1938 *Present* : **Moseley A.C.J., Soertsz S.P.J., and Nihill J.**

# RAMALINGAM CHETTIAR *v.* MOHAMED ADJWAD *et al.*

*317—D. C. Colombo, 4,458.*

***Warranty of title—Notice to warrant and defend—Notice to mother of minor heirs and co-executor—Sufficiency of notice—Compromise by natural guardian—How far binding on the heirs—Liability of heirs for damages for failure to warrant and defend.***

**Where notice of an action, in which title conveyed is challenged, is given to the mother, the natural guardian of the minor heirs liable on an express covenant to warrant and defend title and executrix of the last will and testament of the minor's deceased testator, and to her co-executor,—**

***Held*, that the minors were bound by the result of the action.**

**Where, as the result of such a notice, a compromise is entered into between the mother as natural guardian and co-executrix and the other co-executor on the one hand and the party giving notice on the other, the compromise would be binding on the minors subject to a right to claim restitution if they have been prejudiced by the compromise.**

**The liability of the heirs depends upon proof that administration has been completed by the executors and that property belonging to the estate has passed into their hands and is limited to the extent of such property.**

THIS was an action to recover damages brought by the vendee of a certain land against the heirs of the vendor for failure to warrant and defend title. The heirs were the wife of the vendor, who was also executrix of the last will of her husband, and her minor children.

The defendants pleaded (*a*) that they were not properly noticed to warrant and defend title; (*b*) that at the time the action for eviction was settled, proper steps had not been taken to secure their valid participation in the settlement; (*c*) that plaintiff's claim, if any, was against the executors.

The learned District Judge entered judgment for the plaintiffs.

*H. V. Perera, K.C.* (with him *S. J. V. Chelvanayagam* and *E. B. Wikremanayake*), for defendants, appellants.—The cause of action is set out in the plaint. It is one which is not known to our law.

There is no plea of express warranty of title in the plaint. The plaint merely states that there was a covenant by Marikar to warrant and defend title. Although there had been a warranty of title, the present action is not based on a breach of it. If the action is on an express covenant it is necessary to plead a breach of it. The trial Judge has not appreciated the difference in legal effect between a covenant to warrant and defend title and an express warranty of title. He has thought that the two things are the same or are different aspects of the same thing. It is clear that the present action is, in reality, based on the covenant to warrant and defend title. The defendants, therefore, should have been given proper notice in the previous action relating to the same property. In the former action the two executors were noticed to appear not as executors but in their personal capacity. The present defendants too were noticed, but at that date they were admittedly minors; the notice, therefore, should have been served on a duly appointed guardian *ad litem*. The resulting legal position is that the present defendants cannot be said

to have consented to the settlement in the former action. The provisions of section 500 of the Civil Procedure Code were not complied with.

Further, the wrong persons have been sued. It was the estate, *i.e.*, the executors of the vendor who should have been made defendants—see section 472 of the Civil Procedure Code. On this ground alone, the appeal ought to succeed. The present defendants are only two of the three heirs of the deceased. Nor is there any evidence as to what their share of the inheritance is. There is no reason why they alone of the heirs should be liable for the debts of the testator. One of the defendants is a minor. A minor cannot adiate an inheritance and is not liable to be sued for the debts of the ancestor (*Robert v. Abeywardene et al.*[1]).

*N. E. Weerasooria, K.C.* (with him *N. Nadarajah*), for plaintiff, respondent.—There was no mistake in the District Court as to what this action was. The action was on the deed of sale. In the deed, there were the two covenants, viz.:—Warranty of title and covenant to warrant and defend title, and we are entitled to rely on both. That we relied on the former covenant also is manifest from the fact that the very first authority which was cited in the District Court on plaintiff's behalf was *Dingiri Amma v. Mudiyanse et al.*[2] That case decided that express warranty of title may be enforced without the preliminary condition of notice and eviction.

In regard to the covenant to warrant and defend title, the notice to the executors in the previous case should be taken as notice to the minors. Alternatively, the notice to the mother (one of the executors) was sufficient, as a mother is the natural guardian of her minor children—*Voet 21.2.21* (*Berwick's Translation, p. 527*).

At the trial no isue was raised by the defendants whether the executors should have been sued. "Should this action be brought against the executors, and not against the heirs?"—such an issue might have been raised. It is probable that the testamentary case is over and that the executors are not functioning now. The position, however, is that the defendants are heirs under the will. They became liable as soon as the property vested in them. We are only asking that our claim should be limited to the amount which the defendants actually received under the will. All the relevant facts are before the Court and there is no reason why justice should be denied. See *dictum* of the Privy Council in *Jayawickreme v. Amarasuriya*[3].

*H. V. Perera, K.C.*, in reply.—As regards the proper party to be sued, the executor only is responsible for the debt of the estate. An executor never ceases to be executor—section 540 of the Civil Procedure Code. Heirs can be sued only as executors *de son tort*. But once executors are appointed, the executor *de son tort* is displaced. In the present case, both the executors are alive. Administration involves the payment of debts and goes on until all the debts are paid off (*Suppramaniam Chetty et al. v. Palaniappa Chetty et al.*[4].) The executors represent the heirs always.

*Cur. adv. vult.*

[1] *(1912) 15 N. L. R. 323.*
[2] *(1931) 33 N. L. R. 282.*
[3] *(1918) 20 N. L. R. 289 at 297.*
[4] *(1904) 3 Bal. Rep. 57.*

October 23, 1938. SOERTSZ S.P.J.—

By deed No. 593 dated October 13, 1926, Thambirajah Sinne Lebbe Marikar sold a block of land 37 acres 2 roods and 23 perches in extent to Ramalingam Chettiar, and the vendor for himself, his heirs, executors, and administrators declared, covenanted, and agreed with his vendee—(1) that he had good and legal right and title to the land conveyed, and (2) undertook that he and "his aforewritten shall and will at all times hereafter warrant and defend the same and every part thereof unto the said vendee and his aforewritten against any person or persons whomsoever".

On May 5, 1927, the incumbent of a Buddhist Vihare sued Ramalingam Chettiar for declaration of title to this land. The trial Judge found in his favour, but awarded Ramalingam Chettiar compensation for certain improvements. There was an appeal. The decree entered was set aside and the case was remitted for trial *de novo*.

While the retrial was pending, Ramalingam Chettiar, through his Proctor, moved for a notice on four respondents "to show cause why the first respondent should not be appointed guardian *ad litem* over the second and the third minor respondents, and to warrant and defend the petitioner's (*i.e.*, Ramalingam Chettiar's) title". Notice was allowed for June 30, 1932. The journal entry of that date is as follows:—"Notice served on respondents pointed out. Mr. C. files proxy of the first and fourth respondents. He has cause to show. Second and third minors". The first respondent is the widow of Tambirajah Sinne Lebbe Marikar the vendor, and she is co-executrix with the fourth respondent of her husband's last will and testament. The second and third respondents are her children by Sinne Lebbe Marikar. It is to her and her children that Sinne Lebbe Marikar bequeathed and devised his estate. It will be noticed that although the motion of November 15, 1932, asked that the first respondent be appointed guardian *ad litem* of the second and third respondents, that was not done. But, there was really no occasion for such an appointment, for all Ramalingam Chettiar had in view at that stage was to notify the respondents of the action brought against him, so that they might take such steps as they thought fit to warrant and defend his title. The necessity for a guardian *ad litem* for the minors would have arisen only in the event of their becoming parties to the litigation. This they never became, for when on March 23, 1933, Ramalingam Chettiar's Counsel inquired whether respondents would "take charge of the defence", the first and the fourth respondents said they would afford him every assistance, that is without becoming added parties to the litigation.

On May 12, 1933, the case came up for trial, and the proceedings of that day are recorded in these terms. "Parties noticed present. Substituted added plaintiff present. Mr. B. for the plaintiff. Mr. P. and Mr. A. for first defendant. Mr. P. for parties noticed by first defendant to warrant and defend title. With the consent of the parties noticed, plaintiff and defendant have settled the case as follows:—Judgment for trustee for 12½ acres" . . . . This settlement resulted in Ramalingam Chettiar losing 12½ acres of the land sold to him, and he instituted the present action against the defendants-appellants who were the minor respondents referred to in the journal entries I have quoted, to recover

Rs. 15,000 at which sum he assessed the damages sustained by him. His cause of action was that the defendants-appellants being liable to warrant and defend the title conveyed to him, and having been duly noticed to do so, had failed to fulfil this obligation in respect of the 12½ acres which had gone to the temple in consequence of the settlement to which they consented.

The defendants-appellants filed answer, and the defences they put forward were—(*a*) that they are not liable because they had not been properly noticed to warrant and defend title; (*b*) that at the date of the settlement they were minors and proper steps had not been taken to secure their valid participation in the settlement, and that, therefore, any loss occasioned by that settlement could not be imputed to them; (*c*) that, in any event, they were not liable because the plaintiffs' claim, if he had any, was against the executors of Sinne Lebbe Marikar.

Issues were framed to cover these defences and after trial, the learned trial Judge entered judgment for the plaintiff for Rs. 11,954.17 and costs.

In regard to plea (*a*) in one part of his judgment, the learned Judge held that this was an action on an express warranty of title and that, therefore, notice and eviction were not conditions precedent to a claim for damages such as this. In a later part of his judgment he found that the defendants had been given sufficient notice. As for plea (*b*) it is difficult to gather the view of the trial Judge in regard to it. I can only say that he found against the defendants but I cannot follow the reasoning which led him to that view. So far as plea (*c*) is concerned, he held that " the defendants *as heirs of the vendors* are liable to warrant and defend the title conveyed by the deed in view of the express warranty of title ".

I understood from Counsel who appeared before us that these were the matters discussed when this appeal was before my brothers Wijeyewardene and Cannon JJ., and in view of the general terms of the reference to us, I assume that these are the questions we have been called upon to decide.

I will deal with these pleas in the order in which I have set them forth. The deed of conveyance to Ramalingam Chettiar contained both an express warranty of title and a covenant to warrant and defend the title conveyed, and it was open to the plaintiff to frame his action on one or other or both of these. If he chose to proceed on the express warranty of title, all he had to prove in order to sustain his claim for damages was that the vendor had not a good title. He was under no obligation to wait till that title was disputed or challenged, or till he was evicted, nor was he under any obligation to give his vendor or those liable on the express warranty, notice of the defect in the title or of any threat to it. If however, he was basing himself on the covenant to warrant and defend title, he would have no cause of action against his vendor or against any others liable on the covenant, till he had suffered judicial eviction in consequence of litigation of which he had duly apprised them. In this instance, the plaintiff appears to have failed to appreciate this difference. This failure on the part of the plaintiff seems to be shared by the learned Judge himself, and the view taken is that the covenant to warrant and defend title is dependent on the express warranty of title. In other

words, that the two things are counterparts of one single obligation. That, of course, is not correct, and Mr. Weerasooria sought to escape from the difficulty created by this confusion of thought by submitting that this action is based on both the express warranty of title and on the covenant to warrant and defend title. It is impossible to accede to this submission. Paragraphs 3, 5, 8, 9, and 10 of the plaint show unequivocally that the cause of action is based on the covenant to warrant and defend title. There is no reference whatever to the express warrantly of title.

This action, then, being on the covenant, to warrant and defend title the question is whether the defendants, if they are ultimately liable on this covenant, had proper notice of the action in which Ramalingam Chettiar's title was challenged. It was contended before us that the notice alleged to have been served on the defendants was ineffective, whether the service be regarded as effected on the mother of the defendants for and on their behalf, or on the defendants themselves. It is urged that in view of their admitted minority at that date, the proper course would have been to serve the notice on a duly appointed guardian *ad litem*. I am unable to agree with this contention. As I have already pointed out, a guardian *ad litem* is required only in cases in which it is sought to sue minor defendants. The plaintiff was not seeking to sue these defendants. Indeed, at that stage, he had no cause of action against them. He was taking steps to arm himself with a cause of action by giving them notice of the action brought against him. It was at their option whether they would take steps to have themselves added as defendants so that they might take control of the litigation. The journal entry of March 23, 1933, shows that they did not choose that course. In those circumstances, my view is that the service of notice effected in this case is sufficient to bind the defendants for two reasons, firstly, because there was service on their mother who was their natural guardian, and secondly because there was, in effect, service on the executors of the estate of Sinne Lebbe Marikar. *Vander Linden* in his *Institutes of the Laws of Holland*, Chapter 4, section 1, says, " this parental power with us is possessed not only by the father but also by the mother, and after the death of the father, by the mother alone. It consists of the entire direction of the maintenance and education of their children *and the management of their estates*". But, over and above that service, there was in this case service of the notice of the earlier action on the executors of the last will and testament of the testator whose estate was sought to be charged with liability for the plaintiff's claim. It is true that in the petition filed for the purpose of giving notice, the executor and executrix were not described in the caption as such, nor did they so describe themselves in the proxy they gave to their Proctor. But it seems clear that the petitioner when he sought to give them notice, envisaged them as executor and executrix. Paragraph 4 makes that quite clear. It says " the said Thamby Rasa Sinne Lebbe Marikar died leaving a last will and appointing Sitti Nabisa and Ahamadu Lebbe Marikar Mohamed Ameen as executors and giving and devising his properties to the said Sitti Mohamed Ajwad and Sitti Pathumma both of whom are minors and his estate was administered in D. C. Colombo, case No. 3,368 ". Moreover, Ameen's liability to warrant and defend

title is ascribable only to his executorship. There was no other reason for making him a respondent. In these circumstances we must, I think, pay attention to the substance of the proceeding more than to its form and hold that, in this case, there was service of notice on the executor and the executrix. Such a service clearly binds those beneficially interested in the estate. The fact that the plaintiff sought to give notice to the minors themselves makes no difference. It is surplusage and can be ignored.

In regard to (*b*), the authorities indicate that the natural guardian of the minor is entitled to enter into a compromise on his behalf, and that the minor would be liable on such a compromise subject to his right to claim *restitutio-in-integrum* within a certain period if he has been prejudiced by the compromise. In this instance, no prejudice is alleged. On the face of it, the compromise appears to be beneficial to those liable on the deed on the express warranty and on the covenant to warrant and defend title. The temple sought to be declared entitled to the whole land, and by the compromise, obtained only one third of it. In the first trial they had judgment for the whole land. That is one view of the matter. The defendants are bound by the compromise in that way. But, as I have already indicated there is another view according to which they must be held to be bound. The record shows that their mother and the other executor consented to the compromise.

I need only add that this is not a case to which section 500 of the Civil Procedure Code, to which reference was made, applies because Nabisa Ammah and her children were not parties to the action.

The only question left for consideration is (1) whether although the defendants were properly noticed, and must be held to have consented to the compromise or to be bound by the consent given on their behalf, they are liable in damages for the loss sustained by the plaintiff in consequence of that compromise, on the action as it is framed at present. The learned trial Judge held " that the defendants *as heirs of the vendor* are liable in law to warrant and defend the title conveyed by the deed ". This, in my view, is much too wide a proposition and cannot be supported. It saddles devisees and legatees or those who would have been heirs in the event of an intestacy with absolute liability for all the debts and obligations of their testator or intestate. The defendants are two of the three heirs of the plaintiff's vendor. They are intended to take under his will. But, there is no allegation in the plaint, nor is there any evidence, that there is in their hands property of the testator sufficient to cover the claim made by the plaintiff or any part thereof, and in these circumstances, I fail to understand the legal basis on which this liability is founded. To seek to fix the defendants with liability by a bare allegation that they are heirs is to relegate them to the position occupied by the *heres suus et necessarius*, and the *heres necessarius*, of the early Roman Law, as the universal successor of his testator or intestate. In the later Roman Law, the position of an accepting heir, was that he was liable only to the extent of the assets in his hands. *Maasdorp* in his *Institutes of Cape Law*, volume 1, page 106, *et seq* (2nd edition) says that the later Roman system was adopted in the United Provinces and became the common law of the

Cape Colony till it was swept away by statute law. He says "at the present day, the administration of the estate of a deceased person devolves no longer upon his heir but is vested in testamentary executors whose duty it is to liquidate the estate under their care, to pay the debts of the deceased and the legacies left by them, and to hand over the nett balance of the estate to the heir who is only liable for the payment of such legacies as may have been imposed upon him by will . . . . The inheritance is the nett balance of the estate of a deceased person which is left after the debts and legacies have been paid . . . . The heir, therefore, is only a residuary legatee and is in no worse position as regards the debts of the deceased testator than any other legatee with this exception that he will before all other legatees be liable, *at the suit of the executor,* to a *conductio indebiti* or action for refund for any money paid to him in settlement of his inheritance before the debts of the testator were fully paid, *and also to a direct action for such refund at the suit of the creditors of the deceased; but beyond what he has actually received out of the estate he will not be liable*". This is the position in our law too. Section 540 of the Civil Procedure Code provides that "if no limitation is expressed in the order making the grant (*i.e.*, of probate) then the power of administration which is authenticated by the issue of probate . . . . extends to every portion of the deceased person's property . . . . and endures for the life of the executor . . . . or until the whole of the said property is administered, according as the death of the executor . . . . or the completion of the administration, first occurs". In this instance, both the executor and executrix appointed by the will are alive, and it is not at all clear to me why the plaintiff singled out these defendants who were the minor heirs, and one of whom is still a minor to make his claim against. Be that as it might, a direct action will lie against the heirs only if the administration of the estate has been completed by the executors, and property belonging to the estate of the deceased testator has passed into the hands of the heirs, and they would be liable only to the extent of the property that has so passed. But as I have observed, there is no material on the record to show that the executors have completed their administration, and that property belonging to the deceased vendor has devolved on these defendants, while this claim against his estate is outstanding. In that state of things, no case has been made out against these defendants, and the judgment entered against them cannot be sustained.

I have considered carefully the question of what the order should be on this appeal, and I have come to the conclusion that, in all the circumstances, the fairest course would be to set aside the decree entered in the Court below and to remit the case to enable the plaintiff, if so advised, to allege and prove the facts upon which he fixes the defendants directly with liability on his claim. For this purpose, an amendment of the pleadings will be necessary. The plaintiff must, however, as a condition precedent, pay to the defendants all the taxable costs incurred by them up to date. If the plaintiff does this and files an amended plaint within two months of this record being received back in the trial Court, the case will proceed to trial in due couse. If he fails to comply with these conditions, the District Judge will, on the expiry of the two months'

period, send the case back for decree to be entered here, allowing the appeal and dismissing the plaintiff's action with costs in both Courts.

I need hardly add that this order does not preclude the parties from coming to a settlement if they so desire.

MOSELEY A.C.J.—I agree.

NIHILL J.—I agree.

*Set aside.*
*Case remitted.*