

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

**In the matter of an Appeal from
a Judgment of the Court of Appeal**

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.

Plaintiff

Vs

**SC APPEAL 110/2010
SC (Spl) LA 9/2010
CA No. 775/98 (F)
D.C.COLOMBO No. 15849/L**

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
Both of No. 21, Galle Face
Terrace, Colombo.

Defendants

AND

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.

Plaintiff Appellant

Vs

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
Both of No. 21, Galle
Face Terrace, Colombo.

Defendants Respondents

AND NOW

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
Both of No. 21, Galle
Face Terrace, Colombo.

**Defendants Respondents
Appellants**

Vs

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.

**Plaintiff Appellant
Respondent**

**BEFORE: S. EVA WANASUNDERA PCJ.
K. T. CHITRASIRI J. &
PRASANNA S. JAYAWARDENA PCJ.**

COUNSEL: Romesh de Silva PC with Sugath Caldera for the Defendants
Respondents Appellants.
Faiz Musthapha PC with Amarasiri Panditharatne for the
Plaintiff Appellant Respondent

ARGUED ON: 30. 11. 2016.

DECIDED ON: 08. 03. 2017.

S. EVA WANASUNDERA PCJ.

In this Appeal, special leave to appeal was granted on the following questions of law:

1. Is the judgment of the Court of Appeal contrary to law and against the evidence and material which were before Court?
2. Did the Court of Appeal fail to consider that the Appellants were willing and ready to sell the said property by the 1st of March,1991 as established by the letter dated 25.02.1991. marked P7 by which the Appellants requested the Respondent to submit the draft copy of the Transfer Deed for approval by the Attorney at Law of the Appellants to conclude the sale as agreed?
3. Should the written consent referred to in Section 6 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 as amended be direct and/or can it be implied or inferred?
4. Does the failure on the part of the Respondent to forward the draft Deed of Transfer before 01.03.1991 or thereafter, affirm that the Respondent was not willing to fulfill its obligation under the said Contract?
5. If the performance is impossible, could the Court make order for specific performance?

The facts pertinent to this case should be summarized before considering the law since the problem between the parties who have litigated for so long could be understood clearly only in that background. The Defendants Respondents Appellants (hereinafter referred to as the Defendants) who are husband and wife hailing from the peninsula of Jaffna, yet living in Colombo entered into a written agreement with the Plaintiff Appellant Respondent (hereinafter referred as the Plaintiff) to sell their property in Colombo bearing No. 101/1, W.A.D.Ramanayake Mawatha, Colombo 02. It was an Agreement to Sell dated 24th August, 1990 bearing No. 2795 which was attested by M.Kamil Zaheed, Notary Public marked as P1 at the trial in the District Court. The said Agreement provided that the sale price was Rs. 2000,000/- and that at the time of the execution of document P1, Rs. 1000,000/- was paid. Accordingly the rest of the money, i.e. another Rs.1000,000/-

was due to be paid by the Plaintiff to the Defendants at the time of the execution of the Transfer Deed. It was also agreed that the sale should be concluded on or before the 1st of March, 1991. At the time of the execution of the Agreement to Sell, the Plaintiff was given possession of a **part of the property**. The possession of the other part of the property **was to be given** at the time of the **execution** of the Transfer Deed. The Plaintiff instituted action in the District Court praying for **specific performance** of the sale in compliance with the conditions contained in the said Agreement to Sell No. 2795.

Both parties to the Agreement No. 2795 were aware at the time of execution of the same, that the other part of the property was occupied **by Rowlands Ltd.**, a company running its business as a **tenant** of the Defendants.

The Defendants in their answer stated that the informally agreed true sale price was Rs.3000,000/-. The Defendants also took up the position that the Agreement No. 2795 **was bad in law** since the 2nd Defendant had not previously granted **his consent in writing to the 1st Defendant to legally transfer her share** to the Plaintiff as required by the law of Thesawalamai which governed the Defendants. The Defendants answering the Plaint submitted that **yielding the vacant possession** of the remaining part of the property **was not attainable** in as much as the tenant Rowlands Ltd. refused to vacate the said part of the property, despite all efforts made by the Defendants to get them out of that part of the property before 01.03.1991. The next position taken up by the Defendants was that **the Plaintiff knew that the Defendants were trying** to get the property from Rowlands Ltd. but had so far failed to get it and therefore **the Plaintiff had acquiesced in such inability of the Defendants to secure the vacant possession** of the said portion tenanted by Rowlands Limited. The Plaintiff had **also refrained from requiring the Defendants for specific performance for a long time**. It was after one year and one month from the date on which

execution of the transfer deed was due to be done, that the Plaintiff filed action in the District Court in April, 1992.

At the District Court trial, the Plaintiff, the 2nd Defendant, the valuer Tissera and the Police Constable Indrapala gave evidence. The Plaintiff closed his case reading in evidence documents P1 to P10. The Defendants concluded the defense marking in evidence documents D1 to D16. At the end of the trial, after the written submissions, the learned trial judge **dismissed the Plaintiff**.

The Plaintiff appealed to the Court of Appeal and the learned judges of the Court of Appeal **allowed the appeal and granted the Plaintiff the reliefs prayed for by the Plaintiff**. Being aggrieved by the said judgment of the Court of Appeal, the Defendants are before this Court by way of this Appeal.

The Plaintiff had been filed by the Plaintiff against the Defendants on 14th April, 1992. The **only relief** prayed for is **specific performance** of the sale of the property by the Defendants to the Plaintiff as agreed by the Agreement to Sell No. 2795. There is no alternative relief prayed for such as damages. The property in question is Assessment No. 100/1, W.A.D.Ramanayake Mawatha, Hunupitiya, Colombo within the Municipal limits of Colombo. The property consists of a big single storey dwelling house with four bed rooms, a spacious sitting hall, a library room, open verandhas, two bathrooms and in between spacious open spaces etc. of around an extent of 2500 square feet on the land of 18.87 Perches, according to the evidence before court. **Part of the house, at the time of the Plaintiff was occupied by the Plaintiff and the other part was occupied by Rowlands Ltd. as a tenant of the Defendants.** The tenants had agreed to leave that part of the house before 01.03.1991.

The Answer dated 11.11.1992 submitted to court revealed that the market value of the property as at the date of execution of the Agreement to Sell, was Rs. 4 million and in 1991 the Plaintiff had

informally agreed to pay the Defendants Rs. 3 million even though the Agreement No. 2795 stated the sale price as Rs. 2 million. Rs. 1 million was taken as an advance and possession of part of the house was given. The Defendants' position was that the said agreement was bad in law as the 2nd Defendant had not given his consent in writing to the 1st Defendant to agree to transfer her share of the property to the Plaintiff and also, that, due to the tenant Rowlands Ltd. not leaving the other part of the premises, the refusal by that company to leave the said portion of the premises and yield up possession of the said part had made the specific performance by the Defendants of the Agreement referred to in the Plaint an **impossibility**.

P7 is the basis of the second question of law raised before this Court. This is a letter dated 25.02.1991 written by the 2nd Defendant to the Attorney at Law, Kamil Zaheed who attested the Agreement 2875, informing him that **“the premises would fall vacant and be ready for sale by the 1st of March,1991”**. The 2nd Defendant also added, in the same letter, thus. **“ Please submit a draft copy of the Transfer Deed early in order to get the approval of our Lawyers”**. He further added that he needs the original of the Agreement 2795 as the photocopy is unacceptable to his lawyers. Since no response was forthcoming the 1st Defendant wrote another letter dated 12th March,1991 with a copy to the Plaintiff which letter was produced in evidence marked as P8. The body of the letter reads thus: **“ Further to our letters dated 25.02.1991, we wish to forward a copy of the letter dated 11.03.1991 from the Managing Director of the Rowlands Limited regarding their willingness to vacate the premises as early as possible and their reasons for not having done so, as had been earlier agreed to. Please be kind enough to send the documents we requested earlier by registered post to the above address. We hope the final transaction will be settled at the very earliest. We thank you.”** A copy of the letter sent to the 1st Defendant by Rowlands Limited Managing Director, which was referred to, in the body of the letter to the Attorney at Law Kamil

Zaheed' was also produced in evidence marked as P10. By these two letters P8 and P10, it is proven that neither the Plaintiff nor the Attorney at Law of the Plaintiff took any steps to forward a draft copy of the Transfer Deed which was due to be executed on 01.03.1991.

What can be understood by the aforementioned documents is that the Defendants were ready and willing to execute the Deed of Transfer on or before the 01.03.1991 as agreed but the Plaintiff did not perform his part of sending a draft before that date.

Thereafter Rowlands Limited did not keep their word to leave the part of the premises but kept on stating that they have not been able to find another place. There is evidence to the effect that the Defendants were trying to find alternate accommodation for Rowlands Limited which had failed. The Defendants had informed the Plaintiff that they might have to file action to eject Rowlands Limited and that it would take some time to get them ejected.

Then the Defendants had informed the Plaintiff a way out of the problem by offering to execute the sale of the portion the Plaintiff was already occupying which was about 14 Perches in extent. The Plaintiff had not agreed to that suggestion. The evidence show that thereafter the Plaintiff had forcibly opened the library room and the rooms which had till then contained some of the goods belonging to the Defendants and the parties got more and more antagonized. The Plaintiff had obstructed the road used by Rowlands Ltd. workers by putting up an unauthorized wall and also sunk a tube well on the land which Rowlands Ltd. was occupying. There had been many police complaints and police statements by the Defendants and the Plaintiff which were produced in Court through a Police Officer who was called upon to give evidence.

The evidence before court proves that after paying Rs. 1 million, the Plaintiff was occupying a bigger portion of the property than the

portion which was given on rent to Rowlands Limited. The Defendants had genuinely tried to get rid of the tenants. Thereafter the Defendants had given up on the tenant's promise to vacate the smaller portion and decided to file action against the tenants. **They informed the Plaintiff about the impossibility of specific performance due to this genuine reason.** The Defendants had genuinely tried to solve the problem with the Plaintiff in alternative ways. They failed to move on because the Plaintiff did not want a solution but he wanted **only specific performance** of the Agreement to sell . It is to be noted that by the dead line for the execution of the Transfer Deed, the Plaintiff failed in his duty to submit a draft to the Defendants. The Plaintiff's excuse is that his lawyer had gone abroad by that time.

If the Plaintiff was ready with the money on 01.03.1991 and was present at the lawyer's office having informed the Defendants that he was willing and ready to execute the Transfer Deed as agreed by Agreement to sell Deed No. 2795 and **then** , if the Defendants did not turn up and / or informed the Plaintiff that they are unable to get the portion of the property which should be vacant at the time of the execution of the Transfer Deed at that time and on that date, the position would have been different. In such a case, the purchaser, the Plaintiff would have been entitled to go to court and beg for specific performance of the Agreement. It can therefore be concluded that execution of the transfer deed could not have been performed on 01.03.1991 due to the lapse on the part of the **Plaintiff since he was not ready to get it done on that specific date.** He had not offered the money or sent a draft of the Deed of Sale to be executed even after the 01.03.1991. He had not even sent it at any time before filing action for specific performance.

It is clear by the actions of the Plaintiff that he had accepted the fact that the Agreement to sell could not be performed due to the fact that Rowlands Limited had not gone out of the premises and

therefore the Defendants could not actually give him vacant possession prior to the execution of the Transfer Deed.

Both parties had knowledge of the problem of having the tenant Rowlands Limited in the smaller part of the property. It is mentioned in paragraph 5 of the Agreement that Rowlands Limited is there in part of the property as a tenant and the Defendants should get vacant possession prior to the execution of the Transfer.

When the purchaser accepts the fact that the premises is encumbered with a tenant, the purchaser in turn has to accept that it could be possible to get vacant possession or it could be impossible to get vacant possession.

The law of the country regarding the tenant and the land lord prevail at all times and there is no way that a land lord can get the premises by force or by any other means other than by filing action for ejection of the tenant in the District Court. In the case in hand, the tenant company had in writing agreed to leave but failed to do so. Yet, both parties knowing of this situation cannot complain of any aftermath due to this reason, as a breach of a condition. The said condition of **getting rid of the tenant had become an impossibility**. Still for all, the Transfer Deed could have been executed on the 1st of March,1991 if the purchaser genuinely wanted to get the ownership, making provision for getting the tenant out by lawful and legal process. The purchaser could have got the consent of the tenant to leave that part of the premises which was the **smaller part** of the property by way of another agreement. The Plaintiff , having understood that Rowlands Limited was the cause of the impossibility, could have easily made him also a party to this action but he has failed and / or refused to do so. It may also have been that if the deed of transfer was executed, the Defendants would have perhaps paid some money to Rowlands Limited and persuaded them to leave, giving them a little more time.

None of these possibilities could have been made to happen due to the reason that the Plaintiff was not ready to perform his obligation of having the money ready and the Draft Deed of Transfer ready by the dead line, i.e. the 1st of March, 1991. Can such a purchaser turn around and ask for specific performance before a court of law? Certainly not, in my opinion. Specific Performance can be sought only if the party seeking that relief has performed his duty precisely according to the terms and conditions of the Agreement and not otherwise.

In this case, there is no contest that the sale price was informally agreed as Rs. 3 million. Yet there is a contest about how much was paid prior to the signing of the Agreement. The Defendants state that it was only one million which was paid but the Plaintiff's case is that Rs. 2 million was paid. The Plaintiff had marked some receipts to that effect. The Defendants allege that they are false documents which the Plaintiff has manipulated having laminated one document and copying the same with different figures. The Defendants had complained to the Police and had begged that the same be investigated into. The police complaints and letters to the police are part of the record. Police officer gave evidence to the effect that there were a number of complaints regarding the son of the Plaintiff physically hammering the 2nd Defendant on five occasions when he went into the land with a surveyor for the purpose of demarcating the portion occupied by the tenant Rowland Limited. The tenant Rowlands Limited also had made many complaints about the Plaintiff having done forcible entering into their portion of the premises etc. to harass them continuously. I noted that in the police statement of the Plaintiff, he had stressed that “ **he had bought the whole property**” from the Defendants for Rs. 2 million. In his statement to the Police which is part of the evidence on record, the Plaintiff states that even though he had paid the money the deed has not been given to him by the Defendants and stresses in his own words that “ **whether I get the Deed or not I remain the owner of the whole property.**”

He had actually got the name of the tax receipts to the Municipal Council, the electricity bill etc. also changed into his name after the Agreement posing to be the owner of the property. I observe that these actions of the Plaintiff are illegal and unlawful as he was not yet the rightful owner of the whole of the property. The evidence to that effect is unchallenged. It looks like that he had tried to gather proof of himself to be the owner before getting the transfer deed in place.

Thus, the balance of probabilities on evidence goes against the Plaintiff for not having wanted to pay the balance of Rs.2 million to the Defendants on or before the 1st of March,1991 and getting the Transfer Deed done in time on the date as agreed. He had wanted to get possession of the whole property by force so that invariably the Defendants would be forced to execute the Transfer Deed paying only Rs. 1 million more which is less than the accepted agreed purchase price of Rs. 3 million and that also only at a time that the Plaintiff wished to give the same to the Defendants. He thought that he was quite safe with the 'specific performance' clause in the Agreement to Sell.

The Defendants had called a valuer to give evidence who had valued the property to be Rs. 4 million in August, 1991. This evidence was not challenged. The 2nd Defendant giving evidence mentioned that **this property was totally tenanted to two parties at the time of agreeing the purchase price as Rs. 3 million.** That fact was the reason to agree to sell at a lower price than the market price. The advertising company who was the tenant of the portion of which possession was given to the Plaintiff at the time of the execution of the Agreement, left after a settlement was arrived before the Rent Board between the Defendants and that tenant, the advertising company, right before the Agreement No. 2975 was signed. So, it is seen from the evidence before court that the property was agreed to be sold at a lower price due to the fact that it was tenanted.

The lease of the smaller part of the house which was tenanted with Rowlands Limited was ending on 01.03.1991 and that is the reason for agreeing to sign the Transfer Deed on that day because they promised in writing to leave at the end of the lease.

The Law of Contracts by Professor Justice C.G. Weeramantry explains the principles governing the grant of specific performance in Sri Lanka in Chapter 29 of the same. He states that “ It has already been observed that specific performance is a **discretionary remedy**. This does not however mean that the court is at liberty to grant or withhold the remedy capriciously and **certain principles** have been evolved which guide the court in the exercise of its discretion.” I note that one of the said guiding principles enumerated by him in this Chapter is that “ **specific performance will not be granted where the contract is impossible of performance** “. In *Amarasinghe Appuhamy Vs. Boteju 1908 , 11 NLR 187*, it was held that where the subject matter of a sale has been disposed of to a bona fide purchaser, specific performance will not be decreed against the seller.”

The time with reference to **which impossibility is judged is the time of performance and not the time of contracting**. In the case in hand even at the time of contracting, the parties were quite aware that the undertaking given to grant vacant possession to the Plaintiff depended on whether Rowlands Limited would vacate on time. The contract Agreement however did not provide for any alternate remedy in case the tenant does not go away leaving the part of the premises vacant by the dead line to sign the Transfer Deed.

Another guideline in granting specific performance is to scrutinize the contract to see whether it is **fair and just**. In the case of *Haynes Vs Kingwilliamstown Municipality 1951, 2 S.A.371 (A.D.)* , it was held that specific performance will not be granted when it would be **inequitable to the defendant or to third parties**. In the case in

hand, I observe that the Agreement to Sell No. 2795 is inequitable to the defendants as well as to a third party, the tenant, Rowlands Limited because the terms of this contract has put both the rights of the Defendants as owners of the property and the tenancy rights of Rowlands Limited in jeopardy. It is not a fair and just contract. The contract does not provide for alternate remedies either.

At this juncture, on the evidence before court and the law analyzed as above, I answer the 2nd, 4th and 5th questions of law as enumerated above, in the affirmative, in favor of the Defendants and against the Plaintiff, **firstly** on the basis that the Plaintiff had failed to perform his part of the condition in the Agreement **to offer the balance money** and get ready to sign the Deed of Transfer on 01.03.1991 even though by P7 the Defendants called for the draft deed of sale **offering vacant possession by 01.03.1991** and **secondly** on the basis that giving vacant possession of the smaller part of the property, which is part of the building standing on or about 4.87 Perches, according to evidence before court, **had become an impossibility to perform.**

With regard to the law that applies to the 1st Defendant and the 2nd Defendant, the evidence before court proves that they are subjects of Jaffna and the Thesawalamai law applies to them at all times. Accordingly, the consent of the husband, (the 2nd Defendant) should be given in writing, for the wife (the 1st Defendant), to agree to part with her property. When the Agreement to Sell No. 2795 was signed, such consent in writing had not been given. It was the argument of the Defendants that the said Agreement was bad in law due to that reason.

Even though the consent had to be given in writing, there is no specific method of giving the consent in writing. Of course, the husband can write " I do hereby consent" or a similar sentence when he signs the document giving his consent but if the said phrase showing the consent in writing is not placed on the

document, can that document be branded as 'not valid' only due to that reason. I am of the opinion that substantial compliance takes place once the husband places his signature on the document. Therefore in the case in hand, the Agreement cannot be held to be bad in law as the husband had signed on the document.

I answer the 1st, 2nd, 4th and 5th questions of law in the affirmative in favor of the Appellant. I answer the 3rd question of law in the negative.

I do hereby set aside the judgment of the Court of Appeal dated 30.11.2009. I affirm the judgment of the District Court dated 02.10.1998. The Appeal is allowed. However I order no costs of suit.

Judge of the Supreme Court

K. T. Chitrasiri J.

I agree.

Judge of the Supreme Court

Prasanna S. Jayawardena PCJ.

I agree.

Judge of the Supreme Court