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

C. A. Appeal No. 810/97 (F)

D. C. Colombo Case No. 3428/ZL

Mrs. Padmini Joshep
No. 17/3, Kuruppu Road,
Colombo 8

Plaintiff

Vs.

Joshep Trevene Lakshman
Cherubim Frnando of Manville
Albarta Canada

By Attorney Hilarian Nicholas Oliver Placidus Fernando of No. 89/2, Sri Dharma Mawatha, Ratmalana.

Substituted Defendant

AND

Joshep Trevene Lakshman
Cherubim Frnando of Manville
Albarta Canada

By Attorney Hilarian Nicholas Oliver Placidus Fernando of No. 89/2, Sri Dharma Mawatha, Ratmalana.

Substituted Defendant – Appellant

Vs.

Mrs. Padmini Joshep
No. 17/3, Kuruppu Road,
Colombo 8

Plaintiff-Respondent

BEFORE	:	**M. M. A. GAFFOOR, J.**
COUNSEL	:	Ikram Mohamed P.C. with S. Mitrakrishnan for the Substituted Defendant-Appellant Nihal Fernando P.C. with Amith Silva for the Plaintiff-Respondent
WRITTEN SUBMISSIONS TENDERED ON	:	03.05.2018 (Further Written Submission by both parties)
DECIDED ON	:	**11.09.2018**

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M. M. A. GAFFOOR, J.

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted this action bearing case number 3428/ZL in the District Court of Colombo on 25th April 1980 (and the amended Plaint was filed on 27th January 1982) against the Defendant-Appellant (hereinafter referred to as 'Appellant') pleading inter alia that;

a) a transfer of the questioned property to the Respondent upon the Respondent paying the balance purchase price of Rs. 14000/-

b) in the event of the Appellant's failure to execute the Deed for an order directing the Registrar of the Court to execute a Deed of Transfer in favour of the Respondent.

Facts of this case may be briefly summarised as follows:

The original Defendant had entered into an Agreement No. 2268 dated 5th July 1974 which is marked as P1 with the Respondent to sell the property called 'Sunninton' in Nuwara Eliya. In terms of the said Agreement P1 original Defendant had agreed to sell the property free from all encumbrances for a sum of Rs.20, 000/- out of which a sum of Rs.1, 000/- had already been paid; and the

Respondent paid the Defendant a further sum of Rs.5, 000/- in reduction of the purchase price of Rs.20, 000/- stipulated in the said agreement (this fact not disputed, *vide Respondent's evidence at page 218 of the brief*).

According to the said Agreement the purchase would be completed by the Respondent on or before 31st October 1974. And the Respondent stated that by letter P5, Betram Fernando, Lawyer of the De Silva and Mendis law firm informed the Respondent to be present at his office on 29th October 1974 for the execution of the deed of transfer relating to the said property; on the particular day the Respondent and her husband visited the law office as requested by the lawyer and that they had taken with them the balance purchase money of Rs.14,000/- to be paid to the original Defendant, as they had gone with intent to purchase the property. Further the Respondent stated that it is their uncontradicted evidence that when they visited the said office the original Defendant was not present.

Furthermore, the Respondent was informed by lawyer Betram Fernando that the said property being an excess house within the meaning of the Ceiling on Housing Property Law No. 01 of 1973 and that the property could not be sold, but later (on or about 1979) the Respondent found that this explanation was false and the property in question had not vested in the Crown. After this the Respondent by letter P8 gave notice to the original Defendant in terms of clause 9 of the said Agreement P1 to effect the transfer of the said property in favour of the Plaintiff within 7 days of the said latter. Therefore the Respondent claimed for *Specific Performance.*

Yet, in the District Court the Appellant's position was that the Respondent has not asked for a declaration that she is entitled to enforce the specific performance; that the Respondent has not deposited the balance; the Respondent has instituted this action after six years.

At the trial the Respondent's husband (a witness to P1) also gave evidence on behalf the Respondent and the Respondent closed her case marking in evidence documents marked P1 to P8. The (Substituted Defendant) Appellant closed his case without calling any witnesses and produced in evidence documents D1 to D7.

At the end of the trial the learned Additional District Judge pronounced the judgment dated 5th October 1997 and decided in favour of the Respondent.

Being aggrieved by the said judgment this appeal was filed by the appellant praying to set aside the judgment of the learned Additional District Judge dated 5th October 1997.

In this case it's pertinent to peruse the relevant terms and conditions (clause 4 and 9) of the said Agreement:

Clause 4 of the Agreement:

The purchase shall be completed by the Purchaser on or before the thirty first day of October One thousand nine hundred and seventy four by tendering to the vendor:-

i. *The balance purchase price of Rupees nineteen thousand (19, 000/) and*
ii. *A Deed of conveyance of the said premises in favour of the Purchaser and or his nominee or nominees in accordance with the provisions of this Agreement (a drift of which conveyance shall have been previously submitted to and approved by the vendor)*

The vendor shall thereupon at the cost and expense of the Purchaser execute the said deed of conveyance free from all encumbrances.

Clause 9 of the Agreement

If upon the purchaser duly observing and performing the terms and conditions set forth in this agreement and on the part of the purchaser to be observed and performed the vendor shall wilfully refuse to execute the deed of transfer as provided in clause 4 hereof, either,

a) *the purchaser shall be entitled to claim from the vendor a refund of the said sum of Rs.1000/- deposited as aforesaid and shall also be entitled to recover from the vendor a like sum as and by way of liquidated damages and not as a penalty or*

b) *the purchaser shall on giving the vendor seven days notice of his intention to do so be entitled to enforce the specific performance of the agreement herein entered into by the vendor.*

After careful perusal of these two clauses of the said agreement, it's clear that, the Respondent's claim can sustainable in *prima facie.* According to the evidence of the Respondent, when she visited the law office of de Silva & Mendis on 29th October 1974, the original Defendant was not present *(vide page 257 and 264 of the appeal brief)*. And the lawyer informed that the property has been vested in the state and as such sale cannot be effective. Therefore, the Respondent argues that she was ready and willing to pay balance money and complete the sale. Further she states that the absence of the original Defendant at the said law office to execute the deed of transfer clearly establishes a breach of the Agreement P1.

Therefore, the Respondent did not settle the due amount as they agreed in the said Agreement and the Respondent had requested to refund her advance from the Appellant (the request letters marked as P6 and P7). However, there was no evidence led by the Appellant to question the said letters.

In this case, I feel difficult to fathom to find that, why the said Betram Fernando gave such false statement regarding the questioned property to the Respondent. The Appellant also was not mindful to call Betram Fernando as a witness of the case thus the Respondent took up a position and argued that '*the Appellant had the opportunity to call Betram Fernando who is the Senior partner of the law firm De Silva and Mendis or at least could have produced documents contained in the file relating to the sale of the said property maintained at the said law firm, which he had access to since his instructing attorney is also partner of the said law firm'*

Further, the Appellant averted that the Notary who attested the Agreement of sell is one Bertram Fernando who was the lawyer and advisor for both the defendant and the plaintiff. And the Appellant stated that she cannot be held responsible for any advice or information given to the Respondent by Mr. B. Fernando who is the Respondent's lawyer also.

To answer this, the Respondent's husband gave evidence that for the purpose of obtaining a loan Betram Fernando had in that instance acted as the lawyer for the Respondent. And the Respondent stated that from P1 it is clear that any at all times Betram Fernando had been the original Defendant's lawyer in the matters relating to the sale of the property inasmuch as P1 states that any notice by the Respondent to the original Defendant can be sent to the law office of De Silva and Mendis.

However, I observe that, on the facts regarding the false statement and acting as a notary to both parties, a clear unethical conduct was from the said Betram Fernando. Even though, the Court of appeal is not a proper forum to discuss the (unethical) conduct of the Attorney at Law.

Now a question arises that without full filling the vital requirement of the said Agreement under clause No.4, whether the plaintiffs' claim to enforce the said Agreement is legal.

In my opinion, the entire facts and evidence led by the Respondent show me that,

a) the Respondent was prepared to comply with the terms and conditions of the said Agreement and never acted in breach of it.

b) the original Defendant who had acted in breach of the said Agreement by not being present to execute the said Deed of Transfer.

c) the original Defendant had wilfully misrepresented by alleging that the said property is vested when it was not.

The learned District Judge too decided that the Appellant had violated the Agreement No. 2268 P1.

In order to arrive at my final finding in this case, it is necessary to consider certain judicial decision.

In ***Noorul Asin and Other Vs. Podinona de Zoysa and Others*** *(1989) 1 SLR 63* this Court observed that: "In terms of the agreement between them, the vendors as well as the purchaser were entitled to claim specific performance in case of default by either party. There was a fair balance of sanctions." The court held thus:

"The right to claim- specific performance of an agreement to sell immovable property is regulated by Roman-Dutch law anal not English law. Under the Roman-Dutch law every party who is ready to carry out his terms of the bargain prima facie enjoys a legal right to demand performance by the other party and this right is subject only to the overriding-discretion of the Court to refuse the remedy in the interests of justice in particular cases. But in English law the only common law remedy for breach of an executory contract is damages but the Chancery Court developed the rule whereby specific performance could be ordered in appropriate cases. In the absence of agreement to the contrary the Roman-Dutch law confers on ***a purchaser ready to fulfill his obligations under an executory contract the right to elect one of two alternative remedies namely, specific performance or damages****. The party that has broken his contract does not get the option of purging his default by payment of money. It is against conscience that such a party should have the right of election whether he would perform his contract or only pay damages for breach of it. The election is rather with the injured party subject to the discretion of Court. This is the Roman-Dutch law:*

'The question always is what the contract is?" The Court must be guided by the primary intention of the parties to be gathered from the instrument embodying the agreement.'

In ***Farmers' Co-operative Society (Reg) Vs. Berry*** *(1912) AD 343.* Innes J stated that:

"Prima facie every party to binding agreement who is ready to carry out his own obligation under it has a right to demand from another party, so far as it is possible, a performance of his undertaking in terms of the contract"

In ***Hubert Fernando Vs. Kusumananda de Silva*** *(1991) 1 SLR 187* the Supreme Court held:

> *"on the terms of the agreement to sell no alternative was made available to the vendor as to the mode of performing the contract. The return of the deposit was no alternative in any true sense. Hence the vendor was obliged to make specific performance on the purchaser fulfilling his obligations. There was here no substituted obligation."*

The notion of judicial discretion to grant or refuse an order of specific performance is regulated by common law. In ***Haynes Vs. Kingwilliamstown,*** *(1951) 2 SA 371,* De Villiers AJA held that:

> *"It is, however, equally settled law with us that although the court will as far as possible give effect to a plaintiff's choice to claim specific performance it has discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his id quod interest. The discretion which a court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."*

When taking a decision whether to grant relief or not in a case of breach of contract it is necessary to examine the intention of the parties at the time that they signed the agreement.

In the present case what was the intention of the Appellant when she signed the agreement? In finding an answer to this question it must be remembered that the Appellant, at the time of signing the agreement, accepted an advanced payment from the Respondent and that she signed the agreement knowing that there is a clause for specific performance. Thus it is clear that the intention of the Appellant had been, at the time of signing the agreement, to sell the property to the Respondent. What was the intention of the Respondent at the time of signing the agreement? It has to be noted here that she gave a sum of money to the Appellant and signed the agreement knowing that there was a clause relating to specific performance. Thus her intention had been, at the time of signing the agreement, to purchase the property. Thus it is clear that the intention of both parties, at the time of signing of the agreement, was to implement the said Agreement marked P1.

Furthermore, the purpose of including a clause for specific performance is that both parties would be compelled to fulfil their obligations. When I consider all the above matters, I am of the opinion that it becomes the duty of court to make an order, if there is a clause for specific performance in the agreement, implementing the clause for specific performance.

It is an accepted principle in law that the wrongdoer is not permitted to take advantage of his own wrongful acts. The same principle is applicable to a case of breach of contract. In the present case, I have pointed out earlier that according to the evidence led by the Respondent the violator of the agreement was the Appellant. Thus she cannot be permitted to take advantage of her wrongful acts. If specific performance is not ordered she would take advantage of her wrongful act. When I consider all the above matters, I am of the opinion that it becomes the duty of court to order specific performance in this case.

In my view, who has not violated the agreement cannot be permitted to suffer the injuries caused by the violating party. Considering all the above matters, I hold the said Agreement No. 2268 which provides for specific performance and/or damages, the party who is ready to fulfil her obligation in terms of the contract has the right to elect one of the remedies namely, specific performance or damages when the said Agreement is breached and that the party who is in violation of the Agreement has no right to elect between the remedies.

Having considered the above matters and the legal literature, I further hold that the Respondent who is willing to fulfil her obligation in terms of the agreement is entitled to demand specific performance of the agreement by the violating party when the agreement provides for specific performance and/or damages and the violating party cannot elect the option of forcing the party who has not violated the agreement to accept damages in lieu of specific performance.

Further, in this case the Appellant argued that *the Respondent was in silent for about 6 years and then suddenly requests the Appellant to transfer the property to her; and the Appellant stated that the contract has been rescinded.*

However, Learned Counsel for the Respondent was correctly mentioned that the judicial authority is clear that in an action for specific performance in respect of an Agreement to transfer land, the prescriptive period is 6 years from the date of the breach. Therefor the counsel further submitted that Agreement P1 is dated 5th July 1974 was breached by the Appellant on 29th October 1974; and the action was filed on 21st April 1980, which is less than from the date of the Agreement P1. I agree with his submission.

Section 06 of Prescription Ordinance says that:

> *"No action shall be maintainable upon any deed for establishing a partnership, or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security not falling within the description of instruments set forth in section 5, unless such action shall be brought within six years from the date of the breach of such partnership deed or of such written promise, contract, bargain, or agreement, or other written security, or from the date when such note or bill shall have become due, or of the last payment of interest thereon."*

Further, I respectfully recall the decisions of ***Emis vs. Sango*** *(1911) 1 Court of Appeal Case 6* and ***Ismail vs. Ismail*** *(1921) 22 NLR 477.*

In ***Ismail vs. Ismail,*** Betram, C.J. held that:

> *'When the time for the performance of an obligation is fixed so that there can be a definite starting point for the running of the period of prescription, the breach of contract occurs when the performance does not take place within the time so fixed. But when there is no fixed date for the performance, but there is only an obligation to do any act within a reasonable interval after a given date, there is no breach, unless there is a refusal either on demand or otherwise to perform the obligation, or unless the person liable has in some way disabled himself from performing the contract.'*

I am in an opinion that, once the Respondent had known the true fact regarding the property (non-vesting), at that time she reasonably claimed for the remedy in the way of specific performance before completion of the prescriptive period. Therefore Respondent's action still in a sustainable position.

For the aforementioned reasons, I hold that the learned Additional District Judge has come for a lawful conclusion.

Therefore, I affirm the judgment dated 5th October1997. And dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL