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1952 *Present :* **Nagalingam A.C.J. and Gunasekara J.**

DAVID PERERA, Appellant, *and* ENDIRIS SINGHO, Respondent

S. C. 297—D. C. Kegalle, 6,273

Vendor and purchaser—" Eviction by judicial process "—Meaning of term—Duty of purchaser to complete title by prescriptive possession.

In an action for damages for breach of covenant to warrant and defend title in regard to a sale of certain premises—

Held, that eviction by judicial process in not confined only to cases where the Court has ordered the ejectment of a party from the premises in question and executed that order by its officers by physical ejectment of the party in possession. The term applies to a wider class and includes a case where a person in possession is dispossessed without process of Court and his assertion of title in an action instituted by him to regain possession is dismissed, resulting in the person dispossessing continuing in possession.

Obiter : When a purchaser of property could have completed his title by prescriptive possession but has not done so and by reason thereof has suffered eviction, he is not entitled thereafter to sue for recovery of the purchase price and damages.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, Q.C., with *S. B. Lekamge* and *V. Ratnasabapathy*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene*, for the plaintiff respondent.

Cur. adv. vult.

April 8, 1952. NAGALINGAM A.C.J.—

The defendant appeals from a decree of the District Court of Kegalle condemning him to pay the plaintiff-respondent the purchase price the latter had paid him in respect of a land sold to him and for damages consequent on a failure to warrant and defend the title conveyed.

By deed P1 of 1936 the defendant admittedly conveyed to the plaintiff and two others a certain allotment of land described in it and placed the plaintiff and his co-vendees in possession thereof. In 1937 the Bank of Chettinad would appear to have entered into possession of the land following upon an execution sale against one Boyagoda and at a time when an action instituted by Boyagoda against the plaintiff and his co-vendees was yet pending—the action having been instituted in 1934.

2——J. N. B 18635-1,490 (7/52)

In 1943 the plaintiff instituted an action bearing No. D. C. Kegalle, 2,411 for partition of the land between himself and his co-vendees. The Bank of Chettinad intervened in that action, denying the title of the plaintiff and his co-purchasers and setting up title in itself. The plaintiff noticed the defendant to warrant and defend the title conveyed by him. After trial the claim of the Bank was upheld on the ground *inter alia*, that the title pleaded by it was superior to that made out by the plaintiff, and in particular that the title deeds relied upon by the Bank applied to the land in dispute while it was doubtful that the title deeds relied upon by the plaintiff had reference to the land. It is important to note that it was expressly held by the learned trial Judge in that case that neither the Bank nor the plaintiff and his co-vendees had acquired a title by prescription. The defendant himself admits that he failed in the partition proceedings to warrant and defend the title conveyed by him.

The plaintiff's claim is resisted by the defendant upon two grounds, firstly that the plaintiff had not suffered eviction by judicial process, and secondly that the plaintiff had "failed to complete his title by prescription".

To deal with the first point, as observed earlier, the plaintiff lost possession as a result of the Bank taking possession on its own, that is to say, without having obtained an order of Court placing it in possession and directing the plaintiff and his co-vendees to be ejected therefrom. But it will be incorrect to say that eviction by judicial process is confined only to cases where the Court has ordered the ejectment of a party from the premises and executed that order by its officers by physical ejectment of the party in possession. The term applies to a wider class and includes a case where a person in possession is dispossessed without process of Court and his assertion of title in an action instituted by him to regain possession is dismissed, resulting in the person dispossessing continuing in possession. Such a case would be also one where eviction of the person in possession has been by due process of law because the eviction is confirmed by the decree of dismissal entered by Court.

It was contended that this principle is limited in its operation to actions *rei vindicatio* and cannot be extended to a partition action instituted by a purchaser, for in a partition action a plaintiff would have to satisfy the Court not merely with regard to his title to the land but would have to take upon himself the larger burden of establishing that his title is good even as against the whole world. This argument may be entitled to weight if it could be shewn that a purchaser failed in the partition action instituted by him because the Court found that he had not made out an absolute title good as against the whole world. But where, as in this case, definite issues were raised between the plaintiff and a third party, the Bank in the present instance, as regards the superiority of their respective titles, it can hardly be said that such a contention should find place.

In this case, as set out earlier, the title of the Bank was set up in opposition to that of the plaintiff and his co-vendees, and the Court had to adjudicate whether the plaintiff and his co-vendees or the Bank had

the better title to the land; the Court found that while the plaintiff and his co-vendees had no title, the Bank it was that had the title. In these circumstances the consideration that in a partition action the plaintiff has to prove his title as against the whole world is of little value. In fact, Voet enunciates the proposition very broadly; after referring to various kinds of action, he says :—

> " Whenever the result of an *action of any kind* is that the purchaser is not permitted '*habere rem*' and he is cut off from all hope of recovering it, the vendor's liability for warranty of title arises. " [1]

I am therefore of opinion that any action, whatever its form may be, where the validity of the title conveyed comes up for determination and decision against such title is given, a cause of action for breach of warranty will arise, provided, of course, the vendor had been duly noticed to warrant and defend the title conveyed by him. The first point, therefore, fails.

The second question is whether the plaintiff failed to complete his title by prescriptive possession. I think it is good law, supported as it is by the high authority of Voet [2] that an action for recovery of the purchase price and damages would fail

> " when the purchaser could have acquired a title by usucaption but has not done so and by reason thereof the thing has been evicted from him. "

The term " usucaption " is explained as meaning long possession or *usucapio*, ultimately superseded by *prescriptio* of the later law.

But the question here is not so much the law but as to what the facts are, for it is only if it be found that the plaintiff failed to occupy or possess the land that the proposition of law would become applicable. The plaintiff gave express evidence that soon after his purchase he had the land planted in plantains and catch crops and two years later had it planted in rubber, but that at the stage when the rubber trees came into bearing the Bank entered into occupation and started tapping adversely to himself. This evidence was not contradicted by the defendant nor was it challenged even in cross-examination, so that on the evidence before him the learned Judge could have come to no other finding than what he did in fact arrive at, that the plaintiff did all he could to " acquire title by *usucapio* ". In view of this finding of the facts, it must follow that the second point of law taken on behalf of the appellant does not arise.

I would therefore dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

[1] *Lib. XXI Tit. II § 1. Berwick's translation, Revised Edition, page 509.*
[2] *Ibid. Lib. XXI Tit. II § 30, page 536.*