Privy Council Appeal No. 44 of 1978

Chooramun Jhoboo – – – – – – – *Appellant*

v.

Elias Ibrahim Coowar – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH JUNE 1982

Present at the Hearing:

LORD DIPLOCK

LORD SCARMAN

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

[*Delivered by* LORD DIPLOCK]

This appeal from the Court of Civil Appeal of the Supreme Court of Mauritius arises out of a contract for the sale of land (" promesse de vente ") expressed in the French language dated 29 August 1973, and signed by the parties without notarial authentication (" contrat sous seing privé "), the appellant being the seller and the respondent the buyer. The contract contemplated its being perfected by the signature by the parties of a notarially authenticated document (" contrat authentique "), to be signed by the parties in the presence of a named notary, against payment by the buyer to the seller of the balance, amounting to R 65,000 of the total purchase price of R 85,000, of which R 20,000 had been paid at the time of execution of the contrat sous seing privé of 29 August 1973. Receipt of it in part payment of the purchase price was acknowledged in that contract. The transfer of the property in the land from the seller to the buyer was expressed to be deferred until, and to be subject to, the payment in full of the balance of the purchase price in one instalment and to the signature by the parties of the contrat authentique.

The time fixed by the contrat sous seing privé for the payment of the balance of the purchase price and the signature of the contrat authentique was 15 October 1973, but under the Code Civile, by which the sale of land is governed in Mauritius and which is derived from the Code Napoléon, time is not of the essence of a contract for the sale of land until it is made so by a formal notice (mise en demeure) given by one party to the other fixing a date for payment of the purchase price or outstanding balance of it and signature of the contrat authentique. In the instant case the seller did serve upon the buyer such a mise en demeure requiring the buyer to attend before the named notary at his office at

11 a.m. on 14 January 1974 and " then and there to pay all sum or sums still due to [the seller], if any, and to sign the authentic deed or deeds witnessing the said sale ".

The buyer duly attended before the notary at the place, date and time appointed, ready and willing to pay the balance, R 65,000, of the purchase price and to sign the contrat authentique; but the seller failed to appear, a fact that was duly attested to in a formal minute drawn up by the notary.

The buyer promptly started proceedings in the Supreme Court of Mauritius to enforce specific performance of the contract of sale by an order: (1) requiring the seller to appear before the named notary to receive the balance of the purchase price and to sign the contrat authentique, or (2) in default of the seller's complying with this requirement, authorising the buyer to pay the balance of the purchase price into court and declaring the judgment of the court to be a good and valid title of the buyer to the land.

This action was heard by Garrioch J. in February 1977. He made the order for specific performance of the contract in the terms prayed for by the buyer, and this order was subsequently upheld by the Court of Civil Appeal.

Much of the argument before Garrioch J. turned upon the question whether a particular condition in the contrat sous seing privé was intended by the parties to have the legal consequences which the Code Civile ascribes to a clause pénale or those which the Code ascribes to a stipulation de dédit. In order to make clear their reasons why they think that this appeal should be dismissed their Lordships find it necessary to transcribe this condition. (For the other terms of the contrat sous seing privé reference may conveniently be made to the judgment of the learned judge.) The condition reads:

> " Que lorsque le soussigné d'autre part aura intégralement payé ledit solde de prix en capital, il sera dressé un contrat authentique par les soins de Me. Bertrand Maigrot, notaire choisi d'un commun accord par les parties qui déclarent entendre subordonner au paiement intégral du prix d'acquisition et à la passation dudit contrat de vente, la perfection du contrat et la transmission de propriété. Et en cas de refus par le soussigné d'une part de signer ledit contrat de vente, ledit soussigné d'une part aura à rembourser au soussigné d'autre part toutes sommes versées par ce dernier et il aura à payer une somme de vingt mille roupies comme dommages et intérêts."

The learned judge, in a carefully reasoned judgment, came to the conclusion that it was a clause pénale, that is to say: that it did not take away the right of the *buyer* to have the contract enforced specifically if the seller made default; it merely provided for the sum to be awarded to the buyer as liquidated damages for the default if he, the buyer, elected not to require the seller to implement his bargain.

Had it been held to be a stipulation de dédit it would have given to the *seller* (not the buyer) an option to elect between on the one hand holding the buyer to his bargain and demanding the balance of the purchase price and the buyer's signature to the contrat authentique, or on the other hand himself withdrawing from the bargain and repaying to the buyer the R 20,000 he had already paid as an instalment of the purchase price together with an additional R 20,000 by way of compensation.

The learned judge went on to hold that even if, contrary to his own conclusion to the contrary, the clause could be classified as a stipulation de dédit, this could not avail the seller because, by the mise en demeure calling upon the buyer to attend before the notary on 14 January 1974

and there pay the balance of the purchase price and sign the contrat authentique, the seller had unequivocally exercised his option, and having done so in favour of holding the buyer to his bargain, he had lost whatever right he might previously have had to withdraw from the bargain himself on payment to the buyer of R 40,000.

In support of this holding Garrioch J. cited a decision of the third Civil Chamber of the French Cour de Cassation of 18 October 1968:

> " Les juges du fond qui relèvent que le vendeur d'un immeuble a manifesté d'une manière non équivoque sa volonté de signer l'acte authentique de vente, peuvent en déduire qu'il a renoncé à user de la faculté de dédit stipulée au contrat sous seing privé."

The Court of Civil Appeal to whom the seller appealed from the judgment of Garrioch J., although mentioning that the question of the proper classification of the clause as clause pénale or stipulation de dédit was not free from difficulty, held that it was not necessary for them to go into it. They agreed with the learned judge upon the second ground on which he had found for the buyer, namely that even if it were assumed in the seller's favour that the clause was a stipulation de dédit the seller by his mise en demeure had irrevocably elected to hold the buyer to his bargain and thereby lost whatever right he might have previously had to withdraw from it himself on payment of compensation.

The Court of Appeal also cited with approval, and adopted as a correct statement of the law of Mauritius, the decision of the French Cour de Cassation which had been relied on by Garrioch J. and is set out above. Their Lordships draw attention to the fact that in that citation it is said to be a question for " les juges du fond " to determine whether a seller has manifested his intention to sign the contrat authentique so unequivocally as to amount to a renunciation of an option to withdraw from his bargain which was reserved to him by a stipulation de dédit. This means that a determination upon this matter is one of fact and not of law; it cannot be disturbed upon cassation. Their Lordships' functions, when hearing appeals from Mauritius, are not confined to those of a cour de cassation. They not infrequently exercise their jurisdiction to decide questions of fact on which there have been conflicting findings in the courts below, but it is their invariable practice not to interfere with concurrent findings of fact made by a trial court and an appeal court of the country from which the appeal is brought. In the instant case there are such concurrent findings, and their Lordships would not have thought it right to overrule them even it they had doubted their correctness. But their Lordships have no such doubts; in their view the judgment of the Court of Civil Appeal was so obviously right as to make any contrary conclusion virtually unarguable.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

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In the Privy Council

CHOORAMUN JHOBOO

v.

ELIAS IBRAHIM COOWAR

DELIVERED BY

LORD DIPLOCK

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