RAMSAMI *v.* BANDARI KONDIAH.

[Civil Jurisdiction (Thacker, Acting C.J.) November 28, 1935.]

Agreement for sale and purchase of lease—lease not in vendor's name —undertaking by vendor to do all in his power to obtain title or a renewal in the name of the purchaser—provision for reference to arbitration if title not obtained—purchaser in occupation of the land—allegation by vendor that he was unable to give title—refusal by vendor to give an assurance as to possession—to what extent is a decree of specific performance available.

Ramsami entered into an agreement to purchase three leases of native land from Bandari. As to one of the leases there was a clause in the agreement to the effect that the lease was not in Bandari's name but that he claimed to have bought the mortgagee's interest and undertook to do all in his power to obtain either a title in his own name or a renewal of the lease in Ramsami's name. It was further provided in the agreement that, in the event of Bandari failing to obtain a title etc., the position should be adjusted by arbitration. In pursuance of this agreement Ramsami entered into possession of the leasehold property. Bandari however failed to obtain title, and accordingly the matter was referred to arbitrators, both parties subscribing to an agreement as to the terms of reference to the arbitrators. The terms of reference required the arbitrators to assess the adjustment between the parties on the basis that although title could not be given to Ramsami he was nevertheless to remain in possession of the land as he had been since the agreement for sale and purchase. An award was made accordingly. Following the award of the arbitrators, Bandari gave notice to Ramsami that Ramsami was liable for the use and occupation of the land. By way of reply Ramsami called upon Bandari to give him an assurance as to possession of the land. This Bandari refused.

HELD.—A vendor under agreement for sale and purchase who has no title beyond bare possession and who puts the purchaser into possession must convey to the purchaser whatever interest he has.

Quære.—Whether a purchaser under agreement for sale and purchase can require an assurance of a limited interest if at the time of contracting he was aware that the vendor's title was defective.

Cases referred to :—

(1) *Lawrenson v. Butler* [1802] 1 Sch. & Lef. 13 (I.R.) ; 42 Dig. 437 n.

(2) *Harnett v. Yielding* [1805] 2 Sch. & Lef. (I.R.); 42 Dig. 453.

(3) *Dyas v. Cruise* [1845] 2 Jo. & Lat. 460 ; 1 Dig. 326.

(4) *Hooper v. Smart* [1874] L.R. 18 Eq. 683 ; 43 L.J. Ch. 704 ; 31 L.T. 86 ; 42 Dig. 579.

(5) *O'Rourke v. Percival* 2 B. & B. 58.

(6) *Castle v. Wilkinson* [1870] 5 Ch. App. 534 ; 39 L.J.Ch. 843 ; 42 Dig. 577.

(7) *Martlock v. Buller* [1804] 10 Ves. 292 ; 32 E.R. 857 ; 42 Dig. 428.

ACTION for decree of specific performance of agreement for sale and purchase. The facts and arguments are fully set out in the judgment.

R. L. Munro, for the plaintiff.

Said Hasan, for the defendant.

THACKER, Acting C.J.—In this action the plaintiff Ramsami is seeking a decree of specific performance of a contract for the sale of 3 leases of native land, in which contract the plaintiff was the purchaser and the defendant the vendor. It is over native lease No. 32/270 that the dispute has arisen. By an agreement dated 6th March 1933 between the two parties the defendant agreed to sell to the plaintiff three native leases for £446. A special clause was incorporated in the agreement with reference only to lease 32/270 as follows :—

> " The land described in Native Lease 32/270 is not in the " Vendor's name, but he claims to have bought the interest of the " mortgagee through one N. S. Chalmers, and the vendor under- " takes to do all in his power to obtain either a title in his own " name or a renewal or extension in the name of the purchaser ; " provided however that if he fails to do so the position shall be " adjusted between the parties by the arbitration of two arbitrators " one to be appointed by either party and before proceeding to such " arbitration the arbitrators shall first appoint an umpire to whom " all matters in difference between the arbitrators shall be submitted " for final decision."

The plaintiff therefore had notice that this land was not all in the vendor's name.

The defendant did not obtain a title in his own name or an extension in the name of the plaintiff and the parties went to arbitration, as it was called, each subscribing to an agreement dated 6th March 1935 which set out the terms of the reference. The relevant clause of this reference is as follows :—

> " The arbitrators are to proceed in manner following :—They " are to take the value of the whole of the land sold under the " said agreement and assess on that basis of value the value of the " said Lease No. 32/70 with all fixtures thereon. They are then " to assess what is the value of the purchaser's present right of " possession of the Lease No. 32/70 when assessed as on a ten- " ancy on sufferance and determinable at will. The difference " between the two values (if any) is to be taken as the compensa- " tion to be awarded by the vendor to the purchaser."

The assessor's award reads as follows :—

> " We hereby assess the difference in value between the lease at " will and present possession provided by paragraph 3 of this " reference at £138 4s. 0d."

The defendant on 6th March 1933 (the date of the making of the sale agreement) gave possession of all the lands including that embraced in native lease 32/270 to the plaintiff and the plaintiff has remained in possession and is still in possession of that parcel of land.

After the award the defendant furthermore took it upon himself to authorise his solicitor to give notice to the plaintiff that he was liable for use and occupation of the land in lease No. 32/270. The defendant now says the property is not his and that he cannot therefore give any title to it. The defendant was called upon to give the plaintiff an assurance as to possession but the defendant refused to do this, and this action is the result. Now it is qute clear from the terms of reference to the arbitrators, signed, be it remembered, by both parties, that the award was to be on the footing of the plaintiff being in possession of the land in native lease 32/270 and the award is in fact made on that footing. The arbitrators were not merely to find the value of the lease, which sum, one would expect, would be the compensation to be paid to the plaintiff if he was to have no further interest in that parcel, but to find the difference between the value of the lease and the value of a tenancy at will or on sufferance, as the reference puts it. This point is of some importance and it is clear from it that both parties appreciated that the plaintiff was in possession before the arbitration and was to remain in possession after the arbitration and that the compensation was to be calculated on the footing of the plaintiff's possessory interest and that he was to be paid the difference between the value of that interest and the value of the lease. If he was to lose his possessory interest and to be deprived of any interest whatever, the compensation would, one would expect, have been the full value of the lease, and the reference to the arbitrators and their award to have been so drawn up. Apart from this clear indication of the intention and minds of the parties themselves after the dispute had arisen and apart from the fact that the defendant was put in possession, what is the main principle of law on which this case rests ? I will read from *Halsbury* Vol. 27 paragraph 14 (4) :—

> " Where at the time of the contract a vendor had not the full " interest he agreed to sell, the purchaser can, as a rule, claim a " conveyance of such interest as the vendor possessed, with com- " pensation, though the vendor would not have a corresponding " right against the purchaser."
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> " In two cases, *Lawrensen v. Butler* [1802], 1 Sch. & Lef. 13, " and *Harnett v. Yielding* [1805], 2 Sch. & Lef. 549, Lord " Redesdale, L.C., expressed the opinion that the principle did not " apply when the purchaser knew at the date of the contract of the " defect in the vendor's title. This opinion has been dissented " from by English judges, who have given specific performance in " such cases ; see *Dyas v. Cruise* [1845] 2 Jo. & Lat. 460, per " Sugden, L.C. at p. 487."

Now *Halsbury* goes further here than he does in volume 25 at paragraph 699 :

> " Specific performance with compensation is, however, not de- " creed at the instance of the purchaser where there is a substantial " difference between the property agreed to be sold and that which " the vendor can convey, and partial performance would inflict " real hardship on the vendor ; or where it would be unjust to " third parties ; or where the purchaser was aware of the defect " or misrepresentation when he entered into the contract, or did not " rely on the vendor's representation."

which possibly is written by another author than the paragraph first cited.

Fry on *Specific Performance* says at page 588, 6th Edition (see paragraphs 1257, 1271 and 1272) :—

> " Although, as general rule, where the vendor has not substantially " the whole interest he has contracted to sell he, as we have seen, " cannot enforce the contract against the purchaser, yet the pur- " chaser, can insist on having all that the vendor can convey, with " a compensation for the difference."
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> " If the purchaser is, from the first, aware of the vendor's in- " capacity to convey the whole of what he contracts for, he cannot, " generally, insist on having, at an abated price, what the vendor " can convey."
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> " Thus where, in the year 1863, a husband and his wife signed " a contract for the sale of the wife's fee simple estate to the " plaintiff, who knew from the plain language of the contract the " true state of the title, it was held that, as the plaintiff clearly " never could have believed for a moment that the husband could " sell the fee simple, he was not entitled to have a conveyance of " all the husband's interest, i.e., his estate for the joint lives of " himself and his wife and his estate by curtesy, with an abatement " of the purchase-money ; and the bill was accordingly dismissed."

Story on *Equity* says in the 3rd Edition, paragraph 779 :—

> " We have thus far principally spoken of cases of actions by the " vendor against the purchaser for a specific performance, where " the contract has not been, or cannot be, strictly complied with. " But actions may also be brought by the purchaser for a specific " performance under similar circumstances where the vendor is in- " capable of making a complete title to all the property sold, or " where there has been a substantial misdescription of it in im- " portant particulars : or where the terms, as to the time and " manner of execution, have not been punctually or reasonably " complied with on the part of the vendor. In these and the like " cases, as it would be unjust to allow the vendor to take advantage " of his own wrong, or default, or misdescription, courts of equity " allow the purchaser an election to proceed with the purchase " *pro tanto*, or to abandon it altogether. The general rule in all " cases, is that the purchaser, if he chooses, is entitled to have the " contract specifically performed, as far as the vendor can perform " it, and to have an abatement out of the purchase money or " compensation, for any deficiency in the title, quantity, quality, " description, or other matters touching the estate, unless the " granting of this extraordinary remedy should inflict unreasonable " hardship upon the seller."

Perhaps it will be as well also to quote certain extracts from some of the leading cases on the subject. They are as follows :—

Hooper v. Smart (1874) 18 Equity 683.

Headnote—

> " Vendors agreed to sell the entirety of certain freehold property " for the sum of £6000, and to make out a good marketable title. " The purchaser, in consequence of delays on the part of the

" vendors, filed a bill for specific performance of the agreement. " It was subsequently discovered that the vendors were entitled to " only a moiety of the property :—

" HELD, that the purchaser was entitled to a decree for " specific performance of the agreement by the vendors of their " moiety, with an abatement of one-half of the purchase money."

O'Rourke v. Percival 2 Ball and Beatty 58-65.

Headnote—

" A bill for specific performance of an agreement for a lease, " signed by the grantor only, and contrary to his leasing power, " of which the plaintiff had notice, afterwards amended ; praying " an execution of the agreement for the life of the grantor, dis- " missed.

" Where a limited owner contracts to grant a certain interest, " which it afterwards appears he cannot carry into execution to the " extent agreed on, yet the grant shall be generally available as far " as his interest will permit.

" But it is otherwise where both contracting parties originally " intended that the contract should operate as a fraud upon the " the powers of the limited owner ".

Castle v. Wilkinson 5 Chancery Appeals 1869/70 p. 534.

" The only question however, is whether this bill for specific " performance can be maintained to the extent of holding that " Richardson shall part with all the interest he can part with, " namely, his estate for the joint lives of himself and his wife, and " his estate by curtesy, with an abatement of the purchase-money. " Now, I apprehend that the law is settled as to this upon the " authorities referred to by Lord St. Leonards, that if a man pro- " fesses to be owner of the fee simple, and undertakes to sell the " fee simple, and it turns out that he had not power so to do, the " purchaser not being at the time aware of the difficulty, then the " vendor must convey as much as he can, and submit to an abate- " ment.—per Lord Hatherley L.C.

" That being so, it is the unquestionable law of this Court that " such a contract cannot be enforced whether partially or wholly. " All those cases in which the contract has been enforced partially " and a partial interest has been ordered to be conveyed, have " been where the vendor has represented that he could sell the fee " simple and the purchaser has been induced by that representation " to believe that he could purchase the fee simple. Here it is quite " clear that the purchaser never could have believed for one mo- " ment that he could purchase the fee simple ; and that being " so, the bill must be dismissed. For myself I should have thought " the law too clear for argument."—per Sir G. M. Giffard L.J.

Dyas v. Cruise 2 Jo. Lat. 485 - 486.

" But then the question, whether the plaintiff was entitled to a " partial performance of the agreement, arose. Lord Redesdale re- " fused it ; for he said that the lessee knew the party had only a " limited power of leasing, and intended to execute it; and that there " was no mutuality. I doubt whether that can be maintained as " the law of the Court, when there is no fraud in the transaction. " If there be a bona fide intention to execute the power, and that

" contract cannot be carried into effect, I do not see why the " interest of the tenant for life should not be bound, to the extent " he is able to bind it, unless there be some inconvenience. In a " late case, *Graham v. Oliver*, the Master of the Rolls, alluding to " the difficulties in these cases, observed, that the Court had " thought it right, in many cases, to get over these difficulties, for " the purpose of compelling parties to perform their agreement ; " and that it was right they should be compelled to do so, where " it can be done without any great preponderance of inconvenience." —per Sir Edward Sugden L.C.

Hannett v. Yielding Ir. Ch. 2 Sch. & Lef. 552.

" . . . but they have constantly held that the party who " comes into equity for a specific performance, must come with " perfect propriety of conduct : otherwise they will leave him to " his remedy at law. He must also shew that in seeking the " performance he does not call upon the other party to do an act " which he is not lawfully competent to do ; for if he does, a " consequence is produced that quite passes by the object of the " the Court in exercising the jurisdiction, which is to do more com- " plete justice. If a party is compelled to do an act which he is " not lawfully authorised to do, he is exposed to a new action for " damages, at the suit of the person injured by such act : and " therefore, if a bill is filed for a specific performance of an agree- " ment made by a man who appears to have a bad title, he is not " compellable to execute it, unless the party seeking performance, " is willing to accept such a title as he can give : and that only " in cases where an injury would be sustained by the party plaintiff " in case he were not to get such an execution of the agreement " as the defendant can give. I take the reason to be this, among " others ; not only that it is laying the foundation of an action at " law, in which damages may be recovered against the party, but " also that it is by possibility injuring a third person, by creating " a title with which he may have to contend. There is also another " ground on which courts of equity refuse to enforce specific execu- " tion of agreements, that is, when from the circumstances it is " doubtful whether the party meant to contract to the extent that " he is sought to be charged. All these are held sufficient grounds " to induce the Court to forbear decreeing specific performance ; " that being a remedy intended by courts of equity to supply what " are supposed to be the defect in the remedy given by the courts " of law. Under these circumstances therefore, I think consider- " able caution is to be used in decreeing specific performance of " agreements : and the Court is bound to see that it really does " that complete justice which it aims at, and which is the ground " of its jurisdiction."—per Redesdale L.C. of Ireland.

Mortlock v. Buller 10 Vesey June. 31. 292.

" . . . I also agree, if a man, having partial interests in an " estate chooses to enter into a contract, representing it, and agree- " ing to sell it, as his own it is not competent to him afterwards to " say, though he has valuable interests he has not the entirety ; " and therefore the purchaser shall not have the benefit of his " contract. For the purpose of this jurisdiction, the person con-

> " tracting under those circumstances, is bound by the assertion " in his contract ; and, if the vendee chooses to take as much as " he can have, he has a right to that, and to an abatement ; and " the Court will not hear the objection by the vendor that the " purchaser cannot have the whole. But that always turns upon " this that it is, and is intended to be, the contract of the vendor."
>
> —per Eldon L.C.

The result of these text books and authorities might possibly be said to be conflicting as to how far knowledge of a defect in the vendor's title will disentitle the purchaser to the relief of specific performance, but even if the qualification referred to in the contract of sale can be said to be notice of a defect in title (and I do not think it can so be construed) I am content to rest my decision in part on the authority quoted of *Dyas v. Cruise,* which was quoted in *Halsbury* Vol. 25. But, here, in my opinion there was no actual knowledge of a defect in the title but mere notice that the land was not in the vendor's name which is not the same thing as knowledge of a defect in title. Had there been nothing more to this case than the mere contract, without possession and without the terms of reference and award it is true that I might have had more difficulty than I have in arriving at a decision in favour of the plaintiff, but in this case, as I have said, there are the additional facts of *de facto* possession and the terms of reference, to be taken into consideration, as well as the fact that I do not consider the plaintiff can be said to have been aware of a defect in title. The defendant says the plaintiff is estopped from disputing the arbitrator's award. So far from this being so, it appears that it is the defendant who is seeking to construe the terms of reference and the award quite differently to their plain meaning. The defendant's solicitors' letter of 17/1/35 is significant in that the defendant's real grievance seems to be that he was forced against his will as he alleges to reduce the purchase price by £28/10/- and that he was not prepared to do anything more to obtain the title which he had contracted to endeavour to get. It may be that this is the real and original cause of this dispute. The earlier correspondence between the respective solicitors supports this view. The defendant's solicitors' letter of 10th July is quite incorrect when it says " The arbitrators assessed the value of the native lease at £138/4/-". They did nothing of the sort. The suggestion in this letter appears to be that the award as signed by the arbitrators is not really that which they intended to make. The answer surely to this is that both arbitrators signed it and the terms of reference, moreover, coincide with the terms of the award.

I am not satisfied that the defendant has no interest in the lease as he now says, and from the evidence led, from the pleadings, from the correspondence and from the terms of reference it is manifest to me that the defendant put the plaintiff into possession of the land, and that he was previously in possession himself and that he regretted the bargain. It is to be observed that the defendant did not offer any evidence nor did his brother, who, it is suggested, purchased the lease in 1923. It is not clear who the actual owner of the lease is, nor is it necessary for me to decide that question. It is sufficient for the purposes of this action to hold that the defendant put the plaintiff in possession and that it was intended the plaintiff should remain in possession, at any rate

until the termination of the lease. The defendant cannot now be heard to allege otherwise and he must convey to the plaintiff whatever interest he had. It would be inequitable to allow the defendant to contract to sell the lease, to put the plaintiff in possession, and then to refuse to the plaintiff that, which by the act of the defendant himself, he already has. It would be inequitable not only by reason of these facts but also having regard to the terms of the reference which show quite clearly that the plaintiff was in possession and was to remain in possession.

There will therefore be judgment for the plaintiff, and a decree for specific performance of the contract except in so far as lease 32/270 is concerned as to which the defendant will execute an assurance conveying to the plaintiff that interest in the land which the defendant has, which I hold is possession of the land. This assurance will be of no avail of course as against the owner of the lease whoever he may be, if the latter wishes to obtain possession of the land, but it will be effective against the defendant. The balance of purchase price will of course require to be paid. The defendant will pay the costs of the action.

RAM MUNNI *ats.* RAM SINGH.

[Appellate Jurisdiction (Thacker, C.J.) April 23, 1936.]

Marriage Ordinance 1918[1] *s.* 45—*unlawfully harbouring—Meaning of unlawful harbouring—Onus of proof.*

A case stated by the Chief Police Magistrate on dismissal of a charge of " unlawful harbouring " was as follows :—

" Upon the hearing of the said charge the following facts were proved before me :—
" (i) That the appellant was lawfully married at Suva to Vedkumar on the 12th day of " October, 1935, a certified copy of the marriage certificate having been produced before me " which is attached herewith.
" (ii) That the appellant and his wife Vedkumar lived together from the date of their " marriage till the 14th January, 1936.
" (iii) That during this period the appellant maintained his wife according to his means and " did not give her any cause to leave him.
" (iv) That on the morning of Tuesday, the 14th day of January, 1936, at about 9.30 a.m. " the appellant allowed his wife to go and stay at the house of the respondent situate in " Bridge Street, Suva, for a day or two, and in fact himself took her to the doorstep of the " respondent's house.
" (v) That on the morning of Thursday, the 16th January, 1936, at about 9.30 a.m. the " appellant went to the said house of the respondent, in the absence of the respondent, " to fetch his wife back but the latter refused to return to and live with him.
" (vi) That on Tuesday, the 21st day of January, 1936, Sergeant-Major Indar Singh of the " Fiji Constabulary was deputed to execute a warrant issued under s. 14 of Ordinance 2 of " 1889 at the instance of the appellant authorising him the said Sergeant-Major Indar Singh to " search for Vedkumar at the house of the respondent in Bridge Street and produce her " before me.
" (vii) That the said Sergeant-Major Indar Singh before he proceeded to search at the said " house of the respondent went to the business premises of the respondent where he saw the " respondent and explained to him the nature of the search-warrant and that he was going " to his house to search for Vedkumar. The respondent told him to take the girl away.
" (viii) That on Tuesday the 21st day of January, 1936, the said Sergeant-Major Indar Singh " went to the house of the respondent at Bridge Street and having found Vedkumar therein " he brought her before my court from where she went back to the respondent. On the " part of the respondent it was contended that there was no case to answer and the respon- " dent did not elect to lead any evidence. The fact that the woman Vedkumar did stay at " the house of the respondent was not denied but his counsel, *Mr. Crompton, K.C.*, argued " that there was no unlawful harbouring within the meaning of s. 45 of the Marriage Ordi- " nance No. 2 of 1918. He argued that the wife Vedkumar was at liberty to live apart from " her husband and unless the prosecution proved that the wife was influenced by the res- " pondent to leave her husband so that her will was overborne by the stronger will of the " respondent, which in this case had not been done, it must fail. He further argued that " there was no evidence to show that the wife had left the appellant without just cause. He " read extracts from an unreported case of the Supreme Court of Fiji decided by Chief " Justice Young in 1925 and submitted that the present case fell within the purview of the " said case.

[1] *Now s. 46 of the Marriage Ordinance (Revised Edition page 1189).*