Agreed translation of Pages 8 & 9 of the Record of Proceedings

ANNEXURE TO STATEMENT OF CLAIM:

1974
On the 14th day of January
Memorandum of non-appearance drawn up at the request of Mr. Elias Ibrahim Coowar

IN THE YEAR one thousand nine hundred and seventy-four, on Monday the fourteenth day of January at eleven o'clock in the forenoon, in the office of the undersigned notary.

And before Mr. Bertrand Maigrot, notary public of Port Louis, Island of Mauritius, undersigned.

APPEARED

Mr. Elias Ibrahim Coowar, of age, proprietor, residing at Curepipe, Higginson Street.

Who stated as follows:

Following service of process by Mr. S. Becharry, Usher of the Supreme Court of this Island, dated twenty-first December one thousand nine hundred and seventy-three, registered in Reg: A 386 No.13854, and which remains annexed to these presents after mention of annexation by the undersigned notary, at the request of Mr. CHOORAMUN JHOBOO having elected legal domicile in the office of Mr. O.L. Abbasakoor, attorney-at-law, situate at No.4, Sir Virgile Naz Street, Port Louis, to appear on the aforesaid day and at the aforesaid hour and place in the office of the undersigned notary for the purpose of:-

1o) signing an authentic deed witnessing the sale by Mr. CHOORAMUN JHOBOO abovenamed to Mr. Elias Ibrahim Coowar of two portions of land, the first of an extent of sixty-four and three-fourths perches situate at Curepipe, Lees Street, and the second of the extent of forty-two perches also situate at Curepipe, morefully described as per title deeds transcribed in Vol.940 No.2 and in Vol.940 No.1, for and in consideration of a price of eighty-five thousand rupees and

2o) paying all sums remaining due on the said sale price.

In consequence the said Mr. Elias Ibrahim Coowar required the undersigned notary to acknowledge and record his appearance and pronounce default against the said Mr. Chooramun Jhoboo in case the latter should fail to appear.

And after the reading thereof the appearer signed along with the notary, (sd) I. Coowar & B. Maigrot.

And whereas/

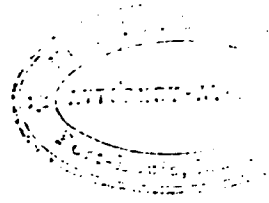
And whereas it was forty-five minutes past noon and the said Mr. CHOOMUN JHOBOO had not appeared and had not caused himself to be represented, the undersigned notary pronounced default against him and acknowledged and recorded the statements and appearance of the said Mr. ELIAS IBRAHIM COOWAR.

In witness of all the foregoing the present memorandum was drawn up

And after the reading thereof, the appearer signed along with the notary.

(sd) E.I. Coowar and Bertrand Maigrot

Reg: A.386 No.1220



Agreed translation of Pages 15 - 20 of the Record of Proceedings

DOCUMENT "A" PRODUCED IN COURT on 16th November, 1976 by Plaintiff

THE UNDERSIGNED : Mr. CHOORAMUN JHOBOO, of age, employed at the Life Insurance Corporation of India Company, residing in the district of Plaines Wilhems, place called Beau Bassin, ON THE ONE HAND, and Mr. ELIAS IBRAHIM COOWAR, of age, proprietor residing at Curepipe, Higginson Street, ON THE OTHER HAND, HAVE STATED, AGREED AND COVENANTED (CONVENU) AS FOLLOWS:- Mr. Chooramun Jhoboo abovenamed is prepared to sell under the conditions hereinafter stated to Mr. Elias Ibrahim Coowar undersigned, on the other hand, who accepts and binds himself to purchase 1o) A portion of land situate in the district of Plaines Wilhems place called Curepipe, Lees Street, of the extent of sixty four and three-fourths perches and bounded according to a memorandum of survey with figurative plan annexed thereto drawn up by Mr. A.A. Tyack, sworn land surveyor, on the sixth day of March one thousand nine hundred and fifty three registered in Reg: L.S. 19 No.1962 as follows:- on one side by the land of Mrs. W. Griffiths on a line broken in two parts measuring respectively ninety four and a half feet, and eight eight feet, on the second side by the land of Mr. Serge Henry on one hundred and fifty two feet between two boundary stones G.A., on the third side by a privat exit road on one hundred and sixty two and one fourth feet, and on the fourth side, partly by the surplus of the land of the vendor and partly by an exit eighteen feet wide on one hundred and forty seven feet three inches. And 2o) A portion of land of the extent of forty two square feet situate in the district of Plaines Wilhems place called Curepipe and bounded according to a memorandum of survey with figurative plan annexed thereto drawn up by Mr. Léon L. Michel Siou, sworn land surveyor, on the fifth day of March one thousand nine hundred and fifty three registered in Reg. L.S. 19 No.1922 as follows: on one side by Beaugeard road now Lees Street on one hundred and forty feet, on the second side by the surplus of the land of Mrs. Willy Griffiths on one hundred and sixteen feet six inches, by a boundary stone marked G.H. to be found at two feet eight inches from the edge of Lees Street, on the third side by the portion which Mrs. Michel Pougnet intends to purchase on one hundred and forty seven feet three inches and on the fourth side by a private road on one hundred and twenty feet. Together with a building consisting of eight rooms made of wood covered with shingles and a lean to covered with corrugated iron sheets with a glazed verandah in front covered with corrugated iron sheets existing on the land hereinabove described under title 1o. as well as the installations for water from Mare aux Vacoas and for electric light appertaining thereto and generally all that may depend therefrom or form part thereof

without any/

without any exception or reservation whatsoever and without further description, the purchaser declaring that he is well acquainted with the subject matter of his purchase and that he is satisfied therewith. The undersigned of the other hand shall have the enjoyment (jouissance) of the said property reckoning from the day of the signature of the authentic deed regularising these presents, but as such sale is being made under the condition precedent (condition suspensive) of the payment in full of the price hereinafter stipulated within the delay hereinafter stipulated within the delay hereinafter fixed, the transfer of the property is subordinate to the payment in full of the said price within the said delay and to the drawing up of the authentic deed as hereinafter stipulated : OWNERSHIP :

The appearer on the one hand is owner of the property hereinabove described and presently sold pursuant to title deed transcribed in Vol. 940 No.2 and Vol.940 No.1 respectively.

PRICE. The sale in question shall be made for and in consideration of the principal price of eighty five thousand rupees out of which the undersigned on the one hand declares and acknowledges having presently received and cashed from the undersigned on the other hand the sum of twenty thousand rupees. WHEREOF ACQUITTANCE.

As regards the balance of the said sale price amounting to the sum of sixty five thousand rupees, the undersigned on the other hand undertakes and binds himself to pay same to the undersigned on the one hand, who accepts, or to his assigns or proxies in one single instalment on the fifteenth day of October one thousand nine hundred and seventy three at the place of residence of the said vendor, being the domicile elected to that effect, and this without interest, it being well agreed between the parties that the balance of the said sale price shall be payable on proof of the regularity of the title of Mr. Chooramun Jhoboo and on his establishing that the said property is not leased, is not under seizure of any kind and is free from all floating or fixed charges and inscriptions generally whatsoever or on the erasure of all inscriptions with which it may be burdened.

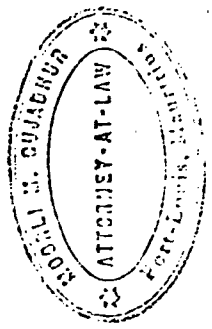
CONDITIONS

1o) No part of the price shall be paid by means of subrogation to any third party whomsoever.

2o) Unless he has been completely acquitted himself of his purchase price in capital, the undersigned of the other hand shall not be entitled to sell the said property or assign his right of purchase to whomsoever without the express written consent of the undersigned of the one hand and in that case the new purchaser shall be subjected to all the conditions enunciated in these presents.

In case/

3o) In case of non-fulfilment or violation by the undersigned of the other hand of anyone of the conditions hereinabove enunciated as well as in case of non-payment of the aforesaid balance of price on the due date fixed hereabove these present shall be considered null and void as of right, and this by mere default of payment of the said balance of price or because of the non-fulfilment or violation of any one of the said conditions, and if the undersigned of the one hand so deems fit eight days after a simple notice"mise en demeure" served on the undersigned of the other hand at the latter's costs and which notice "mise en demeure" shall have remained without effect. In that case the undersigned of the other hand must hand over immediately the said property to the undersigned of the one hand, who, if there is any difficulty on the part of the undersigned of the other hand, shall take back possession by means of a writ Habere Facias Possessionem issued at the costs of the undersigned of the other hand by one of the Judges of the Supreme Court of this Island in Chambers. All sums paid by the undersigned of the other hand to the undersigned of the one hand shall remain acquired by the said undersigned of the one hand as indemnit without his being required to refund any sum whatsoever which may have been incurred by the undersigned of the other hand on the said property.



4o) When the undersigned of the other hand shall have paid in full the said balance of price in capital, an authentic deed shall be drawn up by Mr. Bertrand Maigrot, notary public chosen by common consent by the parties who declare their intention to subordinate the perfection of the deed and transfer of OWNERSHIP (perfection du contrat et la transmission de propriété) to the payment in full of the purchase price and to the drawing up of the said deed of sale (à la passation du dit contrat de vente). And in case of refusal by the undersigned of the one hand to sign the said deed of sale, the said undersigned of the one hand shall have to refund to the undersigned of the other hand all sums paid by this latter and he shall have to pay a sum of twenty thousand rupees as damages. The balance of the said sale price shall be indivisible between the heirs or assigns or other representatives of the purchaser as is authorised by article 1221 of the Civil Code.

The undersigned declare that they are well acquainted with the law on registration (Ordinance No.26 of 1852) and that the price hereinabove fixed represents the actual and true value of the property presently sold and that they are well acquainted with each other and certify as to the identity of each other.

The undersigned of the one hand declares that he is not and has never been civilly married, that he is not a guardian and that the property presently sold is leased to Mr. B. Ramphul for a period of five consecutive years with option of renewal for five years and a monthly rent of one hundred and fifty rupees, and which lease is due to expire on the thirtieth day of April one thousand nine hundred and

seventy four, is not under seizure of any kind and is not burdened with any inscription and that all taxes and other rates incumbent on the said property have been paid up to the thirtieth day of June one thousand nine hundred and seventy four.

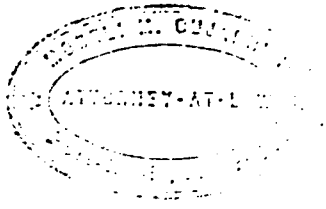
. For the execution of these presents the parties elect domicile in their respective places of residence.

Done and made in triplicate and in good faith at Port Louis, Island of Mauritius, this twenty ninth day of August one thousand nine hundred and seventy three.

Approved (sd) E.I. Coowar

Approved (sd) C. Jhoboo

Reg. C.269 No.5760, Transcribed in Vol.122 No.50.



Agreed translation of Pages 26 & 27 of the Record of Proceedings

p. 26 line 8

The undersigned : Mr. Chooramun Jhoboo ..... of the one hand; and Mr. Elias Ibrahim Coowar ..... of the other hand; HAVE SAID, AGREED and COVENANTED as follows:- Mr. Chooramun Jhoboo abovenamed is prepared to sell under the conditions hereinafter stated to Mr. Elias Ibrahim Coowar, the undersigned of the other hand, who accepts and binds himself to purchase.

1o .....

There follows the description of certain immovable properties subject matter of the agreement "and generally all that may depend therefrom or form part thereof without any exception or reservation whatsoever and without further description, the purchaser declaring that he is well acquainted with the subject matter of his purchase and that he is satisfied therewith". The deed then proceeds.

The undersigned of the other hand shall have enjoyment (jouissance) of the said property reckoning from the day of the signature of the authentic deed regularising these presents, but as such sale is being made under the condition precedent ("condition suspensive") of the payment in full of the price hereinafter stipulated within the delay hereinafter fixed, the transfer of the property is subordinate to the payment in full of the said price within the said delay and to the drawing up of the authentic deed as hereinafter stipulated ...

PRICE. The sale in question shall be made for and in consideration of the principal price of eighty five thousand rupees out of which the undersigned of the one hand declares and acknowledges having presently received and cashed from the undersigned of the other hand the sum of twenty thousand rupees.

The deed next makes provision for the payment of the balance of the sale price on October, 15, 1973, and sets forth certain conditions which are imposed on the purchaser and then goes on:-

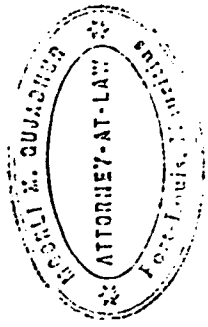
4o) When the undersigned of the other hand shall have paid in full the said balance of price in capital, an authentic deed shall be drawn up by Mr. Bertrand Maigrot, notary public chosen by common consent by the parties who declare their intention to subordinate the perfection of the deed and transfer of ownership to the payment in full of the purchase price and the drawing up of the said deed of sale. And in case of refusal by the undersigned of the one hand to sign the said deed of sale, the said undersigned of the one hand shall have to refund to the undersigned of the other hand all sums paid by this latter and he shall have to pay a sum of twenty thousand rupees as damages.

Agreed translation of pages 27 - 33 of the Record of Proceedings

P.29 line 13

Question (1) offers no difficulty. It results plainly from the expressions used in the first extract quoted from the deed that the agreement is what is called (perhaps misnamed) a "reciprocal promise to sell and buy" of the kind described in these notes from Dalloz, Encyclopédie, Juridique, Répertoire de droit civil, 2ème edn. Vo. Promesse de vente :-

166.- The reciprocal promise of sale and purchase is the one by which both parties undertake to bring about the realisation of another deed : the deed of sale which shall this time be final in its character (caractère définitif). From that point of view , it bears, like the unilateral promise, the character of a preliminary convention and it is widely known as the term "compromis" when the subject matter of the agreement is a business undertaking or an immovable property.



167.- The reciprocal promise of sale and purchase is characterised by the fact that unlike what exists in the case of an option agreement, the parties are both committed with a view to realise the final contract; it will be recalled that, in that respect, in order that there should exist a synallagmatic promise (in the general sense given here to that term), it is not sufficient that the fore-contract ("avant-contrat") would have created obligations devolving on each of the parties (for example by the fact of an indemnity for immobilisation, Cf. supra. no.18) these obligations must have in addition a symmetrical character and must bind the committed parties to the realisation of the sale.

This is the sort of promise to sell which article 1589 C. Nap. has in contemplation and the effect of which question (2) is, according to that article equivalent to a sale.

A promise of sale is equivalent to the sale (vaut vente) when there is reciprocal consent by both parties on the subject matter and the price.

But the promise will not have the effect of a sale if the parties have had in mind to delay the transfer of the ownership of the subject property until the accomplishment of a specified condition ("conditions suspensive") as explained in the following notes from Dalloz, op. cit, ec. vo.-

170.- But, in numerous other cases, the reciprocal promise cannot be brought down to a pure and simple sale:- (a) First, when it is actually impossible to effect the sale because of certain administrative authorisation which must be obtained, certain legal formality fulfilled; the sale then can only exist after the obtention of the one or the fulfilment of the other. (b) Next, when it is the parties themselves who, by introducing in the sale an element of conventional formalism, subordinate the realisation thereof to the occurrence of certain future events such as, very often, to the drawing up of an authentic deed, to the payment in full of the price, to the departure of an occupier ... etc .... In such

a case/

a case - which can, besides, perfectly combine with the preceding hypothesis (since the notarial deed can only be signed once the said authorisation is obtained) - one must first of all ask oneself what are the exact contents of the common will : this latter (common will) may very well have found in the drawing up of the authentic deed but an element of the execution of a sale already perfect (Paris, 21 mai 1927, Gas. Pal. 30 oct. 1927; Civ. 4 nov. 1953, Bull. civ. no.250; 13 juin 1956, Bull, civ. I, no.238) and that is what, it seems should be the normal interpretation in case of doubt and this having regard to the consensual character of the contract of sale, (Cf. Morin, Le compromis p.209 et 272) unless there is indication to the contrary. But if the trial judges (on their sovereign appreciation in such matter) : (Cf. civ. 18 nov. 1965, Bull. civ. I, no.630; 9 juin 1971, Bull. civ. III, no.364) interpret differently the will of the parties, it is generally recognized that the sale is not perfect until realisation of the event under consideration.

171.- Except that, in such cases, it is generally admitted that the element the absence of which prevents the perfection of the sale affects only the "effects" of the sale, which already exists as such (Cf. not. Planiol et Ripert. t. 10 par Hamel, no.175; Ripert et Boulanger, t. 2, no. 2414; Morin, Le compromis, p. 254 et s.); the synallagmatic promise of sale would in such a case be considered to be only a sale subjected to a condition precedent by way of a term (Cf. e.g. Civ. 5 Dec. 1934, S.1935.1.68) or a condition (affecté d'un terme suspensif ou d'une condition suspensive) (Cf. e.g. in cases where an administrative authorisation is required : Civ. 15 janv. 1946, D. 1946. 131; 25 févr. 1946, D. 1946, 341, note P. Hebraud; and relating to the case where the clause subjects the sale to the drawing up of an authentic deed, Cas. 18 dec. 1962, Bull. civ. III, no.522; 11 dec. 1965, D. 1965.198; 18 nov. 1965, J.C.P. 1965, II. 1450; rappr. Civ. 9 juin 1971, Bull, civ. III, nos. 364 et 365), the trial judges appreciating in their sovereignty whether the clause constitutes a term or a condition (Req. 20 oct.1908, D.P. 1912.1.61; 26 juin 1935, D.H. 1935. 414; Comp. Morin, op. cit., p.321, according to whom in case of doubt one should prefer the interpretation in favour of a term).

In the present instance, I find that the realisation of the reciprocal promise to sell and purchase witnessed by the deed and the transfer of ownership of the property concerned have been conditioned on the fulfilment of two requirements, which are : the payment in full of the purchase price at the time stipulated and the signing of an authentic deed.

The rights of the parties under the deed would, if not otherwise restricted by some special reservation, be those vested in contracting parties generally under article 1184 C. Nap. which provides that in the event of one of them failing to perform his part of the obligation.

The contract is not terminated as of right. The party, towards whom the undertaking has not been fulfilled, has the choice either to compel the other one to fulfil the agreement when this is possible or to ask for the termination thereof with damages.

The frustrated party here is the plaintiff. As already said, the defendant had himself first taken steps to complete the sale by calling upon the plaintiff to carry out his part of the bargain, but later backed out. It is not suggested that the agreement has been or is impossible of performance. The principle laid down in article 1184 C. Nap. is applicable in the case of a promise to sell as shown by this note from Dalloz op. cit. eo. vo.-

203. The non-realisation of the final contract (contrat définitif) may result from a direct refusal by one of the parties to carry out his promise (on the hypothesis that there is an alienation consented to a third-party. (Cf. supra, nos. 153 and 194), more often to sign the authentic deed reiterating the initial agreement. One finds oneself then in a particular situation arising out of the preceding hypothesis : a situation where by his own fault one of the parties prevents the formation of the promised contract. So, except in the case where such refusal constitutes only the putting into effect of a stipulation of withdrawal (stipulation du dédit) (Cf. on this point, supra, no.190, the proposed solutions as regards cases of a unilateral promise and which are still applicable there), is the contracting party entitled to consider the sale as existing and to ask for the execution thereof, unless he prefers to rest satisfied with a compensating indemnity.

There would thus be no impediment to the plaintiff's right to have the sale executed except if debarred by some restrictive clause. The defendant that such a clause has been inserted in the deed. This leads us to question (3).

The clause upon which the defence rests is in the form of what is termed a "clause pénale" by the Civil Code and is dealt with in articles 1226 and following. (It is indeed so described by the defendant himself in an affidavit affirmed by him for the purpose of an application for the appointment of a judicial sequestrator to which I shall later refer). The relevant articles are -

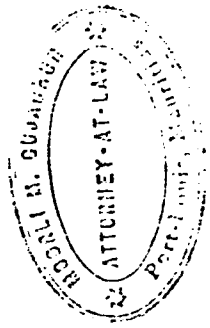
1226.- The penal clause ("clause pénale") is the one by which a person, with a view to ensuring the fulfilment of an agreement, binds himself to something in case of non-fulfilment.

1228.- The creditor, instead of asking for the prescribed penalty against the delaying debtor, may proceed with the execution of the principal obligation.

1229.- The penal clause is the compensation of the damages suffered by the creditor for non-fulfilment of the principal obligation.

He cannot claim at the same time the principal and the penalty unless the latter has been stipulated in case of simple delay.

It would follow from article 1228 that the plaintiff is, despite the clause referred to, entitled to sue for the performance of the promise of sale by the defendant. It has, however, been urged on behalf of the defendant that those articles of the Civil Code in no way prevent a clause like the one which he invokes from excluding all other remedy than that for which it provides if such has been the intention of the parties. Counsel has referred to Dalloz, Nouveau Code Civil annoté, article 1152 notes 1 to 4. The article itself reads -



When the agreement mentions that the party who shall fail to fulfil it shall have to pay a certain sum as damages, the other party cannot be allowed a greater or lesser sum. And the notes -

1.- The clause meant by article 1152 is a kind of penal clause, J.C. obligat., 838,

2.- From there it follows that in the case provided by article 1152, the creditor may, like the creditor of an obligation with a penal clause, ask for the fulfilment of the contract instead of the sum.- J.C. Obligat., 838, 1591. V. infra, art. 1228.

3.- However, that option no longer exists, if, by the fixing of a lump sum, the intention of the parties was not to agree upon a settled measure of damages, in the form of the lump sum, as compensation to the aggrieved party in the event of a breach of the main contract but in fact that they had agreed to convert that main obligation itself into an obligation to pay the said amount in the event of the non-fulfilment of the main obligation itself; in such a case, the option rests with the debtor who is empowered to free himself from this obligation under the contract by paying the agreed amount. J.C. Obligat., 838.

4.- This sort of novation depends on the terms of the deed and on the circumstances: if there is a doubt, in the case of an obligation to do the change must be more easily presumed; in the case of obligations to give the agreement shall be considered, by preference, as a penal clause.- J.C. Obligat., 838.

The position is more clearly explained in Fuzier-Herman, Code civil anoté, article 1228, n.4.-

However/

4.- However the creditor would no longer be able to claim the fulfilment of the contract if it were established that the true intention of the parties was to stipulate a conditional novation in case the debtor, after a notice "mise en demeure", would not fulfil the first obligation. There would be then no derogation to the principle; for one would not be faced with a principal covenant affected by a penal clause but with two principal obligations, one under resolutory condition and the other under condition precedent (condition suspensive) the former eventually replacing the latter. If the intention of the parties were to remain doubtful, the penal clause should then be admitted for novation is not presumed (art. 1273).- Baudray-Lacantinerie et Barde, loc., cit., n.. 1347. Cass. req., 21 juill. 1885 (D. 86.1.32).

What remains to be determined is, - (and this will answer question (4) -, what was the true intention of the parties concerning the purpose of the litigious clause. After carefully considering the terms of the deed and the surrounding circumstances in the light of the principles laid down by the authorities cited, I must decide that it was not the common wish of the parties that the plaintiff should by that clause be deprived of his legal right to insist on the performance of the contract and that the clause was in essence truly penal in that it simply fixed beforehand as a lump sum the damages claimable by the plaintiff in the event of the defendant's default. I have taken special note of the fact that the defendant, who argues to the contrary, has availed himself of his own right to have the agreement carried through. Even if one were prepared to assume for the sake of argument that the clause under examination could be construed as constituting a "stipulation de dédit" (Dalloz, Repertoire de droit civil, eo. vo. no. 203 (supra) or a covenant of the kind mentioned in note 3 to Dalloz, Nouveau code civil annote, art. 1152 (supra), that is to say, in either case one which had for consequence to leave the defendant with a choice between perfecting the sale and retracting his undertaking, the result would still be the same. By calling upon the plaintiff to stand by his own pledge the defendant would have manifested an unequivocal intention to proceed with the first of the two courses open to him and to sign the authentic deed. By complying with the defendant's notice the plaintiff would on his part have crystallized the reciprocal promise to sell and purchase from which neither party could then withdraw. I find support for that view in a decision of the Court of Cassation of the 18th October, 1968, which is referred to in a note to another "arrêt" of that Court (civ., 3e. 28 janv. - 1971 - D.1971. Somm. 152) and according to which -

The trial judges who find that the vendor of an immovable property has expressed in an unequivocal way his will to sign the authentic deed of sale, may infer therefrom that he has renounced to make use of the option of withdrawal stipulated in the contract under private signature.

I, for those/

I, for those reasons, hold that the parties are now irrevocably bound and that the plaintiff is entitled to sue for the regularisation of the sale under reference. The rest is a matter of procedure. It is settled law in France that, where the perfection of a sale depends upon the drawing up of an authentic deed, a judgment of the Court may be substituted for the wanting deed. (Dalloz, Encyclopédie juridique, Répertoire de droit civil, 2e. edn. - Vo Promesse de vente, no. 204). That in my view, is the correct solution. I consequently order the defendant to appear before Mr. Notary Bertrand Mingrot within one month from the date of this judgment to cash the balance of the sale price and to sign the authentic deed of sale of the properties in suit to the plaintiff. In default of the defendant complying with this order within the time fixed, the present judgment shall stand in lieu and stead of the authentic deed of sale and the plaintiff shall be entitled to have it transcribed and to deposit the balance of the sale price with the cashier of this Court, and the judgment so transcribed shall be a good and valid title to the plaintiff. The defendant is in the meantime prohibited from selling the properties to any third party.

The plaintiff has also claimed a sum of Rs.5,000.- as damages from the defendant. The claim is objected to on the ground that under article 1229 C. Nap. the plaintiff cannot insist on the performance of the agreement and on the payment of damages at the same time. For the plaintiff it is submitted that the compensation prayed for has no relation to the non-fulfilment of the agreement but is due for the prejudice suffered by the plaintiff as a result of the delay in obtaining satisfaction from the defendant. There is indeed a distinction to be drawn in that connection between the indemnity payable under a "clause pénale" for non-performance and that demandable for delay. This is shortly but clearly explained in Planiol et Ripert, Traité Pratique de droit civil français, 2e edn. t.7, n.868, p. 201.

But it goes without saying that the penal clause excludes the judicial damages only if the eventuality for which it has been agreed occurs. If it is meant for the case of simple delay and remains silent in the case of non-fulfilment, or inversely, the prejudice resulting from the one hypothesis, among the others, which has not been anticipated does not become subject to the clause and gives rise to an indemnity which may be freely determined by the Courts.

In support of that view the learned authors refer, among others, to a decision of the Court of Cassation of the 13th July, 1899. (D.99.1.524) the headnote to which reads -

The debtor fails in his undertakings and becomes liable for damages when there is either non-fulfilment or delay in the fulfilment.

And, in case of delay as well as of non-fulfilment, the parties may by an express clause, and as a penalty, settle the amount of damages

which shall be due to the creditor;

But if such a stipulation is meant for the simple delay and remains silent in the case of non-fulfilment, or reciprocally, the prejudice resulting from the one of the two hypothesis which has not been anticipated, having not been settled by the covenant, it is for the judge to determine it and decide on the amount of damages.

That is the law. On the facts, however, owing to the stand taken by the parties with regard to evidence, the plaintiff's claim on this score has remained a bald statement and the Court left without any element permitting some form of appreciation or assessment. I must, accordingly, disallow it.

Lastly, the plaintiff has, incidentally to this action, moved for the appointment of a judicial sequestrator and/or provisional administrator to look after and manage the properties pending the decision of the Court. But the defendant having in the course of the proceedings given an undertaking, which was duly recorded, not to dispose of the properties until the end of the case, the plaintiff has not pressed for the appointment prayed for. The only question at this stage with regard to the plaintiff's application is which party, if any, should pay its costs. Counsel for the plaintiff seems to have been of the opinion that my decision should depend upon the success of the main action. In my view the question would rather depend upon a finding whether the application was necessary or not, a matter of fact upon which the Court has not been in a position to pronounce. I shall, therefore, make no order as to the costs of the motion.

There will, accordingly, be judgment for the plaintiff in terms of the orders made above. The defendant shall also pay the costs of the action.

(sd.) H. GARRIOCH
SENIOR PUISNE JUDGE

2nd February, 1977

Agreed translation of pages 52 - 56 of the Record of Proceedings

(Record No.73) IN THE COURT OF CIVIL APPEAL

In the matter of:-

C. Jhoboo

Appellant

v/s

E.I. Coowar

Respondent

JUDGMENT

The respondent (then plaintiff) and the appellant (then defendant) entered into a contract in terms of which the appellant agreed to sell certain immoveable properties to the respondent, subject to certain conditions enumerated in the deed. It was stipulated (a) that the respondent would have the free enjoyment of the properties as from the signature of the notaria deed; (b) that the properties would not pass until the full purchase price had been paid and the notarial deed had been signed (c) that the said purchase price had to be paid within a delay fixed by the parties. The deed went on to say this :

When the undersigned of the other hand shall have paid in full the said balance of price in capital, an authentic deed shall be drawn up by Mr. Bertrand Maigrot, notary public chosen by common consent by the parties who declare their intention to subordinate the perfection of the deed and transfer of ownership (perfection du contrat et la transmission de propriété) to the payment in full of the purchase price and to the drawing up of the said deed of sale.(à la passation du dit contrat de vente). And in case of refusal by the undersigned of the one hand to sign the said deed of sale, the said undersigned of the one hand shall have to refund to the undersigned on the other hand all sums paid by this latter and he shall have to pay a sum of twenty thousand rupees as damages.

The respondent who had already made part-payments under the contract, was ready and willing to pay the balance of the said price at the time it was due. Some two months later, the appellant caused a notice to be served on the respondent, requiring him to appear before Mr. Notary Maigrot to pay the balance of the purchase price and to sign the notarial deed as agreed by the parties. On the appointed date, the respondent duly appeared before the notary to perform his obligations, but the appellant failed to turn up.

Thereupon the respondent entered an action praying the Court to declare that he was the lawful owner of the properties in question and applying for consequential relief.

The appellant/

The appellant contended that in virtue of clause 4 quoted above he was entitled to refuse to sell the properties, on repaying to the respondent all sums paid in advance by him, plus a further sum of Rs.20,000 as damages.

The learned Judge who tried the case took the view that the first issue he had to decide was whether on a reading of the contract as a whole, the intention of the parties was that condition 4 was a mere "clause pénale", or a "stipulation de dédit". The importance of the question is this : if condition 4 is a mere "clause pénale", it is the respondent who has the choice of accepting the damages fixed in the clause, or of insisting on specific performance of the contract. If, on the other hand, condition 4 was meant to be a "stipulation de dédit", the choice would rest with the appellant : by paying the sum agreed as damages, he would be exempted from any obligation of transferring the properties.

After an elaborate analysis of the authorities, the learned Judge came to the conclusion that condition 4 was a mere "clause pénale", and that in consequence the respondent was entitled to obtain specific performance of the contract.

On appeal, we were favoured with an erudite and able argument by learned counsel for the appellant, who submitted that the learned judge had misinterpreted the contract. He strongly argued that until the signature of the notarial deed, the appellant had no obligation to give an immoveable right to the respondent, but a mere duty to do something (une obligation de faire, et non pas une obligation de donner), and that in terms of a. 1142, C. Nap., "Toute obligation de faire .... se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur". In his view, the appellant had reserved to himself a 'locus poenitentiae', and had inserted in the contract a true "stipulation de dédit", which gave him a right to opt between transferring the property and paying the sum agreed as damages.

We agree that the question is not free from difficulty, but we do not consider it essential to decide it, as in our view this appeal can be disposed of on other grounds.

As we have pointed out above, the respondent was always ready and willing to perform his obligations under the contract, and when the delay fixed for paying the balance of the purchase-price had elapsed, the appellant summoned the respondent to appear before a notary to pay that price. The respondent duly appeared, but the appellant left default. The learned Judge came to the conclusion that, even if at the origin the appellant had had a choice between perfecting the sale and paying damages, he had by his own conduct deprived himself of that faculty of choice : by summoning the respondent to appear before the notary to pay the balance of the purchase-price, he had manifested an

unequivocal intention to proceed with the sale and waived his right to liberate himself by paying damages.

We agree with that conclusion of the learned judge. Whatever may have been the exact rights of the parties under the original contract, when the appellant summoned the respondent before the notary, he was electing on a definite course which amounted to an offer which became irrevocable when the respondent accepted it : as a result, once the respondent appeared before the notary to pay the balance, the appellant could no longer withdraw his offer to cash the money and transfer the properties.

Our finding is borne out by a decision of the Cour de Cassation of the 18th October, 1968, quoted in a footnote to a decision reported in D.1971. Somm. 152 :

The trial judges who find that the vendor of an immovable property has expressed in an unequivocal way his will to sign the authentic deed of sale, may infer therefrom that he has renounced to make use of the option of withdrawal stipulated in the contract under private signatures.

On any other view, we would be allowing the appellant to have the best of both words : if the respondent had failed to appear, or had proved unable to pay the balance, the appellant would, under the terms of the agreement, have been entitled to rescind the contract and to keep the part-payments effected by the respondent without incurring any obligations on his part; but if the respondent appeared and offered to pay, the appellant would still reserve to himself the right not to transfer the property on paying damages which might have turned out to have no relation to the loss suffered by the respondent. To permit such conduct appears to us to be in contradiction with the fundamental rule that bilateral contracts must be executed in good faith.

For the above reason, we find that the learned Judge came to the right conclusion, and dismiss the appeal, with Costs.

(sd). M. RAULT
Acting Chief Justice

(sd). P. de RAVEL
Acting Senior Puisne Judge

19th December 1977