

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

In the matter of an application for Leave to
Appeal against the judgment of the Civil
Appellate High Court of Kandy.

SC. APPEAL. No: 218/2014

SC. HC. CA. LA. No.476/2014

Civil Appellate High Court Case No:

CP/HCCA/Kandy/ 78/2012 (F)

D.C.NuwaraEliya Case No:

1255/2007 Miscellaneous

WicramaPathirana Mahesh Ruwan

Pathirana

“Sampath”, Udumulla,

Nugathalawa,

Welimada.

PLAINTIFF

Vs.

GinthotaSarukkaleVitharanage

Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

“Links View”, Kandy Road,

NuwaraEliya.

DEFENDANT

AND BETWEEN

Wicrama Pathirana Mahesh Ruwan
Pathirana

“Sampath”, Udumulla,

Nugathalawa,

Welimada.

PLAINTIFF-APPELLANT

Vs.

Ginthota Sarukkale Vitharanage
Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

“Links View”, Kandy Road,

NuwaraEliya.

DEFENDANT-RESPONDENT**AND NOW BETWEEN**

Ginthota Sarukkale Vitharanage
Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

“Links View”, Kandy Road,

NuwaraEliya.

DEFENDANT-RESPONDENT**APPELLANT****Vs.**

Wicrama Pathirana Mahesh Ruwan
Pathirana

“Sampath”, Udumulla,

Nugathalawa,

Welimada.

**PLAINTIFF-APPELLANT-
RESPONDENT**

BEFORE : **SISIRA J DE ABREW, J.**
PRIYANTHA JAYAWARDENA, PC, J. and
PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL : Pradeep Fernando for the Defendant-
Respondent-Appellant.

Samantha Ratwatte instructed by Ms.
Upuli Amunugama for the Plaintiff-Appellant-
Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 8.1.2015 by the Defendant-Respondent-Appellant

28.4. 2015 by the Plaintiff-Appellant-Respondent

ARGUED ON : 5.12.2016

DECIDED ON : 15.2.2017

SISIRA J. DE ABREW J.

This is an appeal by the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) against the judgment of the Civil Appellate High Court (hereinafter referred to as the High Court) dated 6.8.2014 wherein it set aside the judgment of the learned District Judge who dismissed the case of the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent). This court by its order dated 17.11.2014, granted leave to appeal on the following questions of law.

1. Have the learned Judges of the Civil Appellate High Court of the Central Province given adequate weightage and/or evaluated the provisions contained in clause '5' of the Agreement to Sell bearing No. 188 dated 27/11/2006 marked as P1?
2. Is there a finding that the Petitioner has violated the Agreement to Sell bearing No. 188 marked as P1?
3. If so, can a violator of an agreement elect the option of forcing the non guilty party to accept the damages in lieu of specific performance when a contract specifically refers to the right of seeking specific

performance?

4. In any event, is a party who is willing to carry out his obligations in terms of an agreement entitled to demand for specific performance by the other party, when the agreement has provided for specific performance as well as damages?

The 1st question of law was raised by the Defendant-Appellant whilst the 2nd, 3rd and 4th questions of law were raised by the Plaintiff-Respondent. Facts of this case may be briefly summarized as follows.

The Defendant-Appellant by document marked P2 dated 11.11.2006, leased out the property in suit (hereinafter referred to as the property) to the Plaintiff-Respondent for a period of 1 ½ years. As per the said agreement, renovation to the property was carried out by the Plaintiff-Respondent with the consent of the Defendant-Appellant.

Thereafter on 27.11.2006 the Defendant-Appellant has, by an Agreement to Sell marked P1, agreed to sell the property to the Plaintiff-Respondent for a total sum of Rs.9.0 Million within 1 ½ years from 27.11.2006. At the time of the execution of the Agreement to Sell marked P1, the Plaintiff-Respondent paid Rs.1.0Million to the Defendant-Appellant by way of a cheque to be encashed on or after 31.5.2007. The Defendant-Appellant did not encash the cheque. The reasons as to why she did not encash the cheque have not been revealed at any stage of the trial.

The Attorney-at-Law for the Plaintiff-Respondent by letter dated 17.7.2007 marked P14, informed the Defendant-Appellant that the Plaintiff-Respondent had

deposited with him the balance amount of money of the agreed price of the transaction to be paid to the Defendant-Appellant in fulfillment of the Agreement to Sell marked P1 and for the Defendant-Appellant to make arrangements to convey the property in the name of the Plaintiff-Respondent by way of a Deed of Transfer. The Defendant-Appellant did not reply this letter. However the Attorney-at-Law for the Defendant-Appellant, by letter dated 8.9.2007 marked P16, informed the Plaintiff-Respondent that he had misled the Defendant-Appellant to enter into the Agreement to Sell marked P1 and to take steps to cancel the said Agreement to Sell and collect the cheque given by the Plaintiff-Respondent. The letter marked P16 further stated that the value of the property is Rs.250 Million. But it has to be noted here that the Attorney-at-Law for the Defendant-Appellant, in the said letter, states that the value of the property is Rs.250 Lakhs. The Defendant-Appellant did not, at the trial, frame issues; did not give evidence; did not lead any evidence on her behalf; and did not object to the documents marked by the Plaintiff-Respondent at the close of the case for the Plaintiff-Respondent. The Defendant-Appellant did not, however, convey the property to the Plaintiff-Respondent as per Agreement to Sell marked P1. The Plaintiff-Respondent instituted this action against the Defendant-Appellant seeking specific performance of the Agreement to Sell marked P1.

It is clear from the above evidence that the Defendant-Appellant has violated the Agreement to Sell marked P1. The learned District Judge too decided that the Defendant-Appellant had violated the Agreement to Sell marked P1. However, the learned District Judge was of the opinion that since the Agreement to Sell marked P1 provided for damages in alternative to specific performance, no specific performance could be ordered. The learned Judges of the High Court who

did not agree with the said view set aside the judgment of the learned District Judge and directed her to enter judgment for the Plaintiff-Respondent as prayed for in the prayer to the plaint. This appeal is against the said judgment of the High Court. When the Agreement to Sell marked P1 is examined, it is clear that it provides for specific performance or damages for both parties in the event of either party refuses to fulfill his or her obligations as per the agreement (vide clause 5,6 and 7 of the agreement).

The learned District Judge has relied on the judicial decisions in Thamel Vs Fernando [2001] 2 SLR 44 and Paiva Vs Marikkar 39 NLR 255. In both cases there were no clauses in the agreement for specific performance but provided only for damages in the event of violation. But in the present case there is a clause for specific performance in the Agreement to Sell marked P1. Therefore, I am of the opinion that the judicial decisions in the said cases do not apply to the facts of this case. In order to arrive at the correct decision in this case, it is necessary to consider certain judicial decisions. In Noorul Asin Vs Podinona de Zoysa [1989] 1 SLR 63 the Court of Appeal 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 of Appeal held thus:

"The right to claim- specific performance of an agreement to sell immovable property is regulated by Roman-Dutch law and¹ 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 fulfil 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 is the contract ?" The Court must be guided by the primary intention of the parties to be gathered from the instrument embodying the agreement.

The agreement PI in clear and unambiguous terms has given the option to the party who has performed his part-of the contract to demand and compel performance by the other party. The plaintiff has performed her part of the obligations under the contract. Therefore she is entitled to a decree for specific performance."

In *Hubert Fernando Vs Kusumawathi de Silva* [1991] 1SLR 187 this 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.”

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 Defendant-Appellant when she signed the agreement? In finding an answer to this question it must be remembered that the Defendant-Appellant, at the time of signing the agreement, accepted a cheque for Rs.1.0 Million from the Plaintiff-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 Defendant-Appellant had been, at the time of signing the agreement, to sell the property to the Plaintiff-Respondent. What was the intention of the Plaintiff-Respondent at the time of signing the agreement? It has to be noted here that he gave a cheque for Rs.1.0 Million to the Defendant-Appellant and signed the agreement knowing that there was a clause relating to specific performance. Thus his 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 Agreement to Sell marked P1. What was the purpose of including a clause for specific performance? The purpose, it appears, had been that both parties would be compelled to fulfill 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. For these reasons, I am of the opinion that the learned District Judge has fallen into grave error when she decided in her judgment not to order specific performance of the Agreement to Sell marked P1. The learned High

Court Judges were correct when they in their judgment ordered specific performance of the Agreement to Sell marked P1.

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 the violator of the agreement was the Defendant-Appellant. Thus she is not and 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 in an Agreement to Sell the party 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 that in an Agreement to Sell which provides for specific performance and/or damages, the party who is ready to fulfill his obligation in terms of the contract has the right to elect one of the remedies namely, specific performance or damages when the Agreement to Sell is breached and that the party who is in violation of the Agreement to Sell has no right to elect between the remedies. Having considered the above matters and the legal literature, I further hold that the party to an Agreement to Sell who is willing to fulfill his 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.

The Judges of the High Court in a well considered judgment have considered clauses 5,6 and 7 of the Agreement to Sell marked P1 and have arrived at the correct conclusion. In view of the above conclusion reached by me, I answer the 1st, 2nd and 4th questions of law in the affirmative and answer the 3rd questions of law in the negative.

For the aforementioned reasons, I hold that the learned District Judge was in error when she dismissed the case of the Plaintiff-Respondent. I affirm the judgment of the High Court and dismiss this appeal with costs fixed at Rs.200,000/-. In addition to the above costs the Plaintiff-Respondent is entitled to recover the costs of the case in both courts below.

Appeal dismissed.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

