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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff

S.C. Appeal No.244/2014

SC/SPL/LA No. .173/2014 **Vs.**

C.A. APPEAL No. 908/99(F)

D.C. Colombo Case No. 14950/L

1. H.D. Felix Nevill Tirimanne,
1st Defendant (DECEASED)

1A. Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant

2. P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant

AND

P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant-Appellant

Vs.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff-Respondent

Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant Respondent

AND NOW BETWEEN
P. N. Wimalaratne,
No. 150/2,
Averiwatte Road,
Wattala.
Added 2nd Defendant-Appellant-Appellant

Vs.

T. T. P. Anthony Fernando,
No. 150, Averiwatte Road,
Wattala.
Plaintiff-Respondent Respondent
Lalani Patricia Tirimanne
No.225, Kurukulawa,
Ragama
Substituted 1A Defendant Respondent-Respondent

BEFORE : **JAYANTHA JAYASURIYA PC, CJ.**
MURDU N.B. FERNANDO PC, J.
ACHALA WENGAPPULI, J.

COUNSEL : Nihal Jayamanne, PC with Kaushalya Nawaratne & Mokshini Jayamanne for the Addeded 2nd Defendant-Appellant-Appellant, instructed by Sivanantham & Associates.
Manohara de Silva, PC with Vinodh Wickramasooriya for the Plaintiff-Respondent-Respondent.

ARGUED ON : 18th March, 2021.

DECIDED ON : 16th June, 2022.

ACHALA WENGAPPULI, J.

This appeal arises out of an action instituted before the District Court of Colombo by the Plaintiff-Respondent-Respondent (hereinafter referred to as "the Plaintiff"). In the said action, the Plaintiff sought to enforce an agreement for sale entered between him and the 1st Defendant-Respondent-Respondent (later substituted by Substituted 1A Defendant-Respondent-Respondent and hereinafter referred to as the "1st Defendant"). The 1st Defendant had died on 14.01.1993, even before the trial commenced, and was substituted by his wife.

In terms of the said agreement, the 1st Defendant agreed to transfer ownership of the house and property described in the schedule to the plaint, in vacant possession to the Plaintiff for a total consideration of Rs. 200,000/-. The 1st Defendant also agreed that if he failed to fulfil that undertaking during the three-month period

stipulated in the said agreement, the Plaintiff is entitled to specific performance.

The sale did not proceed, and the 1st Defendant had thereafter sold the house to the 2nd Defendant-Respondent-Respondent (hereinafter referred to as "the 2nd Defendant") before the institution of the instant action. When the 1st Defendant had taken up the position that he no longer holds title to the property in his answer, the trial Court had allowed an application by the Plaintiff to add the 2nd Defendant as a party to the action under section 18 of the Civil Procedure Code. The 2nd Defendant was thereafter added to the action.

The parties, having made several admissions, proceeded to trial after settling for 25 issues. During the trial, the Plaintiff and the 2nd Defendant gave evidence and tendered documents in support of their respective cases.

In delivering its judgment, the trial Court held that the Plaintiff is entitled to the relief of specific performance per the agreement P1 since he had fulfilled his part of obligations. Being aggrieved by the said judgment, the 2nd Defendant appealed to the Court of Appeal. The Court of Appeal, in its impugned judgment, held that the Plaintiff had chosen to affirm the contract and sue the 1st Defendant, compelling him for specific performance as it was the 1st Defendant who had acted in breach of the said agreement. In rejecting the 2nd Defendant's claim of *bona fide* purchaser for value without notice, the Court of Appeal held that he had purchased the property with the full knowledge that the Plaintiff had a legal right to seek specific performance against the 1st Defendant.

The 2nd Defendant had then sought Special Leave to Appeal against the said judgment. When this matter was supported by the learned President's Counsel for the 2nd Defendant on 17.10.2014, this Court granted Special Leave to Appeal on several questions of law, as formulated in paragraph 20(i) to 20(xviii) of his petition.

At the hearing of this appeal, the learned President's Counsel presented his contentions in the light of the evidence that had been presented before the trial Court in relation to those questions of law. In view of these questions of law and in consideration of the different areas of law involved, and for the purpose of convenience in presentation, it is proposed to group these multiple contentions that had been advanced by the 2nd Defendant in the following manner:

a. the Plaintiff is not entitled to the declaration of his entitlement to specific performance due to the reason that :–
    i. it is he who breached the contract as he had failed to tender the balance part of the consideration on due date,
    ii. it is he who made the performance of the contract impossible and rendered it unenforceable by insistence the condition of handing over the house in vacant possession, which could only be achieved by unlawfully evicting a tenant,
    iii. he had pleaded damages as an alternative remedy,
b. the Court of Appeal had acted on section 93 of the Trusts Ordinance, despite the fact that the action was founded not

on a constructive trust but upon breach of contract and in the absence of a trial issue to that effect,

c. the 2nd Defendant is a *bona fide* purchaser, who had no notice of the encumbrance upon the agreement to sell P1.

In view of the questions of law on which Special Leave to Appeal was granted and the contentions of the 2nd Defendant as well as the Plaintiff, it is clear that the core issue is whether the Plaintiff is entitled to the remedy of specific performance against the 1st Defendant, upon breach of the agreement to sell, even when the latter had transferred his title to the 2nd Defendant.

A brief reference to the evidence presented before the trial Court is helpful at this stage, in appreciating the submissions of Counsel.

The dispute between the Plaintiff and the Defendants is centred around a house property. The 1st Defendant and his sister owned two separate houses built on a rectangular strip of land in extent of about 33 perches, at *Wattala*. The house belonged to the 1st Defendant's sister was facing the public road while the house of the 1st Defendant was situated towards the rear end of the said land. A narrow strip of land, that had been left out along the North-Eastern boundary of his sister's house, provided access to the said public road, from the 1st Defendant's house.

The Plaintiff, who initially occupied the house belonged to the sister of the 1st Defendant as her tenant, had purchased it in 1986. Around the same time, the house belonged to the 1st Defendant was occupied by the 2nd Defendant as his tenant.

When the 1st Defendant had indicated that his house was for sale, the Plaintiff was keen to purchase it. The Plaintiff and the 1st Defendant had therefore entered into an agreement of sale bearing No. 65, attested

by Notary *Kandiah* on 26.04.1989 (P1). In the agreement P1, the 1st Defendant was referred to as the "Party of the First Part" and the Plaintiff was referred to as the "Party of the Second Part", respectively. The total consideration agreed was Rs. 200,000/- and the Plaintiff had paid an advance of Rs. 15,000/- to the 1st Defendant, with the undertaking that he would pay the balance consideration within "*three (3) months from the date hereof*" after obtaining a loan from a Bank or a Lending Institution. The 1st Defendant, in turn, had agreed thereupon to "*execute a valid deed of Transfer*" in favour of the Plaintiff. He also agreed to handover the Plaintiff "…*complete and quiet and peaceful vacant possession*" of the house.

Importantly, the parties also agreed to the following, in Clauses 6, 7 and 8 of the agreement:

Clause 6 – "*On payment of the said balance purchase price of RUPEES ONE HUNDRED AND EIGHTY FIVE THOUSAND (Rs. 185,000/-) and executing the said Deed of Transfer in favour of the Party of the Second Part the party of the First Part shall handover complete and quiet and peaceful vacant possession of the house and premises standing thereon bearing assessment No. 150/2, Averiwatta Road (formerly bearing assessment No. 142/1) to the Party of the Second Part.*"

Clause 7 – "*In the event of the Party of the Second Part is ready and willing to pay the balance Purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is refusing and/or neglecting to execute a valid deed of Transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance.*"

Clause 8 – "*In the event of the Party of the Second Part failing and/or neglecting to pay the balance sum of RUPEES ONE HUNDRED AND*

EIGHTY-FIVE THOUSAND (Rs.185,000/-) as soon as he obtained a loan from a Bank or any Lending Institution, then the sum of RUPEES FIFTEEN THOUSAND (Rs. 15,000/-) paid as an advance shall be forfeited."

On 21.07.1989, the Plaintiff's Attorney wrote to the 1st Defendant that, "*we are instructed to inform you that our client is ready with the balance consideration of Rs. 185,000/- in terms of Agreement to Sell bearing No. 65 dated 26th April 1989 attested by Miss D Kandiah of Colombo, Notary Public*" (P2). The Attorney had also reminded the 1st Defendant of the condition that the "*vacant possession of the premises must be given to our client*."

In reply, the 1st Defendant, had informed the Plaintiff's Attorney in a handwritten letter on 01.08.1989 that "*I am not in a position to handover my premises on vacant possession and therefore I am not interested to sell the said premises on that condition*" (P3). He also indicated that he would return the advance payment.

The Plaintiff then informed the 1st Defendant through his Attorney on 09.08.1989 that he is not agreeable to accept the advance and that he "… *insist that the sale should take place*" (P4). This letter was replied to by the Attorney of the 1st Defendant, who conveyed to the Attorney of the Plaintiff on 17.08.1989 that "*I am instructed that your client failed to tender the balance consideration of Rs. 185,000/-, by obtaining a loan from a Lending Institution or otherwise, and that up to date your client has failed to obtain any loan for the tender of the balance consideration"* and "*that the amount paid as an advance stand forfeited in terms of the agreement*" (P5).

On 21.08.1989, the Plaintiff's Attorney had replied to the 1st Defendant's Attorney that "… *our client is ready with the balance consideration of Rs. 185,000/-. Your client was not in a position to handover*

vacant possession of the premises" and alleged that the "*default is purely on your client's part*". It was also conveyed that "*we are instructed by our client to institute legal action for specific performance as mentioned in paragraph 7 of the above agreement*" and reiterated that "*our client is still willing to go through the transaction*" (P6).

The reply to P6, the letter dated 29.08.1989 (P7), had been sent to the Attorney of the Plaintiff, this time by a different Attorney on behalf of the 1st Defendant. It is indicated in P7 that his inability to fulfil the obligation to handover vacant possession was due to the fact that his tenant, the 2nd Defendant, did not vacate the premises and therefore he is willing to return the advance payment. He also indicated his willingness to compensate the Plaintiff if he had suffered any loss.

On 01.12.1989, the 1st Defendant had executed a Deed of Transfer No. 2524 (2V1), attested by Notary Public *Zaheed*, transferring his title to the premises described in schedules to the Agreement to Sell P1, and to the plan in favour of the 2nd Defendant, upon a consideration of Rs. 250,000/-. The Plaintiff instituted the instant action on 22.03.1990 before the District Court.

The learned President's Counsel, at the hearing of this appeal, strongly contended on behalf of the 2nd Defendant that the Plaintiff had failed to establish that he had fulfilled his part of the obligations by placing evidence that he had obtained a loan and was '*ready and willing to pay*' the balance consideration to the 1st Defendant, in terms of the said agreement. Therefore, he submitted that the expression '*ready and willing to pay*' in clause 7 of the agreement is confined to the situation, where the Plaintiff had obtained a loan for the balance amount and is willing to pay that to the 1st Defendant. Learned President's Counsel

stressed that '*then and then only*' does specific performance come into play and that too, if the 1st Defendant still refuses to transfer the property.

He contended that the insistence of the fulfilment of the condition of handing over the house in vacant possession clearly indicates that the Plaintiff was willing to pay the balance only if the 1st Defendant confirms that he had made arrangements to hand over vacant possession. He therefore contended that the fulfilment of handing over the house in vacant possession has become the paramount condition that had to be fulfilled on the part of the 1st Defendant in completion of the said agreement. It was submitted that the 1st Defendant was not in a position to handover the premises in vacant possession due to no fault of his, but because of the Plaintiff, who opted not to proceed with the sale *by his not* tendering the balance consideration.

The Plaintiff instituted the instant action on the basis of breach of an agreement to sell a particular property. The main relief he seeks from Court is a declaration of his entitlement to specific performance against the 1st Defendant compelling him to execute a conveyance in the Plaintiff's favour. Hence, the underlying consideration at this stage would be, whether, in the given set of circumstances, the Plaintiff is entitled to the said relief of specific performance or not.

In determining a plaintiff's entitlement to relief to specific performance upon a breach of agreement to re-transfer of a property upon payment of a certain sum, it had been stated by *Lyall Grant* J in ***Jeremias Fernando et al v Perera et al*** (1926) 28 NLR 183 at 184 that, "*unless the Court is satisfied that the plaintiffs have fulfilled their part of the contract, so far as it is possible for them to do so, namely, by tender of the price,*

it seems obvious that it cannot order the defendants to perform their part of the contract inasmuch as the condition precedent to such performance has not been fulfilled."

Thus, in seeking specific performance of the agreement P1, the Plaintiff had to satisfy Court, that he was '*ready and willing to pay*' the balance consideration to the 1st Defendant, in terms of the said agreement, as the learned President's Counsel contends. This factor should be decided against the backdrop of the terms of the agreement and in relation to the evidence that had been presented before the trial Court.

The trial Court, having noted that the Plaintiff was to pay the balance consideration of Rs. 185,000/- within a period of three months, had thereafter arrived at the conclusion that he did fulfil his part of the obligations, as indicative from the evidence and supported by the contents of the letters marked P2 to P7. The Court of Appeal too had adopted the same view.

During his submissions, the learned President's Counsel for the 2nd Defendant submitted that a mere indication that money was ready is not sufficient and the Plaintiff was obligated to tender the balance consideration within the stipulated period, in order to fulfil his part of the obligations. In support of this, the learned President's Counsel invited the attention of Court to the evidence of Plaintiff, where it is said that he did in fact offer the balance amount of the purchase price to the 1st Defendant at the latter's residence, and contended that this factual assertion is wholly unreliable and could not be acted upon as it had been taken up by the Plaintiff for the first time during the trial. Therefore, he contended that it was the Plaintiff who had breached the

contract due to his failure to tender the balance part of the consideration within the stipulated time period. It was also contended by the learned President's Counsel that continuing the breach, the Plaintiff had even failed to deposit the balance consideration in Court, when he instituted the instant action, seeking specific performance of the agreement P1.

The learned President's Counsel for the Plaintiff, in replying to the contention advanced on behalf of the 2nd Defendant, submitted that when the Plaintiff was '*ready and willing*' to pay the balance consideration and to proceed with the transaction, it was the 1st Defendant who refused fulfilment of his part of obligation by stating that he was not interested in proceeding with the said transaction. Therefore, he contended that the Plaintiff had a right to specific performance, upon the said refusal by the 1st Defendant.

The 1st Defendant in his answer had taken up the position that the Plaintiff was not '*ready and willing*' to pay the balance consideration. Perhaps, with a view to consider this assertion, there is in fact a trial issue that had been particularly raised before the trial Court by the Plaintiff as to his readiness and willingness to pay the balance consideration. Issue No. 4 had been framed with two parts, namely issue Nos. 4(a) and 4(b). The issue No. 4(a) was in relation to whether the Plaintiff was ready and willing to pay Rs. 185,000/- to the 1st Defendant and to complete the contract at all times relevant to the agreement while issue No. 4(b) relates to whether that readiness and willingness had been communicated to the 1st Defendant by the Plaintiff. The trial Court, in its judgment, had answered both these issues in the affirmative and in favour of the Plaintiff. The Court of Appeal too was of the same view as it had stated that "*the evidence of the Plaintiff, the wordings in P1, contents of the correspondence exchanged*

between the parties very clearly show that the Plaintiff was ready and willing to perform his obligation of paying the balance sum of Rs. 185,000/- to the 1st Defendant to complete the sale."

In view of these submissions, this Court would review the body of evidence that had been presented before the trial Court, in order to ascertain whether the issue Nos. 4(a) and (b) had been correctly answered by the trial Court and affirmed by the Court of Appeal. The issue No. 4, however, does not specifically put the position of the 2nd Defendant before the trial Court as a trial issue, on the same lines as contended by the learned President's Counsel before this Court, namely that the Plaintiff did not tender the balance consideration. However, the issue whether the Plaintiff had made a valid tender is obviously caught up as an integral part within the said issue, since it called upon the trial Court to determine whether he was willing and ready to pay Rs. 185,000/- to the 1st Defendant at all times relevant to the agreement and thereby to complete the contract.

Before proceeding to consider the relevant evidence, it is necessary to consider the exact nature of the terms in relation to the payment of the balance part of the total consideration, to which the parties have agreed upon. Clause 7 of the agreement P1 reads as follows:

> *"In the event of the Party of the Second Part is ready and willing to pay the balance purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is resisting and/or neglecting to execute a valid deed of transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance".*

The evidence of the Plaintiff is that he, having secured the balance part of the consideration within the three-month period by borrowing the same from one *Ivan*, had conveyed his willingness and readiness to the 1st Defendant, through his Attorney, in letter P2 on 21.07.1989, which stated that "… *our client is ready with the balance consideration of Rs. 185,000/-"* and sought to finalise the transaction. The Plaintiff further stated in evidence that on 25.07.1989, merely a day before the stipulated three-month period was to lapse, he had personally visited the 1st Defendant with the balance amount, only to be told that he "*would not sell*" ("**විකුනන්නෙ නැහැ**").

In the cross-examination of the Plaintiff, the 1st Defendant had challenged this assertion by suggesting to him that it was a false claim. He had further elicited from the Plaintiff that such a position was neither mentioned in any of his letters nor averred to in the plaint.

Clause 8 made it obligatory for the Plaintiff to make the balance payment "*as soon as obtaining the loan"*. It is undisputed that by P2, the Plaintiff had indicated to the 1st Defendant that he was ready with the balance consideration, well within the stipulated time period. In the absence of any reply to P2, the Plaintiff had personally visited the 1st Defendant and offered the balance consideration. But the 1st Defendant was not interested in accepting the remaining part of the consideration or to execute the transfer upon acceptance of the said consideration. The position that the 1st Defendant was not willing to proceed with the sale was communicated to the Plaintiff by the 1st Defendant by letter P3 on 01.09.1989. The said letter P3 of the 1st Defendant, written after the three-month period that had been allocated for the payment of the remaining part of the consideration was over, conveyed to the Plaintiff

that "*I am not in a position to handover my premises on vacant possession. And therefore, I am not interested to sell the said premises on that condition*."

The evidence referred to above clearly indicate two different situations. Firstly, it indicates that the Plaintiff had informed the 1st Defendant in writing that he was ready with the balance consideration and then made a failed attempt to physically tender the balance consideration. Secondly, the alleged refusal of the 1st Defendant to accept the balance consideration at the time of its physical tender. The applicable legal principles in respect of these two situations are quite different to each other, as indicated by the applicable judicial precedents. The said 1st situation in turn has two in-built components into it, which require separate consideration.

The first component of the first situation refers to the situation where the Plaintiff, by writing informs the 1st Defendant, that the balance part of the consideration is ready within the stipulated period of three months.

The case of ***Holmes v Alia Marikkar*** (1896) 1 NLR 282, relates to an action seeking specific performance of an agreement by which the parties have agreed that the defendant should be ready to hand over the document of transfer to the plaintiff's assignor, and the plaintiff's assignor should be ready to handover the price stipulated. The trial Court had dismissed the plaintiff's action that the plaintiff failed to establish a legal tender of Rs. 150/- within the stipulated time. *Withers* J had stated (at p. 286) that "*I think all that the plaintiff was bound to establish was that he required the defendant to execute the promised transfer, and that he was ready and able, on that being done, to pay the Rs. 150 to the defendant. So much I think he has established, and in my opinion, he is*

entitled to relief." In the same judgment, *Lawrie* J, having concurred with that view, had added "*within the time fixed it was the assignor's duty (if he wished to purchase) to give the defendant notice that he had the money ready, and desired the conveyance to be prepared and signed, but he was not, I think, bound to tender the money absolutely and unconditionally.*"

The question whether the money needed to be actually produced was considered in by *Soertsz* J in ***Fernando v Coomaraswamy*** (1940) 41 NLR 466. This was a case where the parties were to transfer a certain property upon payment of consideration, subsequent to the terms of settlement that had been entered in Court. When sued for specific performance upon breach of that agreement, the seller took up the position that there had not been actual tender of money as required by law.

Having quoted *Harris* from the 1908 edition of his book, '*Law of Tender*', where it is stated by the learned author (at p. 1) that '*tender is the instinctive resource of the oppressed against the exactions of the relentless*', *Soertsz* J observed that (at p. 474) "*there was no longer any question of money not being immediately available to the appellant's Attorney. In the face of all this, to hold that the money was not duly tendered would be to make the Law of Tender a horrible snare*". His Lordship held thus in view of the contents of the correspondence between the purchaser's Attorney and the seller's Attorney that "*this money is now in our office and we are in a position to pay it to your client upon his executing the appropriate conveyance.*"

More recently, in ***Premaratne v Yasawathie and Another*** (2015) 1 Sri LR 302, this Court had considered the contention advanced by the seller, upon being sued for specific performance on his breach of an

agreement to sell, that the agreed consideration was not tendered. This Court, in view of the fact that the purchaser had informed the seller by a letter that the agreed consideration was deposited with his Attorney, to call over at his office to collect same and thereupon to make the transfer, concluded that there was proper tender. The Court also noted at p. 310 that the statement '*money is ready*' is "*equal to a proper tendering of the purchase price*."

On the other end of the spectrum, there are several instances where the Courts have held that there was no proper tender of consideration. In view of the circumstances under which the alleged tender had taken place, *Lawrie* J, in his judgment of ***Babahamy v Alexander*** (1896) 2 NLR 159 at p. 159, had said "It *has been repeatedly held that a mere statement that money is ready is not sufficient*". The circumstances under which this pronouncement was made are that the purchaser had gone to see the seller to a field with his Notary but without a prior appointment. He indicated to the latter that the money was ready but neither shown nor tendered. The Court observed that the '*offer*' of money had been conditional as the purchaser had insisted that the seller signs the deed '*there and then*', leaving the latter with no opportunity to examine same. However, in ***Muhandiram et al v Salam et al*** (1947) 49 NLR 80 *Canekeratne* J was of the view (at p. 81) that the dictum of *Lawrie* J in ***Babahamy v Alexander*** (supra) that a mere statement that money is ready is not sufficient should be confined to the particular facts of that case.

The contention, that willingness by the tenant in taking the cheque book with him in visiting his landlord to pay the arrears of rent that had been accumulated for over two years was tantamount to a tender of rent, was rejected by *Basnayake* CJ in ***Razik v Esufally*** (1957)

58 NLR 469 at 471 by adopting the statement in *Harris* on *Law of Tender*, (at p. 11) that "*to constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt.*"

Thus, it appears from the above cited judicial precedents that the actual tendering of the purchase price in the form of cash by the purchaser was not particularly insisted on by the Courts as an absolute pre-condition to hold that there was in fact a tender of the agreed purchase price. If the attendant circumstances indicate that the purchaser's demonstration of willingness, readiness and ability to pay the purchase price, coupled with an unqualified and unconditional offer of same to the seller, it is reasonable to conclude that there was proper tender of the purchase price by the purchaser.

In relation to the instant appeal, the only difference it has with the factual position of ***Premaratne v Yasawathie and Another*** (supra) is that the letter by which the purchaser informed the vendor indicated that the agreed consideration was deposited with his Attorney, whereas in the instant appeal the Plaintiff had stated that he "*is ready with the balance consideration of Rs. 185,000/- …*".

The obligation to tender the consideration that had been agreed upon, in the absence of an agreement to that effect, is not required to be discharged as a distinct and a separate transaction, that is quite detached from the corresponding fulfilment of the obligation to transfer of title. *Canekaratne* J, in ***Muhandiram et al v Salam et al*** (1947) 49 NLR 80, at p. 81 stated that "*unless otherwise agreed delivery of the property and payment of the price are concurrent condition: the seller must be ready and willing to give possession of the property to the buyer and the buyer must be ready and willing to pay. The rule of the Roman-Dutch Law is almost similar*

to that in English Law. It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably." The agreement to sell in P1 had no condition included in it setting out as to the manner in which the balance consideration should be paid by the Plaintiff and the principle enunciated in ***Muhandiram et al v Salam et al*** (ibid) is therefore applicable. It is my view that the Plaintiff, in the absence of a specific clause in P1 to that effect, need not tender the balance consideration as a pre-condition for the 1st Defendant to execute the transfer. The payment of the balance consideration, the act of execution of the transfer and the symbolic act of handing over the property in vacant possession should take place simultaneously, in the absence of any arrangement to the contrary in P1.

In ***Muhandiram et al v Salam et al*** (ibid) *Canakeratne* J noted that "*… in Ceylon, delivery of the deed is sufficient for the consummation of a sale; the proper place of performance would prima facie be the place where the deed is executed by the party and attested by the Notary*." Hence, when the Plaintiff had conveyed through his Attorney that the balance consideration is ready, it is clear that there is an unconditional offer of the money for the 1st Defendant to take that money, if he did turn up at the Attorney's office to execute the transfer and by handing over the premises in vacant possession. The fact that the Plaintiff had made available the balance consideration unconditionally was not disputed by the 1st Defendant, in P3 sent as a reply to P2. In P3, he only indicates that he is not interested to sell since he could not handover the premises in vacant possession. This was the opportunity to the 1st Defendant to accuse the Plaintiff of his failure to tender the consideration within the stipulated time period.

Having contended before this Court that the Plaintiff was never '*ready and willing*' to pay the balance consideration, the 1st Defendant did not even raise that as a trial issue. During the trial, he was content with his challenge to the legality of the sale agreement on the footing that the said agreement made it a mandatory requirement to illegally evict his tenant. The Plaintiff, on the other hand, had relied on the contents of the letter P2, to substantiate his claim that he was ready and willing with the balance payment. It is stated in the letter addressed to the 1st Defendant, by the Plaintiff's Attorney, that his client "*is ready with the balance consideration of Rs. 185,000/- …*". The 1st Defendant neither cross-examined the Plaintiff on this claim in P2 nor did he challenge the assertion contained therein. It is relevant to note in this context, the Plaintiff was willing to proceed with the transaction despite the 1st Defendant's refusal, as indicated by letters P4 and P6.

In view of the above, the evidence presented before the trial Court is sufficient to establish the fact that the Plaintiff was '*ready and willing*' to tender the balance consideration within the stipulated time period in terms of the agreement P1. The position of the Plaintiff, as indicated in the letter P2 that he "*is ready with the balance consideration of Rs. 185,000/-*" could therefore certainly be equated to an instance where there is proper tender of the purchase price.

The second component of the first situation referred to above, is the assertion by the Plaintiff that he did personally make an attempt to pay and the 1st Defendant had refused to execute the transfer, when he did offer the balance consideration in cash at the latter's residence.

The truthfulness of this particular assertion made by the Plaintiff had been challenged by the 1st Defendant. The 1st Defendant suggested

that the Plaintiff had lied in Court. He also elicited that the Plaintiff had failed to mention this incident of refusal in any of his correspondence with the 1st Defendant and his plaint did not include an averment referring to such an incident.

Therefore, the Plaintiff's assertion that he made an attempt to handover the balance consideration to the 1st Defendant personally at his residence confines itself to an issue of credibility as that item of evidence had to be evaluated for its truthfulness and reliability by the trial Court. Strangely, the 1st Defendant in his written submissions to the trial Court did not dwell on this aspect of the Plaintiff's evidence, in spite of his challenge to it during cross examination. The trial Court, as the Court of first instance, had obviously accepted the Plaintiff's evidence as credible, upon utilising the priceless advantage it had in observing his demeanour and deportment.

The challenge to the Plaintiff's evidence that he physically tendered the balance consideration is mounted on the premise that the said assertion was raised belatedly and therefore lacks inconsistency. The applicable test on assessing credibility of his evidence is therefore the test of spontaneity and consistency. Since both lower Courts have accepted his evidence as credible, this Court should consider whether the impugned segment of evidence satisfies the said test on credibility.

It is already noted from the evidence that the Plaintiff, after the agreement was signed, was expected to raise the balance of Rs.185,000/- through a bank loan. He said he did apply for a loan, but since his loan was not approved in time, he borrowed the balance from one *Ivan*, a senior colleague of his. He then informed the 1st Defendant of his readiness with the balance payment by P2. In the absence of any

response, he personally visited the 1st Defendant on 25.07.1989 and offered the balance payment. But the 1st Defendant had declined to accept the balance consideration on that day and sent P3 reconfirming that he was '*not interested*' to sell the property.

The Plaintiff, during cross-examination by the 1st Defendant, conceded that either in P4 or in his plaint, no reference was made in relation to this incident on 25.07.1989. The Plaintiff, however maintained that he did inform his Attorney as to what had transpired on 25.07.1989 soon after.

In his plaint, the Plaintiff had only averred that "*the Plaintiff has at all material times was [sic] ready and willing to perform the said Agreement on his part by paying the balance sum of Rs. 185,000/- of which the Defendant has had notice*." Clearly this averment is bereft of any detail as how he brought to notice of the 1st Defendant as to his willingness and readiness to pay the balance consideration.

The question that should be decided from the above evidence is whether the Plaintiff's assertion that the 1st Defendant's refusal to accept the balance consideration on 25.07.1989 is a credible one or not, owing to its belatedness.

It is correct to say that none of the correspondence indicate that any reference to the offer of balance consideration in cash form was ever mentioned. However, it is relevant to note that the Plaintiff did not state to Court that he offered the balance consideration to the 1st Defendant at the latter's residence as a spontaneous utterance during his evidence. Perusal of the transcript indicates that he stated so only at the end of a long answer, when he was found at fault by the 1st Defendant during cross examination over his failure to indicate that he

was prepared to proceed with the transaction even with the existing tenancy.

In re-examination, the Plaintiff said that he had listed one *Ivan* as a witness and the list of witness for the Plaintiff does contain the name of *Ivan S.J. Dias* of 194, Central Road, *Mattakkuliya*. The reference to *Ivan* in the Plaintiff's evidence is only in relation to the source of his borrowing. Hence, the specific reference to *Ivan* in the evidence is not a last-minute introduction. The Plaintiff anticipated to rely on *Ivan's* evidence by listing him as a witness in support of his assertion that he borrowed Rs. 185,000/-. This factor therefore lends support to the Plaintiff's assertion that he had borrowed Rs. 185,000/- from *Ivan*. When the agreement was signed, the Plaintiff said that he had no funds in his hands to pay the balance consideration. He then obligated himself in the agreement to pay the balance consideration by applying for a bank loan to pay it within three months. The bank had apparently taken a longer time to process the loan and granted approval to the Plaintiff's application only on 20.12.1989, long past the required time period.

It is therefore reasonable to infer that the Plaintiff, being desperate to raise sufficient funds to meet his obligations, turned to his superior, seeking to borrow that amount. He was successful with *Ivan*. Then only the Plaintiff, through his Attorney, had informed the 1st Defendant in writing that he is ready with the balance consideration and to proceed with the transaction. However, there was no response from the 1st Defendant. Anxious to conclude the transaction, the Plaintiff then visited the 1st Defendant and physically offered the balance consideration, but again his tender was refused by the latter.

In assessing the credibility of the Plaintiff's assertion that he tendered the balance consideration to the 1st Defendant on 25.07.1989, by applying the test of spontaneity, it is noted that the reference to the borrowing from *Ivan* is confirmed by the letter P2, which indicated that the balance consideration was ready by 21.07.1989. The timing of letter P2 is consistent with this position. The evidence clearly points to the conclusion that the only way the Plaintiff could have secured sufficient funds to pay the balance consideration was by borrowing it from *Ivan*. Being successful with *Ivan* and therefore having sufficient funds on hand to pay the balance consideration, the claim by the Plaintiff that he physically tendered same to the 1st Defendant on 25.07.1989, with just a day left to complete the all-important three months' period as stipulated by the agreement, to my mind, is a very probable account of the version of events. His keenness to proceed with the transaction is understandable as the house and property belonged to the 1st Defendant is abutting to his own and, owing to that very reason, is more valuable to him than to any other buyer.

The assertion that the Plaintiff had sufficient funds to meet his obligation to pay the balance consideration and had in fact tendered the same to the 1st Defendant on 25.07.1989, was not stated in evidence as a mere afterthought, or as an excuse to get away from a difficult situation that arose in cross examination, which had taken him by surprise, but as a narration of an actual event that had taken place between the Parties. In the absence of a denial by the 1st Defendant, the Plaintiff's claim is clearly more probable. When viewed in these circumstances, the mere absence of a reference to the personal offering of the balance consideration on 25.07.1989, in his correspondence or in the plaint,

would not make a dent in the credibility of the evidence of the Plaintiff, warranting the total rejection of his evidence on this issue.

Furthermore, in P6, the Plaintiff alleged that it was the 1st Defendant who breached the agreement. In P7, the 1st Defendant did not refute that assertion but rather conveyed his acceptance, by agreeing to compensate the Plaintiff for any losses.

Therefore, the evidence clearly points out that the Plaintiff was ready and willing at all times to pay the balance consideration, as indicated by the letter P2 and him personally visiting the 1st Defendant and offering it on 25.07.1989. In view of these considerations, the conclusion reached by the trial Court to that effect and the affirmation by the Court of Appeal of that conclusion, are amply justified.

Having reached the above conclusion in relation to the first of the situations referred to earlier on in this judgment, i.e., whether the Plaintiff had informed the 1st Defendant in writing that he is ready with the balance consideration and then tendered the same personally, I shall now proceed to consider the second situation that is concerned with the alleged refusal of the 1st Defendant to accept the balance consideration when it was physically tendered.

Since the probabilities factor favours the acceptance of the Plaintiff's claim that he did tender the balance consideration physically to the 1st Defendant on 25.07.1989, the evidence that the latter's refusal to accept the same and to make the transfer as agreed, shifts the transaction in a different direction.

On 25.07.1989, the 1st Defendant refused to accept the balance consideration from the Plaintiff informing the latter that he does not intend to proceed with the transfer. The words attributed to the 1st

Defendant, in indicating his refusal to execute the transfer, are "**ලියන්න බැහැ**". This particular reference to 1st Defendant's verbal refusal to execute the transfer was made by the Plaintiff only during his cross examination, and that too, when he was questioned by the former as to the reason in the latter's failure to handover cash and to get the transfer executed. The 1st Defendant did not specifically challenge the truthfulness of the evidence of the Plaintiff in attributing the said utterance to him. On his part, the 1st Defendant too had conveyed a position similar to the one attributed to him by the Plaintiff, when he wrote P3 on 01.08.1989, where he indicated that he is "*not interested*" in proceeding with the transfer on fulfilment of the condition of "*vacant possession*". It is important to note that the 1st Defendant does not deny receiving P2 in time or allege that the Plaintiff had failed to tender the balance consideration within the stipulated time period. The letter P3 is dated 01.08.1989. By then the three-month period, as stipulated by the agreement P1 to complete the transaction, was effectively over.

Thus, the probable assertion of the Plaintiff that the 1st Defendant had refused to accept the balance consideration when offered on 25.07.1989 at his residence would thereby trigger in the applicability of another important legal principle on the law of tender.

This principle of law is a relevant in dealing with the submission of the learned President's Counsel for the 2nd Defendant made in relation to the failure of the Plaintiff to deposit the balance part of the consideration in Court, as a continuation of the latter's willful breach of the agreement to tender the agreed amount of balance consideration, in instituting the instant action for specific performance. It appears that no such requirement could be imposed on the Plaintiff, due to the 1st Defendant's own conduct.

In ***Appuhamy v Silva*** (1914) 17 NLR 238, *Lascelles* CJ dealing with the same question, said (at p. 240):

> *"There can, I think, be no doubt but that the defendant, by announcing his refusal to accept the money, had waived his right to have a formal legal tender. The principle of law has thus been stated in cases where tender is pleaded as an excuse for non-performance: if the debtor tells his creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late, or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby dispensed with, and there is a good tender of the amount mentioned by the debtor. The same principle also applies where there is a contract with a condition precedent. The performance of the condition is excused where the other party has intimated that he does not intend to perform the contract. I think it is quite clear that the plaintiffs are not precluded from suing on the contract by failure to make a legal tender of the redemption money, inasmuch as the defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless."*

This statement of law was adopted and followed by *TS Fernando* J in ***Kanagammah Hoole v Natarajan*** (1961) 66 NLR 484 (at p. 488).

In applying the said principle of law on legal tender to the factual assertion of the Plaintiff that the 1st Defendant had refused to accept his tender of the balance part of the consideration, I am of the view that the said refusal would make the 1st Defendant disentitle from relying on the

failure of the Plaintiff to deposit the balance payment in Court and claim that there was no valid tender.

Continuing with the contention that the Plaintiff is not entitled to the relief of specific performance, the learned President's Counsel for the 2nd Defendant referred to the insistence by the Plaintiff to handover the house property in '*vacant possession*'. He contended that it is a condition the 1st Defendant could not fulfil, as it would amount to an illegal eviction of a tenant, whose tenancy rights were protected by the provisions of the Rent Act.

This contention presupposes that the Plaintiff, in insisting that he be given vacant possession, had in fact wanted the 2nd Defendant illegally evicted from the house property, in order to fulfil his part of the obligation.

The only Clause that dealt with a condition of vacant possession in P1 is Clause 6. The relevant part of the Clause 6 of the agreement P1 is to the effect that upon payment of the balance consideration by the Plaintiff, the 1st Defendant were to execute a deed of transfer and "… *shall handover complete and quiet and peaceful possession of the house and premises standing thereon …*". This condition only made it obligatory for the 1st Defendant to transfer title to his property and to hand over the same in vacant possession. The agreement P1 does not refer to any reservation of the 1st Defendant when he did agree to "*handover complete and quiet and peaceful possession of the house and premises*" that it would depend on the eviction of his tenant, who was in possession of the same. Therefore, no illegality could be imputed to the mere inclusion of this standard clause in the agreement P1.

It is evident from the proceedings before the trial Court that the 1st Defendant had made an unsuccessful attempt to term the agreement P1 as an agreement which cannot be enforceable as it is an illegal contract, which had been formed for the purpose of evicting a tenant, unlawfully. In the absence of any reference to an existing contract of tenancy or to an eviction of a tenant in the agreement P1, this position was rightly rejected by the trial Court, as the terms of said agreement do not stipulate such an obligation on the part of the 1st Defendant.

When the parties had agreed upon the terms of the agreement P1 on 26.04.1989, the 1st Defendant knew that the house property that he intends to sell to the Plaintiff is occupied by his tenant. Despite the said exiting contract of tenancy, the 1st Defendant had proceeded to accept an advance payment from the Plaintiff and agreed to handover the premises in vacant possession, upon the condition of making the balance payment of the consideration within a period of three months. Thus, the 1st Defendant voluntarily conceded to that condition by agreeing that he could handover his property to the Plaintiff within a period of three months. No explanation was offered by the 1st Defendant as to why he agreed to that condition in the first place, if it involves an illegal eviction of a tenant, nor was any explanation offered as to why he promised to do something he could not deliver, in a binding agreement.

It therefore appears that the 1st Defendant had, in advancing the position that he could only have fulfilled the said condition by evicting the 2nd Defendant unlawfully, made an attempt to fuse the fact of insistence of the condition of vacant possession by the Plaintiff with his own interpretation of that condition as contained in the agreement P1. However, there is obviously a legally permissible and more practical

option available to the 1st Defendant, if he was serious about fulfilling that undertaking. He could have easily negotiated with his tenant, the 2nd Defendant, to terminate the contract of tenancy voluntarily. Strangely, no such evidence before the trial Court was ever presented by the any of the Defendants, that, with a view to fulfil that particular undertaking, the 1st Defendant had made any overture to the 2nd Defendant. As to why he did not pursue this option, in order to secure vacant possession of the premises within the said three months period, is therefore remains unexplained.

The 2nd Defendant gave evidence before the trial Court. In his evidence, the 2nd Defendant did not even make a passing reference to any such negotiation he had with the 1st Defendant, during which the latter proposed the former to voluntarily terminate the contract of tenancy. In effect, the 1st Defendant, having undertaken to handover the property in vacant possession, absolutely made no attempt to fulfil that obligation. This issue will be considered fully, in dealing with another contention that had been advanced by the 2nd Defendant, stating that he is a *bona fide* purchaser without notice.

Hence, the contention that the 1st Defendant could not make the transfer, due to the insistence of the Plaintiff to have the property be handed over to him in vacant possession, is without a valid basis and accordingly cannot succeed.

It is clear from the above, that the Plaintiff had fulfilled his part of the obligations as per P1 and it was the 1st Defendant who did not wish to fulfil his part per Clause 6. This he had done by indicating to the Plaintiff that he does not wish to proceed with the transaction on 25.07.1989 and thereafter reiterated that position by sending P3 on

01.08.1989 stating that he is *'not interested'* in proceeding with the sale. When he sent P3, the three months period to fulfil the obligations undertaken by the 1st Defendant, as stipulated by the agreement P1, had already lapsed.

The act of repudiation by the 1st Defendant, in indicating to the Plaintiff that he did not wish to proceed with the sale on 25.07.1989, in law amounts to an instance of an anticipatory breach as *Weeramantry,* in his treatise on the Law of Contracts (Vol. II) at p. 879 states: "*Repudiation may, of course, take place before the time fixed for performance, and is then described as an anticipatory breach*." The learned author clarified this concept with an apt example in relation to the instant appeal as "… *a person who has promised to another a certain land before a specified date may by declaration prior to that date announce to the other that he does not propose to perform his promise …*". *Wessels' Law of Contract, 2nd Ed. [1951]* too supports this position, in describing such an act as one of the five ways in which a breach may arise. It is stated at S. 2925(2), that a breach occurs, "*where the promisor absolutely renounces his intention to perform the contract or repudiates it before the time for performance*". The statement at S. 2964 is also relevant as it states that "*a breach of contract said to occur if a party who is under an obligation to perform the contract either (1) completely fails to perform the contract or (2) fails to perform a substantial part of it. A failure to perform a contract without sufficient excuse constitutes a breach of that contract …*" Thus, the conclusion reached by the trial Court that the Plaintiff had fulfilled all of his obligations and it was the 1st Defendant who breached the contract is a well-founded one, in consideration of the available material and the applicable principles of law. I therefore concur with the conclusion reached on this particular issue by both the lower Courts.

This conclusion attracts the application of another principle of law in relation to specific performance as recognised by our Courts, as it is the Plaintiff, being the purchaser, who seeks specific performance against the seller, the 1st Defendant.

Their Lordships of the Privy Council, whilst affirming the 'admirable' judgment of ***Thaheer v Abdeen*** (1955) 57 NLR 1, by their own judgment of ***Abdeen v Thaheer*** (1958) 59 NLR 385, had quoted the following statement of *Gratiaen* J, which their Lordships 'entirely accept' (at p. 388):

> *"In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain prima facie enjoys a legal right to demand performance by the other party; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases."*

This position is also reflected in *Wessels'* at S. 3102, where it states, "*Prima facie, every party to a binding agreement who is ready to carry out his obligation under it, had a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.*"

Since the accepted view under Roman-Dutch law is, every party who is ready to carry out his term of the bargain enjoys *prima facie* a legal right to demand specific performance against the party responsible for the breach, this Court shall now consider, in view of the said principle of law, whether the Plaintiff is entitled to demand specific performance against the 1st Defendant, in this particular instance.

It is important to note that in ***Abdeen v Thaheer*** (ibid) their Lordships have identified the entitlement of a party who had fulfilled his part of the obligations in stating that such a party "… *enjoys a legal right to demand performance by the other party*". However, their Lordships have qualified that entitlement with the insertion of the phrase "*prima facie*" in that sentence before making reference to the entitlement to the relief of specific performance. The reason to qualify the entitlement with the use of the term "*prima facie*" is evident from the following sentence that appears after the semi colon, as their Lordships further state that "… *this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases.*"

Thus, it is clear that the Plaintiff, in view of the breach by the 1st defendant, is *prima facie* entitled to demand specific performance of the 1st Defendant's obligations under the agreement to sell, even in the absence of specifying the remedy of specific performance in its Clause 7, in the event of a breach.

In this context, I think it is appropriate to deal with the contention advanced by the learned President's Counsel for the 2nd Defendant at this stage, that his client had become the owner of the house property by virtue of deed No. 2524 (2V1) on 01.12.1989, five months after the alleged *'lapse'* of the agreement to sell, P1, and therefore the Plaintiff cannot seek the relief of specific performance against the 1st Defendant, who is now admittedly not the owner of the disputed house property. In advancing the said contention, he heavily relied on the *dictum* of the judgment ***Amarashighe Appuhamy v Boteju*** (1908) 11 NLR 187, where it is stated that a "*fatal objection*" exits to the claim of a plaintiff in seeking specific performance against a seller, who subsequently transferred his rights to a 3rd party, as "*… it is no longer in the seller's power to specifically perform the agreement*."

The learned President's Counsel for the 2nd Defendant had advanced the said contention on the footing that the agreement to sell had in fact lapsed after the stipulated three months period, due to the insistence of fulfilling of an impossible condition that the house property be handed over to the Plaintiff in vacant possession. Since the fulfilment of that condition was beyond the capacity of the 1st Defendant, that the agreement had thereby became an impossible one to fulfil. Hence, when the deed of transfer 2V1 was executed, there was no contract in existence which had been kept alive by an interested party to the contract. In the absence of a contract that had been kept alive, which may have been an impediment on a proper transfer of title, the 2nd Defendant was conferred with legal title. It was also highlighted by the learned President's Counsel that the Plaintiff had instituted the instant action only on 22.03.1990, seven months since the

lapse of the said agreement and almost four months since the execution of the deed of transfer 2V1.

In relation to this contention, it is relevant to note that issue Nos. 24(a) and 24(b) were raised to the effect of, respectively, whether the 2nd Defendant had fraudulently executed the deed of transfer No. 2524, with the full knowledge of the Plaintiff's rights, and whether the said deed of transfer would convey any right, title and interest on to the 2nd Defendant. The trial Court answered issue No. 24(a) as '*not proved*' while answering issue No. 24(b) against the 2nd Defendant by stating that '*it does not*'.

The underlying rationale of the trial Court, in answering these two issues is that the 1st Defendant had no title to pass on to the 2nd Defendant, in view of the breach of the agreement P1 and application of its Clause 7. When the 2nd Defendant had proceeded with the purchase, he had full knowledge of the effect of the agreement P1 between the Plaintiff and the 1st Defendant. The Court had therefore stated that, in these circumstances, the entitlement of the 2nd Defendant is limited only to an entitlement of damages from the 1st Defendant. The Court of Appeal too had concurred with this conclusion of the trial Court on the basis that, by Clauses 5, 6 and 7 of the agreement P1, the 1st Defendant had expressly given up his right to sell the property to any 3rd party other than the Plaintiff and for that reason he had no title without any encumbrances to transfer to the 2nd Defendant in view of its Clause 7, which gave the Plaintiff the right to seek specific performance. The Court of Appeal had acted on the principle from *Wessels'*, at S. 3152, which states, "*until the contract has been performed or*

mutually cancelled or set aside by a competent Court, the bond which unites the contracting parties remains intact."

It is clear from the above that both the Courts below had proceeded to hold with the Plaintiff on the basis that the 1st Defendant had no title to pass on, when he executed the deed of transfer No. 2524 (2V1) on 01.12.1989, as the contract between them had been kept alive. Hence, it is incumbent upon this Court to consider the question of whether, despite the anticipatory breach of the Clause 7 by the 1st Defendant, the Plaintiff had kept the contract between them alive.

It is observed by *Weeramantry* (Vol. II, p. 880) following the judgments of ***The Holland Ceylon Commercial Company v Mahuthoom Pillai*** (1922) 24 NLR 152 ***Mutukaruppan Chetty v Habibhoy*** (1913) 3 CAC 100 and the statements in *Wessels'* SS. 2983-9, that the applicable principles of law in this regard are "… *recognised alike by the English and the Roman Dutch law.*"

In ***Thidoris Perera v Eliza Nona*** (1948) 50 NLR 176, *Basnayake* J (as he was then) answered the question whether a contract comes to an end by its breach with the statement referring to ***Williams on Vendor and Purchaser*** (4th Ed., Vol. II.), p. 993, stating (at p. 179) that "*I think not. The contract is not extinguished by the breach; for no one may discharge himself from his contract by breaking it; and the other party may enforce the contract after the breach.*"

His Lordship thereafter quoted from ***Anson on Contract*** (19th Ed.), where it is stated (at p. 318) that:

> "*A breach does not of itself alter the obligations, of either party under the contract; what it may do is to justify the injured*

party, if he chooses, in regarding himself as absolved or discharged from the further performance of his side of the contract. But even if he does so choose, that again does not mean that the contract itself is discharged or rescinded, if those terms are taken to imply that it is thereupon brought to an end and ceases to exist for all purposes; the contract still survives, though only, as it has been said, for the purpose of measuring the claims arising out of the breach."

His Lordship thought it fit to add that "*a contract does not come to an end until the vinculum juris established by a contract has been loosened and the parties restored to their former freedom of action*", clearly in the lines of Roman Dutch law principle, as found in *Wessels'* at S.3152, that "*The vinculum juris still remains, until brought to an end by performance, payment, mutual agreement or operation of law*."

Therefore, the anticipatory breach of Clause 7 by the 1st Defendant on 25.07.1989, by refusing to accept when the balance consideration that was tendered by the Plaintiff, left several options that were available to the latter in terms of law. But the availability of these options would in turn depend on the decision of the Plaintiff whether to accept the said breach as the end of the contract or not.

In the judgment of ***The Holland Ceylon Commercial Company v Mahuthoom Pillai*** (1922) 24 NLR 152, *Bertram* CJ at p. 156, stated that "*It is settled law, laid down in all the textbooks, that where one party to an agreement repudiates it, the other is not bound to accept the repudiation. He may attend upon his contract and hold the other party responsible and wait for the time of performance."* The 1st Defendant cannot unilaterally treat the contract as terminated. In the Privy Council judgment of ***Noorbhai v***

Karuppan Chetti (1925) 27 NLR 325, Lord *Wrenbury*, by making reference to the contents of a letter written by the buyer, stated (at p. 327) "*… if that letter can be read as a repudiation by the buyer, he as one of the parties to the contract could not avoid it of his own mere motion. The seller might either accept or reject the buyer's attempt to revoke it.*" *Wessels'* too states at S. 3068 that "*every failure to perform a contract constitutes a breach, and the immediate effect of such a breach is to give to the injured party the right to that remedy which the law provides for a failure of performance. Immediately the one party breaks the contract, the other party has the election either to compel the guilty party to perform his promise (specific performance), or to sue him for damages.*"

In clearly describing the legal effects of such a breach, *Weeramantry* states (Vol. II, p. 884), "*it is necessary also to observe that even a breach sufficient to effect a discharge does not itself discharge the contract, but merely gives the other party an option to decide whether he will treat the contract as discharged. Should he elect to do so, he may sue for damages at once without awaiting the date fixed for performance and in the case of an obligation entitling him to specific performance, he may ask for this relief.*"

Clearly the intention on the part of the Plaintiff is evident, when one peruses the contents of the letter dated 09.08.1989 (P4), which acknowledged the letter dated 01.08.1989 (P3), by which the 1st Defendant indicated he is no longer '*interested*' in proceeding with the sale and offered to refund the advance deposit. In P4, despite the 1st Defendant's refusal, the Plaintiff replied that he still insists that the sale should proceed, and he is not agreeable to accept a refund. This position is consistently maintained by the Plaintiff by his letter dated 21.08.1989 (P6). Only then, by letter dated 17.08.1989 (P5), for the first

time, the 1st Defendant takes up the position in P7 that the Plaintiff had failed to tender the balance consideration by obtaining a loan from a Lending Institution, in reply to P4.

Thus, the Plaintiff, at no point of time, had accepted the anticipatory breach of the Clause 7 by the 1st Defendant as the discharge of the obligations of the agreement to sell (P1) and had kept the said contract '*alive*' by continuing with his offer of payment of the balance consideration, well beyond the period of three months. In addition, the Plaintiff had given notice to the 1st Defendant by P6 that he would sue him for specific performance as per Clause 7. In reply by P7, the 1st Defendant offered to compensate the Plaintiff for any loss, by payment of damages. The judgment of ***Alawdeen v Holland Ceylon Commercial Company*** (1952) 54 NLR 289, *Gratiaen* J had quoted from the judgment of the House of Lords in ***Heynam v Darwins Ltd***. (1942) AC 356, where Lord *Simon* points out, "*repudiation by one party does not terminate a contract – it takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other*". In that judgment, Lord *Simon* had cited the following dictum of *Scrutton* LJ in an earlier case;

> "*(The innocent party) may, notwithstanding the so-called repudiation (by the other party) insist on holding his co-contractor to the bargain and continue to tender due performance on his part …*".

Identical situations that arose for determination in ***Alawdeen v Holland Ceylon Commercial Company*** (1952) 54 NLR 289 and ***Senanayake v Anthonisz*** (1965) 69 NLR 225, had been dealt with by adopting the same principle.

The Plaintiff before us, as I have already noted, had obviously adopted the second course of action as sanctioned by law, when he opted to sue the 1st Defendant for specific performance. The trial Court as well as the Court of Appeal, in accepting the position that there is a contract that had been kept alive between the Plaintiff and the 1st Defendant, particularly in view of the evidence of the Plaintiff that, in spite of the refusal to sell the property by the latter on 25.07.1989, he had clearly indicated his intention to proceed with the sale by being ready and willing to pay the balance consideration to the 1st Defendant. The Courts below therefore had correctly applied the applicable principles of law to the body of evidence that had been presented by the Parties on this issue and both the Courts had correctly arrived at the conclusion that the contract had been kept alive by the Plaintiff. Therefore, the contention of the 2nd Defendant that the contract had lapsed at the end of the three-month period with the failure to deliver the property in vacant possession cannot be accepted as a valid one, with the resultant position that the *vinculum juris* established by the agreement P1 has not been loosened and that the Parties have not been restored to their former freedom of action, per ***Thidoris Perera v Eliza Nona*** (supra).

Reliance on the 'fatal objection' per ***Amarashighe Appuhamy v Boteju*** (supra) in relation to the relief of specific performance, was placed by the 2nd Defendant on the basis that the instant action was instituted on 22.03.1990, whereas the transfer deed No. 2524 (2V1) was executed in his favour by the 1st Defendant on 01.12.1989, almost four months prior to the said institution of action. Therefore, the 2nd Defendant contends that even if the Court granted specific

performance against the 1st Defendant, "… *it is no longer in the seller's power to specifically perform the agreement*."

This contention is referable to trial issue No. 24(b), which had been raised in the form of whether the said deed conveys any title on the 2nd Defendant. The trial Court answered the said issue in the negative and against the 2nd Defendant. The reasoning of the trial Court in answering the said issue, as already referred to, is that the 1st Defendant had no title to transfer at the time of execution of 2V1 on 01.12.1989. That reasoning is in turn based on the premise that the 1st Defendant, having promised to sell the property to the Plaintiff, had thereafter breached that undertaking, triggering the specific performance clause. The trial Court had thereupon deduced that the invariable result of that breach would be that the property is deemed to have been sold to the Plaintiff as per the terms of the said agreement and therefore, the 1st Defendant had no title to pass on to the 2nd Defendant, when he subsequently chose to execute the deed of transfer 2V1.

It must be noted that the contention based on the judgment of ***Amarashighe Appuhamy v Boteju*** (supra) was not presented before the trial Court by either of the two Defendants but was only placed before the Court of Appeal by the 2nd Defendant when he preferred an appeal against the judgment of the trial Court.

The Court of Appeal, after agreeing with the trial Court of its reasoning that the agreement P1 had been kept alive by the Plaintiff, considered the said '*fatal objection*' to the granting of the relief of specific performance along with the question whether the 2nd Defendant is a *bona fide* purchaser without notice. The appellate Court

had concurred with the conclusion of the trial Court that the 2nd Defendant is not a *bona fide* purchaser without notice and had apparently relied on the following statement from *Dart on Vendors and Purchasers* (8th Ed., Vol. II, p. 883) in affirming the judgment of the trial Court in granting of specific performance:

> "*Equity will enforce specific performance of the contract of sale, against the vendor himself, and against all persons claiming under him by a title arising subsequently to the contract, except purchasers for valuable consideration who have paid money and taken a conveyance without notice of the original contract.*"

Since the Court of Appeal had considered the said '*fatal objection*' along with the issue whether the 2nd Defendant is a *bona fide* purchaser without notice, for the purpose of clarity, I would proceed to consider these two issues separately by devoting little more space to each of these in this judgment.

In order to identify the factual backdrop against which *Hutchinson* CJ had said that there is a '*fatal objection*' for the grant of the relief of specific performance as per the judgment of ***Amarashighe Appuhamy v Boteju*** (supra), I wish to examine the references made, as to the facts that were available before that Court.

In the said judgment, His Lordship had noted that the agreement upon which the plaintiff had sued the 1st defendant indicated that, upon payment of a further Rs. 450/- by the former to the latter, who had already accepted Rs. 50/- as an advance payment, certain land was to be transferred within four months from the date of their agreement. The

parties had further agreed that in the event of a breach of the said agreement, the 1st defendant was to pay plaintiff Rs. 100, as liquidated damages. Thereafter, the 1st defendant had mortgaged the said land to the 3rd defendant. He had also leased it to the 2nd defendant before making a transfer.

The plaintiff, having claimed that he was ready and willing to pay the balance sued the 1st defendant on breach of the said agreement and joined the 2nd and 3rd defendants in that action. He had prayed for an order of Court against the 1st defendant to execute a conveyance of the land in his favour, to award Rs. 100/- as damages and the transfer and mortgage of the 2nd and 3rd defendants be declared void and cancelled.

At the conclusion of the trial, the District Court had held that the plaintiff was not entitled to specific performance of the agreement "… *because it was now out of the first defendant's power to specifically perform it.*" *Hutchinson* CJ, affirmed the judgment of the trial Court as His Lordship held:

> *"Under this agreement, if the buyer tenders the balance of the purchase money within the four months, he is entitled to a transfer; if he does not, he forfeits his deposit, and is under no further liability. And if the seller, upon the money being tendered to him within that time, fails to execute a transfer (I do not say if he fails to execute it within the four months, but at all events if he fails altogether), he has to pay Rs. 100 as damages. The plaintiff contends that, having been ready within the four months to carry out his part of the agreement, he is entitled to specific*

> *performance of it. But a fatal objection to that claim is that it is no longer in the seller's power to specifically perform the agreement."*

Closer examination of the factual background, as referred to in the said judgment, indicates that the consideration of the grant of relief of specific performance on a breach of an agreement against the 1st defendant arose only upon being sued on an agreement by which he agreed that, in the event of any breach of the agreement to sell the specified land to the plaintiff, he must pay Rs. 100/- "*as liquidated damages*." The 2nd and 3rd defendants claimed that they were not privy to the said agreement between the plaintiff and the 1st defendant and got involved in the transaction only when the 1st defendant had subsequently mortgaged the same land to the 3rd defendant and also to the 2nd defendant by way of a secondary mortgage, before transferring title to him.

Thus, it is clear that in ***Amarashighe Appuhamy v Boteju*** (supra), the agreement upon which the plaintiff sued the 1st defendant, envisaged liquidated damages as the only remedy available to the plaintiff in the event of a breach by the latter. Thus, when the plaintiff sought an order of Court against the 1st defendant seeking a direction to execute a conveyance in the plaintiff's favour, he invited the Court to grant specific performance in its discretion, in addition to seeking liquidated damages, quantified at Rs. 100/-.

Affirming the District Judge's conclusion that the plaintiff was not entitled to specific performance of the agreement, because it was now out of the defendant's power to specifically perform it, His Lordship has held (at p. 189) that:

> *"The plaintiff contends that, having been ready within the four months to carry out his part of the agreement, he is entitled to specific performance of it. But a fatal objection to that claim is that it is no longer in the seller's power to specifically perform the agreement."*

His Lordship, in making the said statement, did not refer to any judicial precedent nor rely on the authoritative text on Roman Dutch law. Having stated thus, His Lordship had then remitted the matter back to the trial Court to determine the issue on damages, since the lower Court had decided the case only on an issue of law, relating to the question of availability of the relief of specific performance to the plaintiff.

This clearly is not the first of such judgments in which this issue was considered. There are several other judgments, where the appellate Courts have considered similar situations that arose for their determination as to the entitlement to specific performance and enforceability of that relief against a third party to whom the property subject to the contract had subsequently been sold.

Basnayake J, in ***Thidoris Perera v Eliza Nona*** (supra) made references to four of such judicial precedents and identifies that the principle of law on which the Courts have acted on, in those instances as (at p. 179):

> *"This Court has held in a number of cases* ***Carimjee Jafferjee v. Theodoris et al****. (1898) 5 Bal. 20.* ***Matthes Appuhamy v. Raymond et al.*** *(1897) 2 NLR 270.* ***Wickramanayake v. Abeywardene et al****. (1914) 17 NLR 169 at 171 and 172,* ***Fernando v. Peris*** *(1916) 19*

NLR 281, decided before the enactment of the Trusts Ordinance, that specific performance of a contract to sell a land cannot be enforced against a third party to whom the land has been sold in violation of the contract, except in the case of fraud, even though the agreement had been registered."

The earliest of these precedents, ***Matthes Appuhamy v Raymond et al.*** (supra), was decided in the previous year, to the year in which ***Carimjee Jafferjee v Theodoris et al*** (supra) was decided, and dealt with a situation where the agreement to sell a parcel of land, which stipulated that if the first defendant failed, refused, declined, or in any manner objected to sell the land as agreed, he should pay plaintiff Rs. 500/- as liquidated damages and return to him the part of the purchase money advanced. The 1st defendant, in breach of that agreement, had sold and conveyed the parcel of land to the 2nd defendant, who had notice of the said agreement. The District Judge held that as the agreement contained a stipulation that the 1st defendant should pay damages in default of performance of his part of the agreement the plaintiff could not compel the 1st defendant for specific performance and dismissed the action.

In appeal, *Bonser* CJ agreed with the said conclusion and dismissed the appeal on the basis that "*… stipulation as to damages was in the circumstances of this case intended to be a substitute for specific performance*". His Lordship then added that therefore "*… it is unnecessary to decide the question which was argued before us, whether specific performance can be granted in a case like the present, where the vendor has before action brought by an actual sale and conveyance to a third person of the thing contracted to be sold put it out of his power specifically to perform the contract*". Nonetheless, His Lordship had proceeded to state "*were it*

necessary to decide that question, I should be prepared to answer it in the negative, for I hold a strong opinion as to the inexpediency of introducing into this Island the doctrines and practice of the English Courts of Chancery with respect to specific performance, with all the subtleties and refinements as to notice which have been evolved by the ingenuity of successive generations of Judges of that Court." Lawrie J concurred with the decision to dismiss the appeal and stated that "*… the only remedy competent to the plaintiff under the contract was to exact payment of Rs. 500 as liquidated damages in addition to any special damage which he might be entitled to from circumstances unforeseen at the date of the contract. On the other hand, if the plaintiff "failed or refused" to pay the balance, the contract provided that he was not to be liable in the full sum of Rs. 3,500, but he should forfeit only the Rs. 250 already paid to the defendant."*

Hence, the plaintiff in that action was deemed not entitled to the remedy of specific performance and it is in *obiter* that *Bonser* CJ observed that he would answer the question referred to above in the negative due to the inexpediency of introducing principles adopted by English Courts of Chancery with respect to specific performance.

In the case of ***Carimjee Jafferjee v Theodoris et al*** (supra) the plaintiff averred that the 2nd to 4th defendants had pledged a land to him as a secondary mortgage. The 2nd to 4th defendants had undertaken to redeem the primary mortgage and not to transfer their title for 20 years. In another action, the plaintiff obtained a decree for costs against the 2nd to 4th defendants and when he seized the said property, the 1st defendant preferred a claim, apparently on a conveyance made in his favour by the 2nd to 4th defendants.

The plaintiff, in filing the action, claimed that the conveyance by the 2nd to 4th defendants in favour of the 1st defendant was made without consideration and in fraud or to avoid payment of debt owed to him. Therefore, he contended that the sale was of no force or avail in law as the vendors were not at liberty to sell the land at the time of its execution. He sought to have the land declared liable to be sold in satisfaction of his writ.

Browne J was of the view that "*if the agreement restraining sale was registered as affecting an encumbrance on the land or a limitation of the right to convey, his action might be held good, but if not might be open to question whether plaintiff ever had right to have it declared as he has prayed when he was not a party to the deed … or that it should not to prejudice him or … to have the partnership dissolved and to account to him for the value of the land sold.*"

It appears that in this instance, the Court decided that the plaintiff was entitled to his claim he sought, only if the partnership deed, in which the 2nd to 4th defendants have agreed not to sell, had been registered against the said land.

In the judgment of ***Fernando v Peris*** (supra), *De Sampayo* J, in determining the validity of the conclusion reached by the District Court, that a deed, by which the vendor had transferred his title to a third party in spite of an already registered agreement of sale, was void and the plaintiff was therefore entitled to specific performance, had held that "*the registration of a deed may be notice to the world of the existence of it, but I am not prepared to agree with the holding that such constructive notice of an agreement to sell ipso facto makes void a subsequent sale by the owner to a third party, and that specific performance may be claimed as against such third*

party". His Lordship further observed that "*In* ***Matthes Appuhamy v. Raymond,*** *which does not appear to have been cited or considered in* ***Carimjee Jafferjee v. Theodoris****, Bonser C.J. and Withers J. doubted whether under our law specific performance could be granted in a case where the vendor had by an actual sale and conveyance to a third person put it out of his power specifically to perform the contract."*

In the judgment of ***Wickramanayake v Abeywardene et al*** (supra) *Pereira* J, referring to the judgments of ***Matthes Appuhamy v Raymond*** and ***Amarashighe Appuhamy v Boteju*** (supra) cautiously stated that it would '*appear*' to His Lordship that "*… where one conveys land to a person which he had already agreed to convey to another, he thereby places himself beyond the power of specifically performing his agreement with the latter; but, clearly, under the Roman-Dutch law fraud vitiates every contract, and if the latter of the two deeds could be shown to be fraudulent, it would be cancelled, and the way paved for the specific performance of the former."*

Basnayake J, in ***Thidoris Perera v Eliza Nona*** (supra) also made a similar observation on the said principle of law by stating that it is "*based on a reading of Voet 19.1.14, which according to Nathan [Nathan's Common Law of South Africa, Vol. II. p. 675, sec. 840.] is not an authority for the proposition that a sale to a third-party purchaser with notice of a prior contract to sell cannot be rescinded in an action for specific performance*." There was no reference made to ***Amarashighe Appuhamy v Boteju*** (supra), however, in the judgment of ***Thidoris Perera v Eliza Nona*** (supra).

In ***Matthes Appuhamy v. Raymond et al*** *Bonser* CJ, in respect of the question whether specific performance can be granted where the vendor had, even before the action was brought, by an actual sale and

conveyance to a third person of the thing contracted to be sold thereby put it out of his power to specifically perform the contract, held that no *"… trace, however, of any such action is to be found so far as we have been able to ascertain in the writings of any of the recognized authorities on Roman-Dutch Law or in the records of this Court. For my own part I feel some difficulty in understanding on what principle a stranger to the contract could be sued in the actio empti, which is the only action competent to the purchaser for enforcing his rights under the contract."*

It is relevant to note that the judgments of ***Matthes Appuhamy v Raymond et al*** (supra), ***Wickramanayake v Abeywardene et al*** (supra) ***Fernando v Peris*** (supra) and ***Amarashighe Appuhamy v Boteju*** (supra) were concerned with the situations whether those plaintiffs, who were only entitled to claim liquidated damages in terms of the contracts upon which they had sued their respective defendants, were entitled to specific performance against such defendants after they made absolute transfers to third parties and therefore had no title remaining in them to pass on to the plaintiffs in specific performance. Their Lordships have considered availability of the remedy of specific performance apparently upon being guided by the considerations of equity as applied in English Law. In ***Appuhamy v de Silva*** (supra) *Lascelles* CJ said that specific performance is an equitable remedy, and in deciding whether this remedy should be given, the Courts in Ceylon are guided by the same principles as the Courts of Equity at home. But the Privy Council, in the judgment of ***Abdeen v Thaheer*** (supra) that had been delivered subsequent to these judgments, accepted the statement of *Gratiaen* J, that *"In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch Law, and not by the English Law."*

There is no question that the remedy of specific performance is also available in Roman Dutch law. In *Wessels' Law of Contract,* 2nd Ed [1951], Vol. II, at S. 3089, it is said that "*the first remedy for a breach of contract is an order to compel the defaulting party to carry out his contract. This is known as order for specific performance (executio in forma specifica).*"

Despite the reservations expressed by *Perera* J and *Basnayake* J, it is noted that *Wessels',* at S. 3122, states that "*the Court will not decree specific performance where it is manifest that the defendant cannot perform specifically. Hence, specific performance of a contract of purchase and sale will not be decreed where the subject matter of the sale has been disposed of to a bona fide purchaser.*"

In relation to the instant appeal, I am of the view that the factual situation presented before this Court is clearly different to the ones that had been dealt with by the series of judicial pronouncements culminating with the judgment of ***Amarashighe Appuhamy v Boteju*** (supra), referred to above on this point.

This is because, in this particular instance, the Plaintiff and the 1st Defendant have agreed that, in the event of a breach of their agreement, the former is entitled to sue the latter for specific performance compelling the sale of house property, as his only remedy stipulated in that agreement. Thus, the 1st Defendant had agreed that if he was found to have been in breach of that agreement, he could be sued by the Plaintiff, demanding specific performance of the agreement to sell.

In addition to this distinction, yet another distinguishing feature could be identified in the other judicial precedents as referred to earlier

on this point. The principle of law, as stated by *Basnayake* J, in ***Thidoris Perera v Eliza Nona*** (supra), after making references to ***Carimjee Jafferjee v Theodoris et al***, ***Matthes Appuhamy v Raymond et al***, ***Wickramanayake v Abeywardene et al*** and ***Fernando v. Peris*** is that *"specific performance of a contract to sell a land cannot be enforced against a third party to whom the land has been sold in violation of the contract, except in the case of fraud, even though the agreement had been registered"*. His Lordship's observation indicates that those judicial precedents are applicable in relation to instances where enforcement of specific performance is sought against a third party who had subsequently acquired title to the subject matter and not in relation to actions that are instituted against the seller, who is in breach of the contract. In this instance, the Plaintiff had sued the 1st Defendant, being the seller, and not the third party, the 2nd Defendant, for specific performance.

As such, the *ratio* of the judgment of the *Hutchinson* CJ in ***Amarashighe Appuhamy v Boteju*** (supra) is of no assistance in the determination of the instant appeal and is therefore distinguished.

Hence, the task of determining the instant appeal should be undertaken by this Court, whilst keeping in mind that the applicable legal principles that are relevant to the determination of the contractual obligations of the contesting parties as found in the authoritative texts on Roman Dutch law, in view of the pronouncement made in the Privy Council judgement of ***Abdeen v Thaheer*** (supra) to that effect. A relevant reference to a principle of law dealing with the issue at hand could be found in *Wessels'* at S. 1998, "*… the general proposition [is] that a condition in a contract, though not fulfilled, is taken to be fulfilled as against one of the parties to the contract where non-fulfilment has been brought about*

by want of good faith on the part of such party". This statement is followed by "*if therefore the loss of the subject matter is due to a positive act on the part of the debtor, he cannot be heard to say that he is not liable because the contract is impossible of performance*."

Since the terms creditor and debtor appear frequently in the texts that refers to contractual obligations, as in the quotation that had been reproduced above, it is important that those terms are properly described and identified. *Wessels'* describes them as follows (at S. 9): "*There are at least two persons concerned in every legal obligation, the creditor and the debtor. The creditor is the person who has the right to demand the performance and the debtor is the person from whom the performance is due.*" In the context of this appeal, since the Plaintiff is the person who demands the 1st Defendant to perform the act he had promised, therefore the 1st Defendant has become the debtor, with the Plaintiff being the creditor.

Thus, being the debtor, the act of the 1st Defendant in executing a deed of transfer of his title to the disputed house property in favour of the 2nd Defendant, especially when he had been forewarned by the Plaintiff through his Attorney that he would seek the remedy of specific performance on their agreement to sell following its breach, qualifies to be treated as "*a positive act on the part of the debtor*" which contributed to loss of the subject matter and therefore "*he cannot be heard to say that he is not liable because the contract is impossible of performance,*" since, the "*non fulfilment has been brought about by want of good faith*" by him.

Earlier on in this judgment, I have concurred with the conclusion reached by the lower Courts, that the contract between the Plaintiff

and the 1st Defendant had been kept alive by the former. Due to this factor, the *vinculum juris* established by the said contract between the Plaintiff and the 1st Defendant had not been loosened and the parties had not been restored to their former freedom of action. In these circumstances, the legal effect of the contract that had been kept alive by the Plaintiff over the ownership rights of the 1st Defendant in relation to the said agreement of sale must be considered.

It was contended on behalf of the 2nd Defendant by the learned President's Counsel that the trial Court, in answering issue Nos. 15 and 17 in the affirmative, had accepted that the 2nd Defendant is the owner of the property and therefore he must be treated as a *bona fide* purchaser, against whom specific performance could not be granted.

Since the 2nd Defendant referred to issue Nos. 15 and 17 and relied on the answers given by the trial Court in support of his contention, it is relevant to consider what those two issues are**.** Issue No. 15 had been raised by the 2nd Defendant to the effect whether ownership of the premises in suit had been transferred to him by Deed of Transfer No. 2524 of 01.12.1989. Issue No. 17 concerns the question of, if that is the case, whether the Plaintiff could institute and maintain the instant action by which he seeks specific performance of the 'purported' agreement No. 65 (P1). During trial, parties have agreed that the 2nd Defendant had become the 'owner' of the said premises by the transfer deed No. 2524 (2V1) and accordingly the trial Court had answered issue No. 16, which relates to the ownership of the premises in suit, in the affirmative and in favour of the 2nd Defendant.

Since the trial Court answered issue No. 17 also in the affirmative, the learned President's Counsel for the 2nd Defendant

contends that, having answered those issue Nos. 15 and 16 in the affirmative, it is not possible for the trial Court to answer issue No. 17 also in the affirmative, in view of the ratio of the judgment of ***Amarashighe Appuhamy v Boteju*** (supra). This contention of the 2nd Defendant demands this Court considers the same under two segments. Firstly, the finding in relation to the ownership of the 2nd Defendant, and secondly, the finding in relation to whether he is a '*bona fide purchaser*'. This is because, the Plaintiff, in his replication, had sought cancellation of the deed No. 2524 (2V1) and it appears that the trial Court had considered all three issues at the same time in its judgment. Therefore, this Court must first verify the legality of the findings of the trial Court as well as the Court of Appeal on these points, in view of the evidence presented by the respective parties and the applicable legal principles.

Perusal of the judgment of the trial Court indicates that, despite answering the issue No. 16 in the affirmative, it had concluded that the 1st Defendant had no 'ownership' remained in him for it to be transferred to the 2nd Defendant, who therefore received a 'void' or no title ("නිස් අයිතිය") by 2V1. This is because at the time of execution of the deed No. 2524 the 1st Defendant had already surrendered his ownership to the demand of specific performance by the Plaintiff. Moreover, the 2nd Defendant has had notice of the agreement to sell and had offered Rs. 50,000/- more than the agreed value between the Plaintiff and the 1st Defendant as stipulated in that agreement. The Court of Appeal affirmed this conclusion of the trial Court and added that subsequent to the search conducted in the Land Registry, the 2nd Defendant was fully aware as to the nature of the legal rights the

Plaintiff had over the house property, in respect of which he sought specific performance.

The attributes of ownership of property were clearly identified by the legal writers and the appellate Courts. In the judgment of Privy Council, ***Attorney General v Herath*** (1960) 62 NLR 145, Mr. *De Silva*, having referred to the text of *Introduction to Roman Dutch law by Lee*, 5th Ed, p. 121, also had quoted *Maasdorp (Volume II., p. 27)* in relation to attributes of ownership of property of an owner and stated that these attributes are "*comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition.*"

When the 1st Defendant, by entering into the agreement P1, had voluntarily undertaken that "*in the event of the Party of the Second Part is ready and willing to pay the balance purchase price aforesaid as soon as obtaining the loan and the Party of the First Part is resisting and/or neglecting to execute a valid deed of Transfer in favour of the Party of the Second Part then the Party of the Second Part shall be entitled to specific performance*" and accordingly had subjected his right to the disposition of his property to the said Clause 7 of the contract P1.

Both the Plaintiff and the 1st Defendant are entitled to enter into a contract on the terms that they choose. *Wessels'* states at S. 2000 thus: "*as the terms of contract constitute a law between the parties, they are entitled by their contract to derogate from the provisions of any public law made in their favour, provided these provisions were not made as a protection to the public.*" With his agreement to the said clause in the agreement to sell, the 1st Defendant had effectively surrendered the right of disposition he had over the disputed property to the Plaintiff and, in the event of a

breach, made it subject to the discretion of the latter, who would then have to decide between the alternatives of either treating such a breach by the former as the end of the contract and sue for damages or whether to seek specific performance. The Plaintiff had unambiguously opted for the latter course of action and had in fact sued the 1st Defendant on that clause, seeking specific performance.

It is stated in the deed of transfer No. 2524 of 01.12.1989 (2V1), executed in favour of the 2nd Defendant "… *that the said Vendor has good and rightful power and lawful and absolute authority to transfer and convey the said premises in the manner aforesaid and that the same are free from all encumbrances claims caveats levies and liabilities or other disadvantages whatsoever …*".

By then, the 1st Defendant, by entering into an agreement to sell with the specific performance clause, had already surrendered his "*absolute authority to transfer and convey the said premises"* and incurred an encumbrance on his "*absolute authority to transfer*". The Plaintiff, on his part, had kept the agreement alive by not allowing the 1st Defendant to end their contract after the latter's breach of same in "… *refusing and/or neglecting to execute a valid deed of Transfer*" and obviously acted on the principle that "*a contract does not come to an end until the vinculum juris established by a contract has been loosened and the parties restored to their former freedom of action*".

In addition to the properties that are subjected to mortgages, the multiple ways in which such encumbrances on ownership could arise have been considered by the superior Courts. The applicable principles in such situations were referred to in these judicial precedents. In ***Fernando v Perera*** (1914) 17 NLR 161, the defendants agreed to sell a

property to the plaintiff and the agreement to sell contained a stipulation that the vendors should "*execute a good and valid conveyance of the said premises free from all encumbrances in favour of the purchasers…*". The plaintiff, having discovered that the defendants cannot pass valid title to the property without obtaining the leave of Court under the Entail and Settlement Ordinance No. 11 of 1876, wanted the defendants to obtain the leave of Court to sell the property, notwithstanding the *fideicommissum* with which it was burdened. The defendants repudiated all liability to execute a conveyance after the expiration of the time stipulated by the agreement. The plaintiff then instituted action, in which he sought that the defendants be ordered to execute a good and valid conveyance free from encumbrances, or in the alternative, to return of the deposit and Rs. 5,000/- damages.

Lascelles CJ held (p. 164) that, "*a good and valid conveyance means a conveyance which is effective in law for transferring the interest which the parties intended to convey, namely, the unfettered ownership. But the words free from all encumbrances greatly strengthen this construction*." His Lordship then poses the question: "*How can property which is burdened with a fideicommissum – the most troublesome of all encumbrances - be described free from encumbrance?*"

Perera J concurring with *Lascelles* CJ, stated (at p. 167) that it is expressly stipulated in the agreement sued upon that the vendors should "*execute a good and valid conveyance of the land free from all encumbrances in favour of the purchaser*", and "*… not merely that the seller was to execute a formal conveyance in accordance with legal requirements, but that he should be in a position to make a good title according to his undertaking to sell and transfer the parcel of land referred to in the deed of agreement.*"

A similar approach was adopted in ***Sulaikamummah et al v Ahamadylevvai*** (1917) 19 NLR 473 where *De Sampayo* J stated (p. 476) the term "*free from all encumbrances*" refers not merely to mortgages or charges, "*but also to all such burdens as fidei commissa, which may affect the title*". In a comparatively recent judgment, ***Mendis v Abeysinghe and another*** (1994) 2 Sri L.R. 29, *Amerasinghe* J held that a land and premises that were subject to Testamentary Action and Estate Duty to have had an encumbrance in favour of the Commissioner of Estate Duty who had the right to have the property sold for payments of Estate Duty.

Wessels' refers to a doctrine that "*if a person buys property with notice of the existence of a burden upon such property, he can be compelled to recognise the burden*" and cited a series of judgments where those principles of law had been applied in South Africa (at S. 4434, Vol. II, p. 1091).

Hence, I am of the view that the conclusion reached by the Courts below, holding that when the 1st Defendant executed deed of transfer No. 2524, he was incapable of disposing his ownership to property in favour of the 2nd Defendant, due to his own act of surrendering that right in favour of the Plaintiff by agreeing to a specific performance clause and as such, no ownership is transferred to the 2nd Defendant, is legally a correct conclusion. I would further add that, since the Courts below were of the view that the 2nd Defendant has had notice of the said specific performance clause, the doctrine that "*if a person buys property with notice of the existence of a burden upon such property, he can be compelled to recognise the burden*" is clearly applicable.

In the context of the Plaintiff's entitlement to enforce the specific performance clause against the 1st Defendant, this Court must make a

reference to another contention advanced by the learned President's Counsel for the 2nd Defendant. In support of his position that the Plaintiff is not entitled to specific performance of the agreement to sell, it was highlighted that the Plaintiff had sought damages against the 1st Defendant, as an alternative relief.

The Plaintiff had averred in his plaint that "*a cause of action has arisen to the Plaintiff to sue the Defendant for breach of contract and to enforce specific performance of the said agreement and/or to recover damages estimated at a sum of Rs. 3000,000.00 together with the advance payment of Rs. 15,000.00.*"

The applicable law on this point has succinctly been stated by *Withers* J, who delivered the principal judgment of the divisional bench in ***Matthes Appuhamy v Reymond et al*** (supra) at p. 274, as follows:

> *"Can the intending buyer compel the intending seller specifically to perform an agreement to sell a particular land if that agreement contains an express stipulation to pay damages generally, or a certain sum by way of damages in the event of the seller not conveying the land in terms of the agreement? The answer to this question seems to me to depend on the wording of the agreement and the intention of the parties as indicated by their contract.*
>
> *If the penal stipulation is intended to be merely accessory to the principal obligation, then it is surely open to the seller to exact specific performance.*
>
> *If, on the other hand, the penal stipulation is an alternative obligation, and it is intended that the party making it may break the principal obligation, but shall pay the consequent damages,*

then the other party is restricted to his right of action to recover those damages. He cannot enforce specific performance. A party who breaks a binding contract is responsible in damages, whether he specially engages to pay those damages or not.

To add a stipulation to pay damages may be of advantage to the party for whose benefit it is made, especially when a definite sum is agreed to as a measure of damages, and that sum is secured by a mortgage or otherwise.

The mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator."

This principle was acted upon in ***De Silva v Senaratne*** (1949) 50 NLR 313 by *Jayetileke* J at p. 316, who added that "*the mere fact of such a stipulation being inserted in a contract does not necessarily imply that it was put in as an alternative obligation for the exclusive benefit of the stipulator. Rather, I think, that if such a stipulation intended to be alternative and not accessory the intention should be clearly expressed or indicated.*"

In the matter before us, the Plaintiff stipulated only specific performance of the contract against the 1st Defendant in terms of their agreement P1, in the event of a breach of same by the latter. Only in the plaint did he include a prayer for damages. *Viknarajah* J said in the judgment of ***Noorulasin and Another v De Zoysa and Others*** (1989) 1 Sri LR 63 at 73 that "*the intention of the parties is clearly and expressly set out in the agreement P1.The intention is to give the option to the party ready and willing to perform his part of the contract to compel performance by the other party who is in default*"; this is as in the instant appeal, where the intention of the parties are clearly evident from the wording of the

Clause 7 of the agreement P1. Since the Plaintiff was ready and willing to perform his part of the contract, as *Jayetileke* J said in ***De Silva v Senaratne*** (supra) "*… the right to elect is rather with the plaintiff.*" In the plaint he had described his cause of action that had accrued against the 1st Defendant a as breach of contract and the enforcement of specific performance of the agreement. The agreed terms indicate that he did select specific performance over damages. The intention of the Plaintiff, as indicative in the correspondence, also points to a claim of specific performance. This view is in line with the principle of law laid down by the Privy Council in ***Abdeen v Thaheer*** (supra) that the entitlement of a party who had fulfilled his part of the obligations "*enjoys a legal right to demand performance by the other party*" and the interests of justice does not demand denial of that right to the Plaintiff.

Another contention that had been advanced by the learned President's Counsel for the 2nd Defendant is that the Plaintiff did not amend the plaint after adding him as a party to the instant action. It was submitted that the Plaintiff therefore did not seek any relief from the 2nd Defendant. It was also submitted that after the addition of the 2nd Defendant as a party on the basis that latter was the current owner of the premises in dispute, the Plaintiff cannot seek the relief of specific performance against him, as *Weeramantry* on Contracts states (at p. 161) "*… 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 learned President's Counsel further contended that since the issue No. 24A had been answered as "*not proved*", it indicates there was no fraud committed by the 2nd Defendant in acquiring the title to the disputed premises.

Placing reliance on these contentions, the learned President's Counsel for the 2nd Defendant submitted that the judgment of the trial Court is erroneously made as it had made several orders against the 2nd Defendant, without any such relief being prayed against him and in the absence of any issues or any evidence presented in support. It was alleged that the trial Court had denied him of an opportunity of presenting a defence, thereby violating the fundamental rule of *audi alteram partem.* He further alleged that the trial Court had undertaken a voyage of discovery on its own, contrary to the principles enunciated in the judgment of ***Pathmawathie v Jayasekera*** (1997) 1 Sri LR 248.

Replying to this contention, the learned President's Counsel for the Plaintiff invited the attention of Court to the replication of the Plaintiff, where it is specifically prayed for several reliefs against the 2nd Defendant as well. Importantly, the Plaintiff had specifically prayed for a declaration of Court that the deed of transfer No. 2524 (2V1) is a nullity. Therefore, the trial Court was called upon by the Plaintiff to grant such reliefs in his favour, and the trial Court had accordingly acted well within the scope of the dispute disclosed by the pleadings and the respective cases that had been presented before it by the contesting parties.

The principle of law stated in the judgment of ***Wickramanayake v Abeywardene et al*** (1914) 17 NLR 169 is relevant and applicable in dealing with this aspect of the contention advanced by the learned President's Counsel for the 2nd Defendant.

On the question of cancellation of the Deed of Transfer (2V1), the judgment of ***Wickramanayake v Abeywardene et al*** (ibid) refers an instance where the plaintiff claims that one *Don Bastian* had agreed to

convey a certain parcel of land to him but failed to do so before his death. The 3rd and 4th defendants, being heirs of *Don Bastian,* had transferred that land to the 2nd defendant. The plaintiff therefore sought a cancellation of the said conveyance by the 3rd and 4th defendants in favour of the 2nd defendant, and as a preliminary to the first defendant, being the administrator of *Don Bastian's* estate, was ordered to execute a conveyance of the land referred to above, in his favour.

Delivering the judgment, *Pereira* J (at p. 170) stated that "… *the present case is similar to a case by A against B and C claiming that a conveyance by B in C's favour be set aside, and that B be condemned to execute a conveyance of the property thus released in favour of A in specific performance of an agreement between A and B prior to the conveyance of the land by B in favour of C* …" and held "*it is clear that no conveyance can be executed by B in favour of A until the conveyance by B in favour of C is cancelled. … Court has more than once laid down, under our law, even a fraudulent conveyance, unlike one executed by a person not competent to contract, which on that account would be null and void, is operative until it is set aside by an order of Court, and when it is set aside, the cancellation refers back to the date of the conveyance*".

Thus, in this instance the deed No. 2524 (2V1) was rightly cancelled by the trial Court before ordering the Registrar of the Court to execute a transfer in favour of the Plaintiff upon the death of the 1st Defendant halfway through the trial. Clearly, the trial Court had acted on this principle of law as referred to in ***Wickramanayake v Abeywardene et al*** (supra).

Having dealt with the contention regarding the '*fatal objection'* as referred to in the *dictum* of the judgment of ***Amarashighe Appuhamy v Boteju*** (supra) in the preceding paragraphs, let me now turn to another

question, as to whether the Courts below have erred in rejecting the defence of the 2nd Defendant that he is a *bona fide* purchaser without notice.

The learned President's Counsel for the 2nd Defendant contended before this Court that the trial Court could not have concluded that he is not a *bona fide* purchaser, when it had answered issue No. 24A as "not proved" while answering issue Nos. 15 and 16, in the affirmative. Issue No. 24A was in relation to whether the 2nd Defendant, whilst being aware of the Plaintiff's rights, could fraudulently acquire ownership upon deed No. 2524 (2V1). Issue Nos. 15 and 16 were to the effect whether the 1st Defendant had sold the property to the 2nd Defendant by virtue of deed No. 2425 and whether the 2nd Defendant had become the owner of the premises upon the said execution. He then submitted that the Court of Appeal had erroneously decided to affirm the said conclusion in its impugned judgment.

Challenging the validity of the contention of the 2nd Defendant that he is a *bona fide* purchaser without notice, the learned President's Counsel for the Plaintiff contended that the 2nd Defendant, having verified that there is an already registered agreement to sell in existence, however, did not insist on its formal cancellation by the 1st Defendant, before proceeding with the transaction of sale. In these circumstances, the learned President's Counsel submitted that the 2nd Defendant cannot plead ignorance of the said encumbrance created by the legally binding agreement on the 1st Defendant, which effectively prevented him from disposing of the said disputed premises.

The 2nd Defendant, in his answer, took up the position that he is a *bona fide* purchaser without notice but did not put that as a trial issue.

This position was raised only in his written submissions before the trial Court and taken up as a ground of appeal before the Court of Appeal. In the absence of a specific issue on this, there is no definitive finding by the trial Court on whether the 2nd Defendant is entitled to be treated as a *bona fide* purchaser or not. Only in appeal did the 2nd Defendant raise a ground of appeal whether the trial Court had erroneously considered the 2nd Defendant as not a *bona fide* purchaser for value without notice. Being constrained without a specific issue, the learned President's Counsel had sought to overcome the said deficiency by amalgamating the scope of issue Nos. 15, 16 and 24A, in formulating his contention that the 2nd Defendant is a *bona fide* purchaser without notice.

Since there is a definite finding by the Court of Appeal against the 2nd Defendant that he is not a *bona fide* purchaser without notice, and having granted leave on the issue, this Court would proceed to consider this contention.

It is interesting that *Wessels'* too states at S. 3122, that "*the Court will not decree specific performance where it is manifest that the defendant cannot perform specifically. Hence, specific performance of a contract of purchase and sale will not be decreed where the subject matter of the sale has been disposed of to a bona fide purchaser.*"

There was no dispute that the 2nd Defendant had purchased the property for consideration. Therefore, in order to succeed in the defence of a *bona fide* purchaser for consideration without notice, the 2nd Defendant should have established that he had no notice of the existing agreement to sell between the 1st Defendant and the Plaintiff. It was his burden to establish the same. Describing the effect of the defence of *bona*

fide purchaser without notice, in ***Kusumawathie et al v Weerasinghe*** (1932) 33 NLR 265, *Macdonell* CJ and in ***Coomaraswamy v Vinayagamoorthy et al*** (1945) 46 NLR 246, *Howard* CJ have quoted from ***Pilcher v Rawlins*** LR 7 Ch. App. 268 where it states:

> *"A purchaser's plea of a purchase for valuable consideration without notice is an absolute unqualified, unanswerable defence … such a purchaser, when he has once put in that plea may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."*

During his examination in chief, the 2nd Defendant did offer evidence of denial in relation to whether he had any notice of the agreement between the Plaintiff and the 1st Defendant over the house property that he had purchased. The 2nd Defendant, having initially maintained that he had no knowledge of that agreement, subsequently admitted with reluctance that prior to the purchase, he did conduct a 'search' in the Land Registry and found that there was a registered agreement to sell. It is his position that upon enquiry, he was advised

by his Attorney that its validity period was over ("කාල සීමාව පැනලා"), a position the 1st Defendant too had confirmed. The 2nd Defendant therefore asserts that only then did he proceed with the purchase. Thus, the 2nd Defendant admits he has had notice of the agreement but was under the impression that its validity has lapsed. In these circumstances, before I consider the question of whether the Court of Appeal correctly concluded that the 2nd Defendant has had notice of the agreement, it is helpful if the evidence relevant to the point is also referred to.

The evidence placed before the trial Court indicates that the three parties to the instant litigation, the Plaintiff and the two Defendants, were not total strangers to each other. The Plaintiff had bought the house he lived in from the sister of the 1st Defendant. The house property in dispute owned by the 1st Defendant too is located in the same land on which the house of the Plaintiff stood and had no physical demarcations or boundaries between them. The 2nd Defendant came into occupation of the house owned by the 1st Defendant as the tenant, a few years before the 1st Defendant entered into the agreement of sale with the Plaintiff. The 2nd Defendant admitted that he had known the Plaintiff well, being his immediate neighbour.

The 2nd Defendant had tendered plan No. 2452 dated 6th November 1972 prepared by Surveyor *Peiris* marked as 2V2. This plan made a subdivision of lot 2 in plan No. 1641 by the same Surveyor, equally dividing the said lot into two sub lots, each with an extent of 16 1/8 perches, depicted as Lot Nos. 2A and 2B therein. The 2nd Defendant admitted that the Plaintiff owns lot No. 2A, which had *Averiwatte* Road as its North-Western boundary and, through deed No. 2524, he had purchased lot No. 2B.

It is important to note that, in the preparation of the plan 2V2, the Surveyor had made the following remark: "*Subdivision of lot 2 into 2 lots marked 2A & 2B is done by me on Plan only, without a survey*." This indicates the purpose of the surveyor's visit to the premises that had taken place prior to when the 1st Defendant executed deed 2V1, as admitted by the 2nd Defendant. Clearly, his visit was to demarcate the boundaries on the land, as per 2V2.

Since 1972, the year in which the plan 2V2 was prepared, the 1st Defendant did not think it was necessary to physically demarcate boundaries to his property, despite the Plaintiff acquiring title from his sister to the adjacent lot 2A. Then what necessitated the 1st Defendant to obtain the services of a surveyor at that particular point of time? Clearly, it is not on the request of the Plaintiff, as if the sale had proceeded as agreed, he would have been happy to have the lots 2A and 2B forming one contiguous land. But, if lot 2B is to be purchased by the 2nd Defendant, then it is likely that he would want his land clearly demarcated and separated from the adjoining lot owned by the Plaintiff with a definite boundary.

It is clear that the Plaintiff and 1st Defendant have entered into the agreement to sell on 26.04.1989 and the transaction was to conclude within a period of three months starting from that date. The agreed consideration was Rs. 200,000/-. However, the 1st Defendant did not want to proceed with the sale, when the Plaintiff informed him that the balance consideration was ready.

What would probably have made the 1st Defendant change his mind?

The answer lies in 2V1, which indicates that the same premises was disposed of to the 2nd Defendant for a consideration of Rs. 250,000/-, a significantly higher price than to the price the Plaintiff had offered. There is no evidence that there were other prospective buyers apart from the Plaintiff and the 2nd Defendant. Therefore, it is reasonable to infer that, in order to make a counteroffer which is significantly higher in value, the 2nd Defendant should be well aware of the already agreed consideration between the Plaintiff and the 1st Defendant. Of course, the 2nd Defendant denies having had any knowledge of the contents of the agreement and relied only on the 'advice' of his Attorney that the validity of the agreement period is over. But he did not explain in his evidence, his failure to enquire from his immediate neighbour, whether the agreement had in fact lapsed. One could say that that itself is an indication as to the *bona fides* of the 2nd Defendant. If the agreement had lapsed and had no validity, as the 2nd Defendant was informed, there was no prospect of the Plaintiff being a competitive bidder and was no longer in a position to prevent the 1st Defendant from proceeding with a sale to another buyer. The 1st Defendant, who had already been informed by the Plaintiff that legal action would be instituted to enforce the specific performance clause of the agreement, had apparently concealed the probable threat of litigation from the 2nd Defendant and proceeded with the sale, obviously to frustrate the Plaintiff from seeking specific performance of the contract.

When considered in light of the above, it is more probable that the 2nd Defendant would have made his offer to the 1st Defendant, within the three-month period as stipulated in the agreement P1, and puts himself as a competitor against the Plaintiff. Since the 2nd

Defendant had made a better and a more enticing offer, it is obvious that the 1st Defendant would prefer to go for the higher price, backtracking from his already made undertaking. This is indicative from the letter by the 1st Defendant P3, written soon after the three-month period was over, informing the Plaintiff that he was not in a position to handover his premises in vacant possession and therefore he was '*not interested to sell*'. The use of the word '*interest*', instead of 'unable' is significant in the circumstances.

During the trial, the 1st Defendant sought to impute liability for the failure to perform the contract on the insistence of vacant possession by the Plaintiff. The 2nd Defendant was in possession of the premises as a tenant of the 1st Defendant. If the 2nd Defendant had no intention to move out within three months and informed his landlord of that position then, why did the 1st Defendant undertake via a written agreement, that he would deliver the premises in vacant possession within that period? It is obvious that the 1st Defendant was confident at that point of time he could deliver vacant possession within the three-month period. But some significant factor had altered the ground situation during this period, which induced the 1st Defendant to retract his own undertaking. The continuance of the 2nd Defendant's tenancy had accrued to the benefit of both the 1st and 2nd Defendants and was sought to be utilised by the 1st Defendant, in seeking to justify his breach of the agreement to sell.

The learned President's Counsel for the 2nd Defendant had relied on the answer of the trial Court to issue No. 24, which was meant to determine whether the 2nd Defendant, whilst being aware of the Plaintiff's rights, fraudulently acquired ownership upon deed No. 2524

as "not proved", to denote his client is in fact a *bona fide* purchaser without notice.

The answer of the trial Court on that particular issue is in line with the judgment of ***Wickramanayake v. Abeywardene et al*** (supra) which dealt with a similar situation where the trial Judge had held that the second defendant before him '*made a collusive purchase*' as his answer to the issue of whether the second defendant was a *bona fide* purchaser for value. This conclusion was reached by the Judge, in the absence of an issue of whether there was fraud. The appellate Court had held that "*… clearly, under the Roman-Dutch law fraud vitiates every contract, and if the latter of the two deeds could be shown to be fraudulent, it would be cancelled, and the way paved for the specific performance of the former. So that, the main question in the present case is whether deed No. 784 was executed in fraud of the plaintiff. No such issue was expressly framed*". In these circumstances Court noted that "… *mere collusion or lack of bona fides does not necessarily amount to fraud. A person may take unfair advantage of a particular situation and act accordingly, but his action may, nevertheless, not be fraudulent. Whatever is dishonourable is not necessarily dishonest in the eye of the law*". Thereupon, *Pereira* J remitted the dispute back to the District Court to try the issue framed by Court. His Lordship observed "*I think that the parties should clearly understand the issue before them and then proceed to trial thereon. I would set aside the judgment, and direct that the following issue be framed and tried in lieu of issue No. 10. Did the third and fourth defendants and the second defendant act collusively and with intent to defraud the plaintiff in the execution of deed No. 784, dated July 16, 1910?*" In the instant appeal, the issue related to fraud had been answered by the trial Court as not proved. There was no contest by the Plaintiff that the trial Court was wrong.

In dealing with the question whether the 2nd Defendant is a *bona fide* purchaser without notice, this Court takes note of the fact that the agreement to sell P2, had been duly executed in compliance of section 2 of the Prevention of Frauds Ordinance and registered properly in the correct folio. The 2nd Defendant did act under section 42 of the Registration of Documents Ordinance, and utilised its provisions, which enable "*all duplicates and copies and all books and indexes kept under this Ordinance may be searched and examined by any person claiming to be interested therein or by his attorney-at-law or agent duly authorized thereto in writing, and certified copies of or extracts from any such duplicate, copy, or book may be obtained if required.*"

The purpose of enacting these provisions was considered by the appellate Courts and, in ***Rajapaksa v Fernando*** (1918) 20 NLR 301, *Ennis* J dealt with the question of constructive notice, arising by reason of registration, and held thus (at p. 304):

> "*The object of registration is the protection of bona fide purchasers; it enables them by search to discover previous dealings with the property; and Hogg (on Deeds of Registration) page 99 enunciates the consequent rule as follows 'The rule that a person searching the register has notice of what is on the register – in Lord Redesdale's words in Bushell v. Bushell, if he searches he has notice – seems to supply the right principle on which to rest the further rule, that a person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice, and constructive notice, quite as much as actual notice, may afford evidence of fraud or want of bona fides.*"

Schneider J also held similar view and quoted the identical passage in ***De Silva v Lapaya et al*** *(1927) 29 NLR 177* at p. 184. These principles were followed in ***Kusumawathie et al v Weerasinghe*** (1932) 33 NLR 265 by *Macdonell* CJ (at p. 271) and in ***Shanmugam and Another v Thambiaiyah*** (1987) 1 Sri LR 357.

Coomaraswamy, in his book titled *The Conveyancer and Property Lawyer* Vol. I, Part 1, citing the Privy Council judgment of ***Munro v Divecott*** 1911 AC 149, states (at p. 31) "*the object of registration … to afford the public the means of knowing to whom the ownership of the land of the country belongs, what are the interests carved out of it and what are the charges upon or encumbrances affecting it, so that their owners may discharge the liabilities which ownership entails, and that those who deal with them may be protected. The objects of registration, therefore, are publicity and the avoidance of fraud*." He then imposes on the purchaser's notary (at p. 344) that he "… *must search in certain registers to discover the rights, if any to third parties which are enforceable against the land. This is an important part of examination of title because a purchaser will generally be affected with constructive notice of everything which is capable of registration and is registered, whether he searched it or not.*"

The judgment of ***Rajapaksa v Fernando*** (supra) was in relation to a registered instrument and even if the purchaser had not taken the more prudent course of action by conducting a search, the Courts have nonetheless imputed '*constructive notice*' of the instruments that have been registered in relation to the disputed property on such a purchaser. In this instance of course, the 2nd Defendant, by his own admission, did conduct a search and therefore qualifies to be considered as a person who has had actual notice of "*what is on the register*" and not mere by a constructive notice of it. When considered in this light, the

absence of a caveat, makes no difference as the 2nd Defendant was fully aware of the terms contained in agreement P1.

The question what constitutes notice in relation to a *bona fide* purchaser was considered in ***Crédit Agricole Corporation and Investment Bank v Papadimitriou*** [2015] UKPC 13 where Lord *Sumption* stated explicitly (in para 33):

> *"Whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same. It is a question which has taxed judges for many years. In particular they have been much exercised by the question in what circumstances a person is under a duty to make inquiries before he can claim to be without notice of the prior interest in question. Ultimately there is little to be gained from a fine analysis of the precise turns of phrase which judges have employed in answering these questions. They are often highly sensitive to their legal and factual context. The principle is, I think clear. We are in the realm of property rights and are not concerned with an actionable duty to investigate. The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests. The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in*

his hands) which calls for inquiry. The rule is that the defendant in this position cannot say that there might well have been an honest explanation, if he has not made the inquiries suggested by the facts at his disposal with a view to ascertaining whether there really is. I would eschew words like "possible", which set the bar too low, or "probable" which suggest something that would justify a forensic finding of fact. If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there are features of the transaction such that if left unexplained, they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none."

When these principles are applied to the circumstances and inferences that have been drawn from them as referred to in the preceding paragraphs, I am of the view that the 2nd Defendant, when he made the purchase of the disputed house property through 2V1 from the 1st Defendant, was well aware as to the specific performance clause it was subjected to, and his conduct referred to above in this judgment, though not termed as 'fraudulent' by the trial Court, certainly indicates of a complicity far more than to mere his collusion. In these circumstances I am inclined to concur with the conclusion reached by Court of Appeal to reject the 2nd Defendant's claim of being a *bona fide* purchaser without notice, by applying the test formulated by Lord *Sumption*, whether the 2nd Defendant "*has established such absence of notice as entitles him to assume that there are no adverse interests*" and answering the same in the negative.

At the concluding stage of this judgment, I think it is pertinent to quote a statement of *HNG Fernando* J (as he was then), from the judgment of ***Abdul Majeed v Ummu Zaneera et al*** (1959) 61 NLR 361, in which their Lordships, in three separate judgments, have enunciated several principles of law applicable in determining a claim of prescription by a co-owner against other co-owners. *Fernando* J in his judgment stated (at p. 377) that "*having regard to my own unfamiliarity with a subject which has received much critical and learned consideration from the Bench and the Bar, and in connection with which Lord Mansfield had observed "the more we read, unless we are very careful to distinguish, the more we shall be confused', I must be pardoned if, in the course of my attempt to analyse the problem which possession by co-owners presents, I emphasise too much that which should have been obvious*". This statement is applicable with equal force, if not more, to this undertaking of mine, in which I have endeavoured to decipher the appliable legal principles relating to specific performance, in the realm of Roman Dutch law jurisprudence.

However, before I part with this judgment, it is necessary to consider one last contention that had been advanced by the learned President's Counsel for the 2nd Defendant. Referring to the Court of Appeal judgment, the learned President's Counsel submitted that the parties to the instant litigation have presented their respective cases on the principles in law of contract and not on the principles of constructive trust created under section 93 of the Trusts Ordinance. The 2nd Defendant complained that the Court of Appeal had decided his appeal upon applying the provisions of section 93 of the Trust Ordinance, a position never relied upon by any of the parties to the litigation, either in their pleadings or in the issues. It was submitted that, in view of section 98 of the Trusts Ordinance, a Court cannot

decide a case on section 93 of that Ordinance, which had no application to the pleadings, the issues, the dispute presented to Court and the cause of action. Hence, the learned President's Counsel for the 2nd Defendant contended that the judgment of the Court of Appeal is liable to be set aside.

The learned President's Counsel for the Plaintiff, submitted that the reference to section 93 of the Trusts Ordinance made by the Court of Appeal was meant for the purpose of supplementing its already made decision to uphold the judgment of the trial Court, as a perusal of the said judgment, and the context in which those references are made, would reveal.

It is noted that the Court of Appeal, immediately after reproducing section 93 of the Trusts Ordinance in its impugned judgment, had proceeded to state that "*if a person agrees to sell a land, and afterwards refuses to perform his contract and then sells the land to a purchaser who has notice of the agreement, the latter will be compelled to perform the contact of his vendor*." Then the appellate Court had quoted the judgments of ***De Silva v Senaratne*** 50 NLR 313, ***Perera v Eliza Nona*** 50 NLR 176 and ***Dart on Vendors and Purchases*** (8th Ed, Vol. II p. 883) and concluded that the trial Court had "*carefully analysed all the evidence led in the case and held with the Plaintiff*" by acting on the principle it had already identified in relation to the claim of a *bona fide* purchaser for consideration without notice. The Court of Appeal therefore decided that there was no reason to interfere with the impugned judgment of the trial Court and the appeal of the 2nd Defendant was accordingly dismissed.

In its 11-page judgment, the Court of Appeal had made reference to section 93 of the Trusts Ordinance after citing the judgment of ***Silva v Salo Nona*** 32 NLR 81, where the registration of an agreement to sell was held as sufficient notice in relation to the said section. The said reference in the judgment had been made by the appellate Court, in dealing with the 2nd Defendant's position that he is a *bona fide* purchaser without notice, and thereby concurring with a similar conclusion reached by the trial Court. In rejecting the claim of a *bona fide* purchaser without notice, the appellate Court had stated "… *it is very clear that the 2nd Defendant purchased the said property with the full knowledge that the Plaintiff had a legal right to seek specific performance of P1 and have the said property transferred to him*." The appellate Court, however, made no finding as to the existence of a constructive trust in its judgment.

It is therefore evident that the reference to the judgment of ***Silva v Salo Nona*** and to section 93, had been made only after that Court had arrived at the conclusion that the 2nd Defendant has had notice of the impediment to the title of the 1st Defendant, in the form of a specific performance clause, in relation to the property he had purchased. It had earlier on concurred with the trial Court that the contract between the Plaintiff and the 1st Defendant had been kept alive since the latter's repudiation of it and therefore the 2nd Defendant had received no title through 2V1. Significantly, the Court of Appeal did not hold in favour of the Plaintiff on the basis that the 1st Defendant, in making the transfer, had retained a beneficial interest in trust on behalf of the former but simply on the application of the principle of law found in the Law of Contracts, namely, that there was a contract that had been kept alive, making the Plaintiff entitled to the relief of specific performance. Thus, it had clearly acted on the principle of law that the

vinculum juris that had been established by the said contract has not been loosened and the parties were not restored to their former freedom of action enabling the 1st Defendant to make a transfer without any encumbrances.

When considered in the light of the said sequence of presentation and the context in which those references to section 93 of the Trusts Ordinance have been made, I am inclined to agree with the submission of the learned President's Counsel for the Plaintiff that those references made by the Court of Appeal to section 93 of the Trusts Ordinance are merely to supplement the conclusion it had already reached, by correctly applying the principles in the Law of Contracts. Hence, the reference made to section 93 of the Trust Ordinance by the Court of Appeal, does not affect the validity of the already reached conclusion on the question whether the 2nd Defendant is a *bona fide* purchaser without notice.

In consideration of the reasons as set out in the preceding paragraphs of this judgment, it is my conclusion that all the questions of law on which special leave to appeal was granted by this Court, as set out in the petition of the 2nd Defendant, are answered in the negative and against the 2nd Defendant. The Court of Appeal had not erred in its determination of dismissing his appeal. Therefore, the judgments of the District Court as well as the Court of Appeal are hereby affirmed.

The appeal of the 2nd Defendant is accordingly dismissed with costs both here and below.

JUDEGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC, CJ.

I agree.

CHIEF JUSTICE

MURDU N.B. FERNANDO PC, J.

I agree.

JUDEGE OF THE SUPREME COURT