

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

Karunamuni Augustine Premathiratne,  
Liyanagemulla,  
Seeduwa.

Plaintiff

C.A. No. 571 / 96 F

Vs.

D.C. Negambo No. 4325 / L

1. Sembukutti Arachchige Sarath  
Senaratne,  
Colpetty,  
Colombo 03.
2. Poster Siri Rental Company,  
No 11, Union Place,  
Colombo.

Defendants

**AND NOW BETWEEN**

Karunamuni Augustine Premathiratne,  
Liyanagemulla,  
Seeduwa.

Plaintiff Appellant

Vs

1. Sembukutti Arachchige Sarath  
Senaratne,  
Colpetty,  
Colombo 03.
2. Poster Siri Rental Company,  
No 11, Union Place,  
Colombo.

Defendant Respondents

BEFORE : UPALY ABEYRATHNE J.

COUNSEL : Kuvera de Zoisa with Ms Roshindra Serasignhe for  
the Plaintiff Appellant.  
Rohan Sahabandu for the 1<sup>st</sup> Defendant Respondent

ARGUED ON : 24.11.2011

DECIDED ON : 01.02.2012

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendants in the District Court of Negambo seeking a judgement directing the 1<sup>st</sup> Defendant Respondent (hereinafter referred to as the Respondent) to transfer the land described in the schedule to the plaint to the Appellant. Said action was filed on the basis that the Respondent agreed to sell the land in suit for Rs 100,000/- and Rs 15,000/- out of said Rs 100,000/- was paid at the time of attestation of the agreement bearing No 2115 dated 12.12.1984, the balance Rs 85,000/- was to be paid in instalments within 06 months from the date of attestation and receipts to be obtained for the payments done, upon the payment of  $\frac{3}{4}$  of the total price a deed of transfer to be executed in favour of the Appellant by the Respondent and at the same time a deed of mortgage to be executed by the Appellant for the balance  $\frac{1}{4}$  of the total price and the Respondent failed to execute the deed of transfer as agreed by the said agreement to sell.

The Respondent, in his answer, took up the position that the Appellant paid only Rs 20,000/- within the stipulated period of the agreement and since he failed to pay the required amount within the stipulated period under the said agreement to sell the agreement became invalid. The Respondent further took up that the agreement which had been produced with the plaint marked X 1 was not the identical document they had entered into and there was no specific performance clause in the original agreement.

It was common ground that the Appellant had paid only Rs 20,000/- within the stipulated period under the said agreement. The Appellant had failed to adduce any evidence with regard to the payment of  $\frac{3}{4}$  of the total price which was to be paid within a period of six months to enable the Respondent to execute the deed of transfer. The Appellant in his evidence said that he sent the letter X 3 dated 07.05.1985 to the Respondent through his Attorney At Law requesting him to execute the deed of transfer under the said agreement. It is important to note that in the said letter the appellant had not made any reference with regard to the payment of  $\frac{3}{4}$  of the total price which had to be paid within six months from the date of attestation. Hence the said letter X 3 does not show the fulfilment of the conditions of the said agreement on the part of the Appellant.

It is clear from the said evidence of the case that there had been no an actual tender of money within the stipulated period. Unless the Court is satisfied that the Appellant has fulfilled his part of the agreement, so far as it is possible for him to do so, namely, by tender of the  $\frac{3}{4}$  of the price, it seems obvious that it cannot order the Respondent to perform his part of the agreement inasmuch as the condition precedent to such performance has not been fulfilled. There is not a scrap of evidence that the Appellant has even offered the balance of  $\frac{3}{4}$  of the total price

to be paid by him. In such circumstances I do not think it will be proper for the Court to decree a specific performance.

In the case of Babahamy Vs Alexander 2 NLR 159 it was held that the notary's act did not amount to a legal lender of the money. The tender should not have been conditional on defendant signing a deed which he had no opportunity of examining; and a mere statement that money was ready without its being offered for acceptance was not sufficient to constitute tender.

In the case of Eramias Fernando Vs Perera (1926) 28 NLR 183 it was held that the tender of the price was a condition precedent to the performance of the promise, and that time was of the essence of the contract.

In the case of Hanifa Umma Vs Parak (1925) 3 Times 172; 7 Law Recorder 49 it was held that where time is of the essence of the contract, the Courts of Equity will not decree specific performance where there has been a delay in payment.

In the aforesaid circumstances I find no reason to interfere with the said judgment of the learned District Judge of Negambo dated 08.07.1996. Therefore I dismiss the instant appeal of the Appellant with costs.

*Appeal dismissed.*

Judge of the Court of Appeal