

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

	D.N. Wijetunga
	No. 80/1A, Layards Road,
	Colombo 05
<b>C.A. 702/89 (F)</b>	Now Residing at
<b>DC Mount Lavinia</b>	No.4, Ramakrishna Place,
<b>Case No. 345/Z</b>	Colombo 06.

**Plaintiff – Appellant**

***Vs.***

T.C. Amarasekera,  
No. 6, 2<sup>nd</sup> Lane,  
Baddegana Road (South)  
Pita Kotte.

**Defendant – Respondent**

**Before : P.R.Walgama, J**

**Counsel : Faiz Musthapha P.C. with Ashia Hussain for the  
appellants.**

**: D.M.A. Dissanayake with L.M.C.D. Bandara for  
Defendant Respondent.**

**Argued on : 14.12.2015**

**Decided on: 29.03.2016**

CASE NO- C.A. 702/89 (F)- JUDGMENT- 29.03.2016

**P.R.Walgama, J**

The question in this appeal is whether the Court below was correct in its reasoning and conclusion.

The Plaintiff- Appellant (in short the Appellant) instituted action against the Defendant -Respondent (in short the Respondent) for the following reliefs inter alia;

For judgment ejecting the Defendant and his servants, agents from the premises more fully described in the schedule to the plaint, and for liquidated damages in a sum of Rs 10,000/.

Further for damages in the sum of Rs.8000/ and for continuing damages at Rs. 400/ per month from 1<sup>st</sup> April 1979 till the Plaintiff is placed in vacant possession in the premises in suit.

For the sake of convenience and brevity I would refer to the relevant facts thus;

On or about 6<sup>th</sup> November 1974 the Appellant allowed the Respondent to occupy the suit premises free of rent bearing No. 6, C.M.A. Housing Scheme, 2<sup>nd</sup> Lane , Beddagana Road South, Pita Kotte.

The Respondent has entered the subject premises as a licensee and while was in occupation entered to an Agreement with the Appellant to purchase the said premises for a sum of Rs. 45,000/. The said 'dossier' was attested by S. Gnanapandithan N.P. on 14<sup>th</sup> February 1975 and bears the No. 431, and it is now marked as A.

At the execution of the said Agreement Respondent paid Rs. 10,000/ to the Appellant as an advance of the purchase price of Rs. 45,000/.

In addition the parties bound themselves by the terms stated herein below;

1. The Seller doth here by covenant and agree to sell and convey unto the Purchaser within three months, the property and premises described in the schedule hereto for the price or sum of Rs. 45,000/
2. Should the Purchaser be unwilling or refuse to purchase the property and premises except for the reasons stated in clause 9 hereof when the said seller is willing to sell the same then the Seller shall be entitled;
  - a. To forfeit the said sum of Rs. 10,000/ paid as an advance, or
  - b. To enforce the specific performance,

c. To be paid a sum of Rs. 10,000/ by way of liquidated damages and not as a penalty.

It is said that the Appellant failed and neglected to purchase the said property and there by the said sum of Rs. 10,000/ was forfeited.

The pith and substance of the Respondent's case was that he had been paying to the National Housing Commissioner on behalf of the Appellant for the advance obtained of Rs. 15,000/ obtained by him. It is alleged by the Respondent that he was ready to pay the balance money and the Appellant had evaded the acceptance of the same, and thereby had failed to execute a Deed of Transfer in favour of the Respondent. Further it is said that there was no time limit or sun set clause in the said agreement.

It is categorically stated by the Respondent that the Appellant has will fully refrained from calling over at the State Mortgage Bank to accept the balance money due on the transaction and to execute the Deed of Transfer.

In addition it is said that the payment of the balance money and to execute the Deed of Transfer was extended from time to time.

Therefore in the above context the Learned District Judge was of the view that the afore said material warrants a specific performance in favour of the Respondent.

The Learned District Judge in evaluating the testimony of the Plaintiff was of the view that he had taken different positions and therefore it lacks probity.

Further it is apparent that the Plaintiff – Appellant has extended the period of payment by the letter marked P2 till the 31.07.1977. It is intensely relevant to note that the Defendant- Respondent has already paid more than half of the agreed amount by paying Rs. 25,000/ to the Plaintiff – Appellant.

In the above context this Court is compelled to arrive at the irresistible conclusion that the Defendant – Respondent was always anxious to purchase the said premises, but it was the Plaintiff – Appellant who was reluctant to honour the said Agreement.

The Learned District Judge has also appreciated the fact that the Defendant's endeavour to fulfil the conditions in respect of the payment by applying for a loan from the State Mortgage Bank, and the Learned District Judge was also of the view that the Plaintiff- Appellant has not challenged the said position as such it is obvious that the Defendant-

Respondent was always willing to purchase the suit premises.

It is transpired from the impugned judgment and the Learned District Judge has adverted to the documents marked P12,P13 and P14 and was of the view that the Plaintiff -Appellant has acted in a manner to stultify the Agreement marked P1. Further the said position is fortified by the document marked P16 too.

The Defendant – Respondent was not in a position to deposit the balance money in Court as he was unable to obtain the loan from the State Mortgage Bank due to the act of the Plaintiff – Appellant.

Therefore in the said backdrop the Learned District Judge was of the view that the Plaintiff- Appellant is totally responsible for his irresponsible act viz a viz by not coming to the State Mortgage Bank to accept the balance money and close the transaction.

It was also the view of the Learned District Judge that the time factor is not in issue in respect of the Agreement Marked P1. Hence it was determined and decreed that the Defendant – Respondent is entitle to have the said Agreement enforced accordingly.

In the above legal and factual matrix this Court of the view that the appeal is devoid of merits and should stand dismissed.

Appeal is dismissed subject to a cost of Rs. 10,000/-

**JUDGE OF THE COURT OF APPEAL**