.1.524)

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the headnote to which reads —

Le débiteur contrevient à ses engagements et devient passible de dommages-intérêts, soit à raison de l'inexécution, soit à raison du retard dans l'exécution;

Et, pour le cas de retard comme pour celui d'inexécution, les parties peuvent, par une clause expresse, et à titre de peine, régler la somme de dommages-intérêts qui sera dûe au créancier;

10 Mais si une telle stipulation a en vue le simple retard et se tait sur l'inexécution, ou réciproquement, le préjudice résultant de celle des deux hypothèses qui n'a pas été prévue, n'ayant pas été réglé par la convention, il appartient au juge de l'apprécier et d'arbitrer la somme des dommages-intérêts.

That is the law. On the facts, however, owing to the stand taken by the parties with regard to evidence, the plaintiff's claim on this score has remained a bald statement and the Court left without any element permitting some form of appreciation or assessment. I must, accordingly, disallow it.

20 Lastly, the plaintiff has, incidentally to this action, moved for the appointment of a judicial sequestrator and/or a provisional administrator to look after and manage the properties pending the decision of the Court. But the defendant having in the course of the proceedings given an undertaking, which was duly recorded, not to dispose of the properties until the end of the case, the plaintiff has not pressed for the appointment prayed for. The only question at this stage with regard to the plaintiff's application is which party, if any, should pay its costs. Counsel for the plaintiff seems to have been of

PART I

the opinion that my decision should depend upon the success of the main action. In my view the question would rather depend upon a finding whether the application was necessary or not, a matter of fact upon which the Court has not been in a position to pronounce. I shall, therefore, make no order as to the costs of the motion.

There will, accordingly, be judgment for the plaintiff in terms of the orders made above. The defendant shall also pay the costs of the action.

(sd.) H. GARRIOCH
SENIOR PUISNE JUDGE.

10 2nd February, 1977.

On 8.2.77 the defendant gives notice of appeal and deposits the sum of Rs. 2000.— for Costs C. B. 325 of 8.2.77.

Recognizance reg. C. 308 No. 2270.

Tuesday the 8th day of January 1977.

Mr. Chooramun Jhoboo appears before me in Chambers, accompanied by his Attorney Mr. O. N. Abbasakoor and gives notice to appeal against judgment in this matter.

20 The appellant is required to furnish security in sum of two thousand rupees which he pays in cash — Vide Cheque No. 0187961 of to-day drawn by the Bank of Baroda to the order of the Government of Mauritius.

Execution of judgment is hereby stayed pending the results of the appeal.

(sd.) H. GOBURDHUN
MASTER AND REGISTRAR

PART I

S.C.R. 18331

**IN THE SUPREME COURT OF MAURITIUS
RECOGNIZANCE BY A PARTY APPEALING**

10. CHOORAMUN JHOOB acknowledges to owe to Elias Ibrahim Coowar the sum of Rs. 2,000.— (two thousand rupees) for which payment the said Chooramun Jhoboo has deposited into the hands of the Master & Registrar of the said Court the said amount as security to prosecute an appeal before the Court of Civil Appeal in the abovematter. (C.B. 325 of 8.2.77).

10 The condition of the above recognizance is such that if the said appellant shall appear and prosecute the appeal lodged by him against a judgment of His Lordship H. Garrioch, Judge, delivered on the 2nd February, 1977 and prosecute the said appeal within the delay prescribed by law to its conclusion before the said Court of Civil Appeal and pay such costs as the said Court may award on such appeal, then, and in such a case, this recognizance to be null & void otherwise to remain in full force and effect.

Good for the sum of two thousand rupees (sd.) C. Jhuboo.

20 Taken & acknowledged by the said deponent at my office this 10th day of February, 1977 (sd.) H. GOBURDHUN, Master & Registrar S/Court.

Interpreted by me (sd.) Y. Bhunnoo, Clerk, S/Court Reg. C 308 No. 2270.

PART II**IN THE SUPREME COURT OF MAURITIUS**

In the matter of :-

CHORAMUN JHOBOO, of N. Decotter Street, Beau-Bas sin

Appellant

v/s

ELIAS IBRAHIM COOWAR

Respondent

TAKE NOTICE that the abovenamed appellant, electing his legal domicile in the office of the undersigned attorney at law, situate at No. 4,
10 Sir Virgile Naz Street, Port-Louis feeling himself aggrieved by and dissatisfied with a judgment of the above Court delivered on the 2nd February, 1977 by H. Garrioch, Senior Puisné Judge, sitting alone, between the said Appellant then defendant and the respondent then Plaintiff in a case pending before the said court in which case the respondent (then Plaintiff) prayed for an order declaring that Plaintiff is the lawful owner of the property under reference. B. Prohibiting the defendant (now appellant) from selling the said property to any third party and C. Condemning and ordering the defendant (a) to appear before Mr. Notary B. Maigrot on a date to be fixed by the Honourable Court then and there to cash the balance of his sale price and
20 to sign the authentic deed of sale of the above properties to the Plaintiff. (b) Decree: that in default of the defendant appearing before the notary within the delay to be fixed by the Court, the Plaintiff shall be entitled to transcribe the judgment of the above Court and deposit the balance of the sale price with the Cashier of the Supreme Court. Such judgment duly

PART II

transcribed to be a good and valid title to the Plaintiff. (c) Condemning and ordering the defendant to pay to the Plaintiff the sum of Rs. 5,000.— as damages, in which case judgment was given in favour of Respondent, then Plaintiff, intends to appeal and does hereby appeal against the said judgment to Her Majesty's Court of Civil appeal of Mauritius in order to have the said judgment quashed, set aside, reversed, amended or otherwise dealt in law for the following amongst other reasons :-

10 1o. BECAUSE, in view of the clear, unambiguous contents of the deed governing the parties, the non-payment of the balance of the sale price by the Respondent (then Plaintiff) as called upon so to do by the « Mise en demeure », the Learned Judge was not justified in his interpretation that the appellant and the respondent did not intend the penal clause to be a novation extinguishing the right of the Respondent to a specific performance of the sale therein mentioned.

And for all other reasons to be given in due course.

Under all legal, Reservations.

Dated at Port-Louis, this 8th February, 1977.

(sd.) O. N. Abbasakoor

Of No. 4, Sir Virgile Naz Street, Port-Louis.

APPELLANT'S ATTORNEY

20

To/

His Honour The Master and Registrar of the above Court.

Received a true copy of the original, this 9th day of February, 1977.

(sd.) H. GOBURDHUN

Master and Registrar, Supreme Court.

PART II**Return :-**

The annexed « Notice of Appeal » was duly served by me, the undersigned Usher upon His Honour, The Master & Registrar, Supreme Court by leaving a true and certified copy thereof with him, *IN PERSON*, found at his Chambers situate in Supreme Court Buildings, Jules Koenig Street Port-Louis.

On WEDNESDAY the 9th day of February, 1977.

(sd.)

Usher, Supreme Court.

10 Registered at Mauritius on the tenth day of February one thousand nine hundred and seventy seven. Reg. DH 396 No. 1991 Received rupee one and cents five.

Fixed duty + 5% Surcharge (sd.)

Return :-

The foregoing annexed Notice of appeal was duly served by me the undersigned Usher on Mr. Elias Ibrahim Coowar, by leaving a true and certified copy thereof for him with his daughter of age of common domicile situate at Higginson Street, Curepipe.

On Wednesday the 9th day of February 1977.

20

(sd.) Pydiah

Usher Supreme Court.

UF.	Rs.	5.65
Mge	Rs.	22.50
Costs	Rs.	<u>28.15</u>

PART II

Registered at Mauritius on the tenth day of February one thousand nine hundred and seventy seven Reg. DH 396 No. 1992. Received Rupee one and cents five.

CAUSE LIST

<i>Appellant</i>	<i>Appellant's Attorney</i>	<i>Appellant's Counsel</i>	<i>Respondent</i>	<i>Respondent's Attorney & Counsel</i>
10 Chooramun JHOBOO	O. N. Abbasakoor, Esq.	Premchand Dabee, Esq.	E. I. Coowar	— —

PROECIPE

To set down the above matter on the General Cause List of Civil Cases which is an appeal to Her Majesty's Court of Civil appeal from the judgment of H. Garrioch, Judge delivered on the 2nd February, 1977.

Under all legal reservations.

Dated at Port-Louis, this 9th day of February, 1977.

(sd.) O. N. Abbasakoor

20

Of No. 4, Sir Virgile Naz Street, Port-Louis.

Petitioner's Attorney

Registered at Mauritius on the tenth day of February one thousand nine hundred and seventy seven Reg. A 401 No. 3622 Received rupee one and cents five.

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TAKE NOTICE that the abovenamed Respondent intends to resist the above appeal.

Under all legal reservations.

Dated at Port-Louis, this 11th February, 1977.

(sd.) S. Veerasamy

Of No. 50, Sir William Newton Street, Port-Louis.

Respondent's Attorney, instructing Mr. H. Moollan, Q. C.

To/

The Appellant abovenamed electing his legal domicile in the office of Mr. Attorney O. N. Abbasakoor, Port Louis.

I hereby acknowledge a good and valid service of the foregoing "Notice of Defence", a true copy of which I have received, this 11th day of February, 1977.

(sd.) O. N. Abbasakoor

Appellant's Attorney.

Registered at Mauritius on the twelfth day of February one thousand nine hundred and seventy seven Reg. A 401 No. 3702 Received rupee one and cents five. Fixed duty 15% Surcharge.

20

Registry,
Supreme Court,
11th June 1977

Gentlemen,

VIR/8 : C. Jhoboo v. E. I. Coowar

PART II

I am directed to inform you that by order of The Honourable The Chief Justice the above-mentioned case has been fixed to 20th June 1977
Mention.

I am,
Gentlemen,
Your Obedient Servant,
(sd.) N. D. VELLIEN
for Master & Registrar

Messrs :-

10 P. Dabee Esq.,

O. N. Abbasakoor

IN THE SUPREME COURT OF MAURITIUS

On Monday 20th June 1977

Before Hon. W. H. Garrioch, Chief Justice.

Vib/73 : C. Jhoboo v. E. I. Coowar.

P. Dabee for applicant is replaced by M. Gujadhur, Q.C.

H. Moollan, Q.C., for respondent is replaced by R. Montocchio, Q.C.

To 3rd November 1977 Merits.

20

(sd.) F. D. FRANCIS
for Master and Registrar

IN THE SUPREME COURT OF MAURITIUS

On Wednesday 16th November, 1977.

PART II

Before Hon. M. Rault, Ag. Chief Justice

and

Hon. P. de Ravel, Judge.

C. JHOBOO v. E. I. COOWAR

M. David, Q.C., appears together with M. Gujadhur, Q.C., and P. Dabee for appellant.

H. Moollan, Q.C., appears for respondent.

Arguments of M. David, Q.C. :—

The case deals essentially with a question of Law and this Court
10 is in the same position as the Trial Judge.

The Judge has early in his judgment set forth 4 questions which arose for his decision, all four being interlinked and in fact interdependent and it is essential to examine each in order to find out any weakness in the reasoning of the Judge. For the first three questions which depend on the “interpretation of true intention of the parties independently of any name by which the parties may have chosen to designate the Judge has quoted articles 166 & 167 of Encyclopédie Juridique Dalloz — Dr. Civ. to which Counsel has no quarrel. Counsel contends that the Judge restricted himself his consideration to articles 170 & 171 and paid no attention
20 to the following notes to which Counsel refers they are notes 172 to 177 and he also quotes Notes 178, 179 & 190.

Quotes :- Planiol & Esmein 1930 ID. Vol:6. Note 111 pp. 140-142

Fuzier Hermann — Demogue — 1st Vol; No. 211

(ter) p. 347

PART II

Dalloz — Promesse de Vente — Notes 191-192 & 193

Semaine Juridique 1971 — Note 16674.

Distinction between — Obligation de donner et de faire ou de ne pas faire — Art: 1136-1140 & 1142 of the Code.

The Trial Judge referred to the various aspects of the deed in consideration. Counsel submits that too much stress should not be laid on the clear and unambiguous intention of the Parties. The conditions are clear and need no interpretation. It was agreed that no full payment, no authentic deed, no sale and immediately follows — “ Et en cas de refus ... comme
10 dommage et intérêts.” These 2 considerations follow each other and it has been the contemplation of the parties that full importance should be given to the 2 situations envisaged by the Parties. Even if Appellant has received the full payment, Counsel submits, it would still be possible for him after having refunded the money and paid the damages, to back out his obligation.

Quotes :- Petit Code Civil 24th ED: p. 247 Notes 2 & 3

Fuzier — Hermann — Demogue — Code C.

Annoté 140 bis of Art: 1184 p. 427

In this Case, Parties have contemplated in case the purchaser did not do anything and remained inactive and that is in the third condition,
20 namely “ Les présentes seront considérées nulles de plein droit... ”

Counsel points out that there are 2 situations contradictory, i.e., the parties stress that the Purchaser “ aura la jouissance du dit bien à compter du jour de la signature... ” and they have included another Clause in which they stated that if the would-be purchaser did not relinquish the property,

PART II

the Vendor should go before the Judge for a Writ.

Quotes :- Fuzier Hermann Art: 1226 Notes 2 & 4. and

Submits that the Judge erred when he referred to the fact that he was dealing with Obligation de Faire and ignored the terms of the deed i.e. the conditions of the contract on the 2 events which were fully contemplated by the Parties.

Also quotes :- Fuzier Hermann - Art: 1273 Notes 2 & 12.

In this Case, there has been no handing of the property and the Obligation was to give it free of Lease payment of the balance to be made 10 by 15th October 73 and the notice was served in December 73. The Vendor finds himself in a situation where he can't leave things forever.

Again referring to Condition 3, Counsel submits that until he would sign the deed, even if he has received the money, the Vendor is entitled to refuse to sign, refund the money and back out.

Mazeau — Tome III — p. 805.

Sommaire Dalloz — 1954 — P: 73 Arrêt — 25.6.54.

“ Jurisprudence p. 201. Comm. de Cass. Note of Lalou.

Moollan, Q.C. :—

Whether this particular term of Contract is a stipulation du dédit ?
20 Submits no. It is a Clause Pénale. Even if it were a stipulation du dédit, it was not a question of waiving one of the 2 alternatives.

The Vendor has expressly exercised the faculty to continue with the sale by serving the ‘ mise-en-demeure ’ and it is having called upon the purchaser, he has clearly indicated that he was going on with the Contract.

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Counsel's submissions will be the same as before the Trial Judge and has no further authorities to quote. The judgment of the Court has fully analysed the situation.

Can it be said that the issue of fact was an avant-contrat or a projet de contrat ? Submits that whole of the interpretation of the contract shows that it is a sale.

Referring to the para. 1 of Statement of Claim, "sold to", Counsel submits that Para. was admitted and in the light of that admission amongst others evidence was not led.

Submits the submissions of Counsel for appellant that it was a pre-contract & intention of sale, etc., find no application to the issue raised on the facts of the Case.

Is it a Clause Pénale on a Stipulation de dédit ? The Trial Judge, after considering the authorities has made a perfect analysis of the contrat per se and have come to the Conclusion that it is a Clause Pénale. Again the element of good faith on the part of the Vendor cannot be seen.

COURT RESERVES JUDGMENT

(sd.) Y. A. BEEBEEJAUN
for Master & Registrar

20

IN THE SUPREME COURT OF MAURITIUS

On Monday the 19th day of December 1977

Before Hon. M. Rault, Ag. Chief Justice.

VI/B/8 Y. Aboobakar replacing H. Moollan, Q.C., for respondent M. Gujadhur, Q.C., (P. Dabee with him) for appellant.

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His Lordship reads out the judgment of the Court (Hon M. Rault, Ag. Chief Justice and Hon. P. de Ravel, Ag. Senior Puisné Judge) filed of record, dismissing the appeal with Costs.

(sd.) O. A. KHODADIN
for Master and Registrar

(Record No. 73) IN THE COURT OF CIVIL APPEAL

In the matter of :—

C. Jhoboo

10

Appellant

v.

E. I. Coowar

Respondent

Judgment

The respondent (then plaintiff) and the appellant (then defendant) entered into a contract in terms of which the appellant agreed to sell certain immoveable properties to the respondent, subject to certain conditions enumerated in the deed. It was stipulated (a) that the respondent would have the free enjoyment of the properties as from the signature of the notaria
20 deed; (b) that the properties would not pass until the full purchase price had been paid and the notarial deed had been signed (c) that the said purchase price had to be paid within a delay fixed by the parties. The deed went on to say this :

Que lorsque le soussigné d'autre part aura intégralement

PART II

payé ledit solde de prix en capital, il sera dressé un contrat authentique par les soins de Me Bertrand Maigrot, notaire choisi d'un commun accord par les parties qui déclarent entendre subordonner au paiement intégral du prix d'acquisition et à la passation dudit contrat de vente, la perfection du contrat et la transmission de propriété. Et en cas de refus par le soussigné d'une part de signer ledit contrat de vente, le dit soussigné d'une part aura à rembourser au soussigné d'autre part toutes sommes versées par ce dernier et il aura à payer une somme de vingt mille roupies comme dommages et intérêts.

10

The respondent who had already made part-payments under the contract, was ready and willing to pay the balance of the said price at the time it was due. Some two months later, the appellant caused a notice to be served on the respondent, requiring him to appear before Mr. Notary Maigrot to pay the balance of the purchase price and to sign the notarial deed as agreed by the parties. On the appointed date, the respondent duly appeared before the notary to perform his obligations, but the appellant failed to turn up.

Thereupon the respondent entered an action praying the Court
20 to declare that he was the lawful owner of the properties in question and applying for consequential relief.

The appellant contended that in virtue of clause 4 quoted above he was entitled to refuse to sell the properties, on repaying to the respondent all sums paid in advance by him, plus a further sum of Rs. 20,000 as damages.

PART II

The learned Judge who tried the case took the view that the first issue he had to decide was whether on a reading of the contract as a whole, the intention of the parties was that condition 4 was a mere “ clause pénale ”, or a “ stipulation de dédit ”. The importance of the question is this : if condition 4 is a mere “ clause pénale ”, it is the respondent who has the choice of accepting the damages fixed in the clause, or of insisting on specific performance of the contract. If, on the other hand, condition 4 was meant to be a ‘ stipulation de dédit ’, the choice would rest with the appellant: by paying the sum agreed as damages, he would be exempted from any obligation of transferring the properties.

After an elaborate analysis of the authorities, the learned Judge came to the conclusion that condition 4 was a mere “ clause pénale ”, and that in consequence the respondent was entitled to obtain specific performance of the contract.

On appeal, we were favoured with an erudite and able argument by learned counsel for the appellant, who submitted that the learned judge had misinterpreted the contract. He strongly argued that until the signature of the notarial deed, the appellant had no obligation to give an immoveable right to the respondent, but a mere duty to do something (une obligation de faire, et non pas une obligation de donner), and that in terms of a. 1142, C. Nap., “ Toute obligation de faire... se résout en dommages et intérêts, en cas d’inexécution de la part du débiteur ”. In his view, the appellant had reserved to himself a ‘ locus poenitentiae ’, and had inserted in the contract a true “ stipulation de dédit ”, which gave him a right to opt between

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transferring the property and paying the sum agreed as damages.

We agree that the question is not free from difficulty, but we do not consider it essential to decide it, as in our view this appeal can be disposed of on other grounds.

As we have pointed out above, the respondent was always ready and willing to perform his obligations under the contract, and when the delay fixed for paying the balance of the purchase-price had elapsed, the appellant summoned the respondent to appear before a notary to pay that price. The respondent duly appeared, but the appellant left default. The learned Judge
10 came to the conclusion that, even if at the origin the appellant had had a choice between perfecting the sale and paying damages, he had by his own conduct deprived himself of that faculty of choice: by summoning the respondent to appear before the notary to pay the balance of the purchase-price, he had manifested an unequivocal intention to proceed with the sale and waived his right to liberate himself by paying damages.

We agree with that conclusion of the learned judge. Whatever may have been the exact rights of the parties under the original contract, when the appellant summoned the respondent before the notary, he was electing on a definite course which amounted to an offer which became irre-
20 vocable when the respondent accepted it: as a result, once the respondent appeared before the notary to pay the balance, the appellant could no longer withdraw his offer to cash the money and transfer the properties.

Our finding is borne out by a decision of the Cour de Cassation of the 18th October, 1968, quoted in a footnote to a decision reported in

PART II

D. 1971. SOmm. 152 :

Les juges de fond qui relèvent que le vendeur d'un immeuble a manifesté d'une manière non équivoque sa volonté de signer l'acte authentique de vente, peuvent en déduire qu'il a renoncé à user de la faculté de dédit stipulé au contrat sous seing privé.

On any other view, we would be allowing the appellant to have the best of both words: if the respondent had failed to appear, or had proved unable to pay the balance, the appellant would, under the terms of the agreement, have been entitled to rescind the contract and to keep the part-payments
10 effected by the respondent without incurring any obligations on his part; but if the respondent appeared and offered to pay, the appellant would still reserve to himself the right not to transfer the property on paying damages which might have turned out to have no relation to the loss suffered by the respondent. To permit such conduct appears to us to be in contradiction with the fundamental rule that bilateral contracts must be executed in good faith.

For the above reason, we find that the learned Judge came to the right conclusion, and dismiss the appeal, with Costs.

(sd). M. RAULT

Acting Chief Justice

(sd.) P. de RAVEL

Acting Senior Puisne Judge.

20

19th December 1977

PART III
IN THE SUPREME COURT OF MAURITIUS
— COURT OF CIVIL APPEAL —

In re :-

C. JHOBOO **Appellant**

v/s

E. I. COOWAR **Respondent**

AND

In the matter of :-

C. JHOBOO **Appellant**

v/s

E. I. COOWAR **Respondent**

MOTION PAPER

COUNSEL is instructed to move this Honourable Court for an
ORDER

- a) GRANTING LEAVE to the Appellant to appeal to Her Majesty the Queen Her Heirs and Successors in Her Privy Council against the judgment dated 19th December 1977 delivered by the Court of Civil Appeal composed of Their Lordship M. Rault, Ag. Chief Justice, and P. de Ravel, Judge, dismissing with costs the appeal of the abovenamed Appellant preferred against the judgment of His Lordship W. H. Garrioch, Senior Puisné Judge, as he then was, dated 2nd February 1977, the whole more fully set out in the affidavit of the Appellant herewith annexed.

10

20

PART III

- b) **GRANTING** a stay of execution of the aforesaid judgment on such terms as to this Honourable Court may seem just and proper.

Under all legal reservations.

Dated at Port Louis, this 6th of January 1978 (sd.) M. Gujadhur, of Cathedral Square, Port Louis, Appellant's Attorney.

(sd.) Madun Gujadhur, Q. C., of Counsel for appellant.

IN THE SUPREME COURT OF MAURITIUS

On Friday 6th January 1978

10 Before Hon. M. Rault, Ag. Chief Justice

and

Hon. P. de Ravel, Ag. Senior Puisné Judge

20631 C. JHOBOO v. E. I. COOWAR

M. Gujadhur, Q.C., appears for appellant, files the motion paper, notice of motion and an affidavit (which he undertakes to have registered) and moves in terms thereof.

H. Moollan, Q.C., appears for respondent and moves for a week's postponement as he was briefed only this morning and has not been able to look into the matter. He adds that he will make submissions on the second
20 issue, namely, the stay of the execution of the judgment.

Case will be mentioned on the 16th January 1978.

(sd.) Y. A. BEEBEEJAUN

FOR MASTER & REGISTRAR

PART III

Take Notice that the abovenamed Appellant shall on FRIDAY the 6th day of January 1978 at 10.30 a.m., or any subsequent day or days when the Court shall sit and hear motions, move this Honourable Court for LEAVE TO APPEAL to Her Majesty the Queen, Her Heirs and Successors in Her or Their Privy Council against the judgment delivered by the above Court on the 19th December 1977 in the matter of C. Jhoboo v/s E. I. Coowar — Record No. 73 of the Court of Civil Appeal.

AND TAKE FURTHER NOTICE in order that you may not plead or pretend ignorance of the same that herewith is served upon you a true copy of the affidavit affirmed by the abovenamed Appellant on the 4th January 1978.

AND TAKE FURTHER NOTICE that the said motion will be made in the day and at the hour aforesaid whether you be present or not.

UNDER ALL LEGAL RESERVATIONS.

Dated at Port-Louis, this 4th day of January 1978.

(sd.) M. GUJADHUR

Of Cathedral Square, Port Louis

Appellant's Attorney.

To/

20 Elias Ibrahim Coowar, of Higginson Street, Curepipe.

Return :-

The foregoing Notice of motion, together with the annexed affidavit, was duly served by me the undersigned Usher upon Elias Ibrahim Coowar by leaving true and certified copies thereof, for him, in his absence, with

PART III

his daughter-in-Law, Shirin Coowar, found at domicile, situate at Higginson Street, Curepipe.

Dated this 4th day of January 1978

(sd.) M. MANIKAM

Usher, Supreme Court.

Registered at Mauritius on the sixth day of January One thousand nine hundred and seventy eight Reg. DH 405 No. 2605 Received rupee one and cents fifteen. Fixed duty 15% Surcharge

(sd.) F. JEAN-PIERRE.

10

IN THE SUPREME COURT OF MAURITIUS

— Court of Civil Appeal —

In Re :-

C. JHOBOO *Appellant*

v/s

E. I. COOWAR *Respondent*

Record No : 73

And in the matter of :-

C. JHOBOO *Appellant*

v/s

20

E. I. COOWAR *Respondent*

I, Chooramun Jhoboo, of Beau-Bassin, a proprietor

MAKE MY SOLEMN AFFIRMATION AS A HINDOO AND SAY :-

1. That I am the Appellant in the above matter.
2. That the Respondent — then Plaintiff — entered an action

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against me on 2nd March 1974 before the Supreme Court of Mauritius, whereby he claimed, inter alia, for a judgment: decreeing that he was the lawful owner of a property situate at Lees Street, Curepipe, which he alleged I had sold to him; and condemning and ordering me to appear before a Notary to cash the balance of the ' sale price ' and to sign an authentic deed of sale of the said property.

2(b). That on 2nd February 1977, His Lordship W. H. Garrioch, Senior Puisné Judge, as he then was, ordered as follows :-

“ I, for those reasons, hold that the parties are now irrevocably
10 bound and that the Plaintiff is entitled to sue for the regularisation of the sale under reference. The rest is a matter of procedure. It is settled law in France that, where the perfection of a sale depends upon the drawing up of an authentic deed, a judgment of the Court may be substituted for the wanting deed. (Daloz Encl. Juridique, Répertoire de Droit Civil, 2e Edn. Vo. Promesse de Vente No. 204). That in my view, is the correct solution. I consequently order the Defendant to appear before Mr. Notary Bertrand Maigrot within one month from the date of this judgment to cash the balance of the sale price and to sign the authentic deed of sale of the properties in
20 suit to the Plaintiff. In default of the Defendant complying with this order within the time fixed, the present judgment shall stand in lieu and stead of the authentic deed of sale and the Plaintiff shall be entitled to have it transcribed and to deposit the balance of the sale price with the Cashier of this Court, and the judgment so transcribed shall be a good and valid title of the Plaintiff. The Defendant is in the meantime prohibited from selling the

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properties to any third party”.

3. That on 8th February 1977 I appealed to the Court of Civil Appeal against the said judgment.

4. That my said appeal was dismissed with costs on the 19th December 1977 in virtue of a judgment delivered by Their Lordships the Ag. Chief Justice, and P. de Ravel.

5. That being dissatisfied with the judgment of the Court of Civil Appeal as well as with that of the Supreme Court dated 2nd February 1977. I intend to and am hereby lodging an appeal to the Privy Council.

10 6. That under section 81(1)b of the Constitution of Mauritius set out in the Schedule to the Mauritius Independence Order 1968 an appeal lies as of right against the said judgments, in as much as the value of the matter in dispute exceeds Rs. 10,000.— and, in any event, the property in issue is worth much more than Rs. 85,000.— (eighty five thousand rupees).

7. That pending the making of the Appeal to and the disposal thereof by the Privy Council, I pray that the execution of the said judgment be suspended on such terms as to this Honourable Court may seem just and proper.

20 Solemnly affirmed by the abovenamed) Depo-
 nent as a Hindoo at Chambers) Court House, } (sd.) C. JHOOBOO
 Port-Louis, this 4th day of January 1978. }

Before me,

Y. Espitalier-Noël

Master & Registrar, Supreme Court.

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Registered at Mauritius on the sixth day of January one thousand nine hundred and seventy-eight — Reg: A 406 No. 4862. Received rupee one and cents fifteen.

(sd.) F. Jean-Pierre.

IN THE SUPREME COURT OF MAURITIUS

On Monday the 16th day of January 1978.

Before the Honourable M. Rault, Ag. Chief Justice

S.C.R. No. 20631

10

C. JHOBOO v. E. I. COOWAR

M. Gujadhur, Q.C., appears for appl.

H. Moollan, Q.C., for respondent is replaced by E. Ribot

Gujadhur states that the Parties are trying to come to a settlement concerning the stay of execution of the judgment and he moves for 2 weeks' postponement.

E. Ribot concurs.

30th January 1978 Mention

(sd.) F. D. FRANCIS

for Master & Registrar.

20

IN THE SUPREME COURT OF MAURITIUS

On Monday 30th January 1978.

Before Hon. M. Rault, Ag. Chief Justice.

20631

C. JHOBOO v. E. I. COOWAR.

PART II

M. Gujadhur, Q.C., appears for appl.

H. Moollan, Q.C., for respondent states that he has discussed the matter with his friend, and that they have reached an agreement which will have to be drafted and filed. He adds that subjects to that agreement be put in, he will have no objection to the motion. He moves that the matter be adjourned to next Monday.

No objection from Gujadhur.

6th February 1978 Mention.

(sd.) F. D. FRANCIS

for Master and Registrar

10

IN THE SUPREME COURT OF MAURITIUS

On Monday 6th February 1978

Before Hon. M. Rault, Ag. Chief Justice.

20631 C. JHOBOO v. E. I. COOWAR.

M. Gujadhur, Q.C., for appellant is replaced by M. Avrillon, Q.C.

H. Moollan, Q.C., appears for respondent and files the agreement reached by the parties as follows :-

The parties have discussed the issue of the provisional execution of the Judgment of the Court pending the disposal of the appeal and have agreed as follows :-

1. The applicant (C. Jhoboo) confirms his undertaking not to sell, alienate and in any way charge, mortgage or burden the property in lite or in any way depreciate the value of the

PART III

property.

- 2(a) All rent or revenue of any nature whatsoever accruing from the property in dispute since March 1977 shall be paid into a special account at The Mauritius Commercial Bank under the appellation Jhoboo v. Coowar Rent account which account shall be operated jointly by Messrs. Moorli Gujadhur and S. Veerasamy.
- (b) All drawings from the said account shall be made only with the consent and under the signature of both Me. Moorli Gujadhur and Me. S. Veerasamy.
- 10 (c) No drawings shall be made from the said account except for Municipal rates and taxes relating to the said property and for effecting such repairs and maintenance work on the property as are approved by both parties as concerns both the nature and the cost of the works.
- (d) All funds in the account shall be paid over to the successful party in the appeal.

3. Execution of the judgment shall be otherwise stayed pending the appeal.

20 In the light of the above agreement, the respondent has no objection to leave to appeal being granted subject to the usual conditions.

Avrillon agrees with the agreement filed.

Court states that it will look into the matter and make the order subsequently.

PART III

(sd.) F. D. FRANCIS
for Master and Registrar.

Registry,
Supreme Court,
28th February 1978

Gentlemen,

Re : VIB/4 : C. JHOOB v. E. I. COOWAR.

I am directed to inform you that the Court will deliver judgment
10 in the abovementioned Case on : Wednesday the 1st March, 1978 at 10.30
a.m., before Hon. Ag. Chief Justice.

Yours faithfully,

(sd.) H. D. VELLIEN
for Master and Registrar.

Messrs :—

M. Gujadhur, Q.C.

Moorli Gujadhur

H. Moollan, Q.C.

S. Veerasamy

20 Crier

IN THE SUPREME COURT OF MAURITIUS

On Wednesday 1st March 1978

Before Hon. M. Rault, Ag. Chief Justice.

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20631 C. JHOBOO v. E. I. COOWAR.

The judgment of the Court read out and filed of record (Hon. M. Rault, Ag. Chief Justice and Hon. P. de Ravel, Judge).

The Court grants the applicant leave to appeal against the judgment delivered by the Court of Civil Appeal. The execution of the decision appealed from shall be suspended pending the appeal.

Costs of the present application to be Costs in the Case.

(sd.) A. Y. IP HEE WAI

for Master and Registrar.

10

Record No : 20631

IN THE SUPREME COURT OF MAURITIUS

In the matter of :-

C. JHOBOO

Appellant

v.

E. I. COOWAR

Respondent

and

In the matter of :-

C. JHOBOO

Applicant

v.

E. I. COOWAR

Respondent

20

Judgment :-

After considering the motion made by the applicant, which was not resisted, we grant the applicant leave to appeal against the judgment

PART III

delivered by the Court of Civil Appeal on the 19th December, 1977, under section 81(1)(b) of the Constitution of Mauritius set out in the Schedule to the Mauritius Independence Order 1968, upon condition, as required by section 4 of the Mauritius (Appeals to Privy Council) Order 1968 —

- 10 (1) that the applicant shall, within six weeks from the date of this judgment, enter into good and sufficient security to the satisfaction of the Master and Registrar in the sum of Rs. 10,000.— for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the applicant to pay the Costs of the appeal (as the case may be); and
- (2) that the applicant shall procure the preparation of the record and the despatch thereof to England within four months from the date of this judgment.

We direct that, subject to the conditions agreed upon between the parties and filed of record, the execution of the decision appealed from 20 shall be suspended pending the appeal.

Costs of the present application to be costs in the cause.

(sd.) M. RAULT

Acting Chief Justice

(sd.) P. de RAVEL,

Judge.

1st March, 1978

PART III**IN THE SUPREME COURT OF MAURITIUS**

In the matter of :-

C. JHOBOO

Appellant

v/s

E. I. COOWAR

Respondent

I, ASHOKE ROY, Chartered Accountant, of Curepipe,

MAKE MY SOLEMN AFFIRMATION AS A HINDU AND SAY :-

- 10 1. That I am the owner of an immoveable property of the extent of 33 41/100 perches situate at 13A Impasse Couvent de Lorette, Curepipe, and bounded as per title deed transcribed in Volume 1203 No. 21 on which stands a building made of concrete under slab, the whole worth more than Rs. 100,000.— (one hundred thousand rupees).
2. That the said immoveable property is not burdened with any mortgage inscription.
3. That all my debts and liabilities paid, I am worth more than Rs. 10,000.— (ten thousand rupees).
- 20 4. That I am willing and prepared to stand as surety for Mr. C. Jhoboo for the sum of Rs. 10,000.— (ten thousand rupees) for the due prosecution by him of the Appeal he has lodged against the decision of the Court of Civil Appeal delivered on 19th December, 1977 to Her Majesty's Privy Council and for the payment of all such cost as may become payable by him in the event of the Appeal being dismissed for non-prose-

PART III

cution or of the Judicial Committee of the Privy Council ordering the Appellant to pay the costs of the Appeal.

Solemnly affirmed by the abovenamed
deponent at Chambers, Court House, (sd.) A. ROY
Port Louis, this 11th day of April, 1978)

(sd.) H. GOBURDHUN,
Ag. Master and Registrar
Supreme Court.

Registered at Mauritius on the thirteenth day of April one thousand
10 nine hundred and seventy-eight. Reg: A 409 No. 1083 Received rupee one
and cents fifteen.. Fixed duty + 15% Surcharge.

(sd.) N. BALASOUPRAMANIEN

IN THE SUPREME COURT OF MAURITIUS

In the matter of :-

C. JHOOBOO *Appellant*

v/s

E. I. COOWAR *Respondent*

I, DEODUTH PRAYAG, of 30 Cossigny Avenue, Quatre Bornes,
20 MAKE MY SOLEMN AFFIRMATION AS A HINDU AND SAY :-

1. That I am the owner of an immoveable property of the extent of 11½ perches situate at 30 Cossigny Avenue, Quatre Bornes, and bounded as per title deed transcribed in TV 1237 No. 166 on which stands a building made of concrete under slab, the whole worth more than Rs. 100,000.—

PART III

(one hundred thousand rupees).

2. That the said immoveable property and the building standing thereon are burdened with a mortgage inscription enrolled in Volume 1263 No. 130 to secure a loan of Rs. 55,000.— (fifty-five thousand rupees) in favour of The Mauritius Housing Corporation.

3. That all my debts and liabilities paid, I am worth more than Rs. 10,000.— (ten thousand rupees).

4. That I am willing and prepared to stand as surety for Mr. C. Jhoboo for the sum of Rs. 10,000.— (ten thousand rupees) for the due pro-
10 secution by him of the Appeal he has lodged against the decision of the Court of Civil Appeal delivered on 19th December, 1977 to Her Majesty's Privy Council and for the payment of all such cost as may become payable by him in the event of the Appeal being dismissed for non-prosecution or of the Judicial Committee of the Privy Council ordering the Appellant to pay the Costs of the Appeal.

Solemnly affirmed by the abovenamed,
deponent, at Chambers, Court House, (sd.) D. PRAYAG
Port Louis, this 11th day of April, 1978

Before Me,

(sd.) H. Y. ESPITALIER-NOEL

Ag. Master and Registrar

Supreme Court.

20

Registered at Mauritius on the thirteenth day of April one thousand nine hundred and seventy-eight. Reg. A 409 No. 1084. Received rupee one

PART III

and cents fifteen. Fixed duty + 15% Surcharge.

(sd.) N. BALASOUPRAMANIEN.

IN THE SUPREME COURT OF MAURITIUS

In the matter of :-

CHOORAMUN JHOBOO, of Beau Bassin

Applicant

v/s

E. I. COOWAR

Respondent

BE IT REMEMBERED THAT WE :-

- 10 (i) Chooramun Jhoboo, of Beau Bassin ;
 (ii) Ashoke Roy, of Curepipe and
 (iii) Deoduth Prayag, of Quatre Bornes

hereby acknowledge ourselves to be indebted jointly and in solido to the Respondent in the sum of Rs. 10,000.— (ten thousand rupees).

Whereas on the 19th December, 1977, Judgment was given by the Court of Civil Appeal dismissing the Appeal entered by the Applicant against the respondent.

And Whereas by a Judgment of the above Court made on the 1st March 1978, it was adjudged that the Applicant should have leave to appeal
 20 under Section 81(1)(a) of the Constitution of Mauritius upon condition :-

(1) that the Applicant shall, within six weeks from the date of the last mentioned Judgment enter into good and sufficient security to the satisfaction of the Master and Registrar in the sum of Rs. 10,000.— (ten thousand rupees) for due prosecution of the Appeal and the payment

PART III

of all such costs as may become payable by the Applicant in the event of not obtaining an order granting him final leave to appeal or of the appeal being dismissed for non prosecution or of the Judicial Committee of the Privy Council ordering the Applicant to pay the costs of the Appeal as the case may be ; and

(2) the Applicant shall procure the preparation of the record and despatch thereof to England within four months from the date of the last mentioned judgment.

Now, the conditions of this obligation are such that in case the
 10 abovenamed Applicant does prosecute the above appeal and in case the abovenamed Applicant does pay all costs that may become payable to the Respondent in the event Applicant not obtaining an Order granting him final leave to appeal or the appeal being dismissed for non-prosecution or of the Judicial Committee of the Privy Council ordering the Applicant to pay the costs of the Appeal (as the case may be), then this obligation to be null and void, otherwise to remain in full force and value.

Good for the sum of ten thousand rupees (sd.) C. JHOBBOO

Good for the sum of ten thousand rupees (sd.) A. ROY

Good for the sum of ten thousand rupees (sd.) D. PRAYAG

20 Taken and acknowledged by and before me.

The Applicant has satisfied me that he has this day provided good and sufficient security in the sum of Rs. 10,000.— (ten thousand rupees) from Mr. Ashoke Roy, of Curepipe, and Mr. Deoduth Prayag, of Quatre Bornes, by subscribing the foregoing in my presence.

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Chambers, Court House, this 11th day of April, 1978.

(sd.) Y. ESPITALIER-NOEL

Ag. Master and Registrar, Supreme Court.

Parties state that they understand the English Language

(sd.) F. D. FRANCIS, Clerk. S.C.

Reg. C 316 No. 1877 (sd.) N. BALASOUPRAMANIEN

ORDER OF THE COURT

S.C.R : 20631

10 **IN THE SUPREME COURT OF MAURITIUS**

On Wednesday the 1st day of March, 1978, in the 27th year of the reign of Queen Elizabeth II.

In the matter of :-

C. JHOBOO *Appellant*

v.

E. I. COOWAR *Respondent*

and

In the matter of :-

C. JHOBOO *Applicant*

v.

E. I. COOWAR *Respondent*

20

UPON hearing M. Avrillon, Q.C., replacing M. Gujadhur, Q.C., of Counsel for the applicant and H. Moollan, Q.C., of Counsel for the res-

PART III

pendent; and after consideration.

IT IS ORDERED that the Applicant BE and HE IS HEREBY granted leave to appeal against the judgment delivered by the Court of Civil Appeal on the 19th December, 1977, under section 81(1)(b) of the Constitution of Mauritius set out in the Schedule to the Mauritius Independence Order 1968, upon condition, as required by section 4 of the Mauritius (Appeals to Privy Council) Order 1968 —

(1) that the applicant shall, within six weeks from the date of this judgment, enter into good and sufficient security to the satisfaction
10 of the Master & Registrar in the sum of Rs. 10,000.— for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the applicant to pay the costs of the appeal (as the case may be); and

(2) that the applicant shall procure the preparation of the record and the despatch thereof to England within four months from the date of this judgment.

IT IS FURTHER DIRECTED THAT, subject to the conditions
20 agreed upon between the parties and filed of record, the execution of the decision appealed from shall be suspended pending the appeal.

IT IS ALSO ORDERED that Costs of the present application BE costs in the cause.

By the Court

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(sd.) O. A. KHODADIN
for Master and Registrar

CERTIFICATE OF THE MASTER AND REGISTRAR

I hereby certify that the foregoing is a true and correct copy of all proceedings, judgments, decrees and orders had and made, of all exhibits received or given in the above matter

Given under my hand and the seal of the Supreme Court of the Island of Mauritius.

10 This 16th day of May 1978

(sd.) Y. ESPITALIER-NOEL
Master and Registrar.

The Standard Printing Establishment Ltd.
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LES PAILLES — MAURITIUS
1978
