Present: Lascelles C.J. and Pereira J

1914.

FERNANDO *v.* PERERA.

53—D. C. Colombo, 38,580.

Agreement to sell land and to execute a valid conveyance—Vendor's title defective—Is purchaser bound to accept a formal conveyance ?

Plaintiff and defendant entered into a notarial agreement that the latter should sell to the former, within a month from the date of the agreement, a certain parcel of land and " execute a good and valid conveyance of the premises free from all encumbrances in favour of plaintiff." Within the period of one month mentioned above plaintiff discovered that defendant's title was defective, and that he could not convey a valid title to the land.

Held, that plaintiff was not bound to accept from defendant a formal conveyance of the land, and that he was entitled to recover damage from defendant for non-performance of his part of the agreement.

PEREIRA J.—The rule of the Roman-Dutch law, that in the case of a sale of land the purchaser cannot claim a cancellation of the contract owing to any defect of title in the seller would, under our law, apply to the time between the execution of the notarial conveyance and the delivery of the deeds to the purchaser, and not to the case of merely an agreement to sell.

THE facts are fully set out in the judgment.

Bawa, K.C., and *Drieberg*, for plaintiff, appellant.—The property is burdened with a *fidei commissum*. The defendants are not, therefore, in a position to give good title. A purchaser is not bound to accept a defective title. The view taken by the District Judge that the vendors are only bound to place the purchaser in possession, and that the purchaser's remedy is to sue the vendors when evicted, is not correct. [Pereira J.—Are you not bound by the decision of the Full Court in *Jamis v. Suppa Umma et al.*? [1]] The facts of that case are entirely different. The agreement in this case speaks of a " good and valid conveyance free from all encumbrances." This does not mean merely a notarial conveyance. Counsel referred to *Halsbury's Laws of England, vol. XXV., p. 341; Lysaght v. Edwards*.[2]

A. St. V. Jayewardene, Bartholomeusz, and Canakeratne, for defendants, respondents.—This case is on all fours with the decision of the Full Court in *Jamis v. Suppa Umma et al.*[1] The English law, as stated by Halsbury, depends to a great extent on the statute law in England. English decisions on the duties of vendors and purchasers habe no application here. The words " good and valid conveyance "

[1] *(1913) 17 N. L. R. 33.*

[2] *2 Ch. D. 507.*

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cannot have any reference to the title of the vendor. It means only a deed in conformity with Ordinance No. 7 of 1840. The Roman-Dutch law is clear on this point. The purchaser must in the absence of any express terms take whatever title the vendor has, provided he is placed in possession. In this case, the plaintiff himself knew that this property was subject to *fidei commissum*—for the agreement is signed by the father (*fiduciarius*) and children (*fidei commissarii*). The case of *Lysaght v. Edwards* [1] merely decides that in a contract for sale of land the vendor becomes trustee for the purchaser, and that the vendor is therefore bound to take reasonable care of the property. Counsel cited *Burge, vol. II., p. 540.*

Bawa, K.C., in reply.

Cur. adv. vult.

March 21, 1914. LASCELLES C.J.—

This appeal raises a question of some importance with regard to the liability of persons who have contracted to buy property to complete the contract where the vendor is unable or unwilling to make a good title.

By deed dated February 10, 1913, between the first defendant and his two daughters (the second and fourth defendants) of the one part and the plaintiff of the other, the former agreed to sell and the latter agreed to purchase certain property at Moratuwa, within one month from the date of the agreement, for Rs. 13,250. The deed contained a stipulation that the vendors should "execute a good and valid conveyance of the said premises free from all encumbrances in favour of the purchasers within the time hereinbefore specified, such conveyance to be prepared at the expense of the purchaser." A deposit of Rs. 1,350 was paid by the purchaser on the execution of the agreement, the balance being payable on completion.

The agreement further provided by clause 4, that on failure by the vendors to execute a good and valid conveyance of the premises within the stipulated time, they should repay the deposit of Rs. 1,350, and pay Rs. 5,000 by way of liquidated damages. On the other hand, it was provided that if the purchaser failed to purchase the premises within the stipulated time, he should forfeit his deposit, and pay the vendors Rs. 2,000.

After the execution of the agreement, the plaintiff obtained the defendant's title deed and submitted it to his proctor, who advised him to obtain counsel's opinion. The opinion of an eminent counsel was obtained, and thereupon the plaintiff's proctor wrote to the defendants' proctor the following letter:—

March 3, 1913.

DEAR SIR,—WITH reference to the agreement No. 387 dated February 10, 1913, attested by you, whereby our client, Mr. William A. Fernando, of Moratuwa, agreed to purchase an allotment of land called Meeripennewatta from your clients for Rs. 13,250, we write to inform you that we

[1] *2 Ch. D. 507.*

have examined the title to this property and find that your clients cannot pass valid title to the property without obtaining the leave of Court under the Entail and Settlement Ordinance, No. 11 of 1876. Under these circumstances, we write to inquire whether your clients are prepared to obtain an order of Court, and if so, within what time ?

Yours, &c.,
DE VOS & GRATIAEN.

To this the defendants' proctor replied by letter P 2 :—

Moratuwa, March 7, 1913.

DEAR SIR,—With reference to your letter dated March 3, I beg to inform you that I am unable to reply to it until the deeds of Meeripennewatta are returned to me. Please cause your client to return the deeds to me.

Yours, &c.,
J. G. FERNANDO.

The deeds were forwarded by the plaintiff's proctor and in response the defendants' proctor wrote the letter P 4 :—

Moratuwa, March 12, 1913.

DEAR SIRS,—I AM in receipt of the deeds of Meeripennewatta belonging to Mr. M. Perera and his children. My clients instruct me that they have been and still are ready and willing to carry out the terms of the deed of agreement entered into between them and Mr. William A. Fernando. My clients will not bind themselves to grant a conveyance of Meeripennewatte to Mr. William A. Fernando after the expiration of the period mentioned in the deed of agreement.

Yours, &c.,
J. G. FERNANDO.

The attitude taken by the defendants' proctor in this letter is important. He completely ignored the suggestion that steps should be taken under the Entail and Settlement Ordinance, No. 11 of 1876, to obtain the leave of the Court to sell the property, notwithstanding the *fidei commissum* with which it was burdened. He repudiated all liability to grant a conveyance after the expiration of the time limited by the agreement.

It is undesirable that I should say more than is necessary about the defect in the defendants' title, but, in my opinion, the objection raised by the plaintiff's advisers was well founded, and the title offered by the defendants was not one which a prudent purchaser would have accepted. The plaintiff then brought the present action, in which he asks that the defendants be ordered to execute a good and valid conveyance free from encumbrances. In the alternative he asks for a return of the deposit and Rs. 5,000 damages. He now confines his claim to a return of the deposit and such damages as the Court considers reasonable.

The defendants claim in reconvention Rs. 2,000 by way of liquidated damages for the plaintiff's failure to complete the purchase in terms of the agreement, and a declaration that the deposit of Rs. 1,350 has been forfeited.

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The learned District Judge, relying on the case of *Jamis v. Suppa Umma et al.*,[1] and holding that by the agreement the vendors were bound to execute a conveyance which was good and valid merely as to form, dismissed the plaintiff's action, and condemned him, on the claim in reconvention, to forfeit the deposit of Rs. 1,350 and to pay Rs. 2,000 as damages.

The result is startling. The plaintiff, whose conduct appears to me to have been that of a prudent purchaser, is practically offered the alternative of accepting a defective title or paying Rs. 3,350. Any security which he might have had from the implied warranty of title of the vendors is, from the circumstances of the case, quite worthless. For the principal danger to be apprehended will arise only after the death of the vendors.

In *Jamis v. Suppa Umma et al.*[1] the majority of the Court held that a purchaser at an auction who signs conditions agreeing to complete the purchase is not entitled to withdraw on the ground of a defect in title, and that, in the absence of fraud on the part of the vendor, and of an express warranty of title, he is only entitled to get vacant possession, and to have his title defended by his vendor in the event of his being judicially evicted.

It is a decision of the Full Court, and is binding on me, so far as it is relevant; but it is clear from the judgments of Wood Renton A.C.J. and De Sampayo A.J., that their judgments would have been different if the conditions of sale had stipulated for a good title. In the present case the learned District Judge has construed the stipulation " to execute a good and valid conveyance of the said premises free from all encumbrances " to mean that the obligation of the vendors was merely to execute a conveyance which would conform to the requirements of Ordinance No. 7 of 1840, that is, a conveyance attested by a notary and two witnesses.

In my opinion this is too narrow a construction, and, apart from what follows, I think that " a good and valid conveyance " means a conveyance which is effective in law for transferring the interest which the parties intended to convey, namely, the unfettered ownership. But the words " free from all encumbrances " greatly strengthen this construction. How can property which is burdened with a *fidei commissum*—the most troublesome of all encumbrances —be described as free from encumbrance?

The case of *Lysaght v. Edwards*[2] is an authority in favour of this construction. A " valid contract " was held to mean, not only a contract sufficient in form and in substance, but, as regards real estate, a contract where the vendor is in a position to make a title according to the contract. I see no reason for giving a more restricted meaning in the present case to the words " a good and valid conveyance," especially in view of the principle *verba fortius accipiuntur contra proferentem*.

[1] *(1913) 17 N. L. R. 33.*

[2] *2 Ch. D. 507.*

I am therefore of opinion that the defendants have failed to comply with their agreement to execute a good and valid conveyance and that they are liable to repay the deposit of Rs. 1,350 with interest, and also to compensate the plaintiff for his loss of damages. I would fix the damages at Rs. 500. But for the unreasonable attitude of the defendants' proctor with regard to the proposed application to Court to sell he property, I should have assessed the damages at a lower figure.

This disposes of the appeal, but I do not wish to pass unnoticed the arguments which have been addressed to us with regard to the effect under the Roman-Dutch law of a contract to purchase land.

It is true that in a contract of sale under the Roman-Dutch law all that the purchaser is entitled to is that he should be placed in vacant possession of the land, and that his vendor should warrant the title. But it is important to bear in mind what is meant by a contract of sale.

By Roman law the contract of *emptio venditio* required no particular form ; it depended upon the consensus of the parties, and was valid the moment the parties were agreed in regard to the subject-matter of the sale and the price to be paid.

Under the Roman-Dutch law it was the same, but the transfer of immovable property was at one period effected by delivery formally made before the local tribunal.

In Ceylon, since the enactment of the Ordinance No. 7 of 1840, the transfer of immovable property can be made only by means of notarial conveyance. The notarial conveyance is thus the "contract of sale," and it is by virtue of the effect which the law attributes to a notarial conveyance that the purchaser obtains his right to be placed in possession of the property, and if he is molested in his enjoyment of the property, to call on his vendor to warrant and defend his title.

The agreement under consideration in this case is an instrument of an entirely different nature from the contract of sale. It is not the contract which effects the conveyance ; but it is an agreement that a conveyance shall be executed at a future date on certain conditions, which are either expressed or implied in the agreement.

Nearly all the authorities cited in argument apply to contracts by which a sale is effected, and not to executory agreements of this nature.

Under English law an agreement to sell land implies, in the absence of any indication to the contrary, that the vendor's interest in the land is in fee simple, and a vendor cannot compel the purchaser to complete the contract where he fails to make out a good title. But in *Jamis v. Suppa Umma et al.*[1] the Full Court has taken a different view, which is binding on me, of the effect under the law of Ceylon of an agreement to purchase without stipulations as to title.

[1] *(1913) 17 N. L. R. 33.*

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The present case illustrates the danger which awaits persons in Ceylon who agree to purchase property without stipulating that the completion of the purchase is conditional upon the vendor making a good title. If the title proves to be bad, they wil have no redress except the warranty of the vendor (which may be worthless), provided they have been placed in possession.

The danger is specially serious in sales by auction, where the bidders, as a rule, have no opportunity of investigating the title, and have no hand in settling the conditions of sale. Purchasers can, of course, escape this danger by refusing to sign agreements or conditions of sale, unless it is distinctly provided that the completion of the sale is conditional on the vendor making a good title.

In the result the judgment of the Court below will be set aside and judgment entered for the plaintiff for Rs. 1,350, with interest at 9 per cent. from February 10, 1913, and Rs. 500 by way of liquidated damages. The plaintiff will have his costs here and in the Court below.

PERERA J.—

In this case the plaintiff claims an order on the defendants for the specific performance of an agreement for the sale of a certain parcel of land, or, in the alternative, for the refund of the part purchase money paid by the plaintiff to the defendants, and damages. The agreement was entered into by the parties on February 10, 1913, and the undertaking on the part of the defendants was that they should sell to the plaintiff, within a month from the date of the agreement, the parcel of land referred to above, and "execute a good and valid conveyance of the said premises free from all encumbrances in favour of the plaintiff." Within the period of one month mentioned above the plaintiff discovered that the defendants were not the absolute owners of the land that they had agreed to sell, and he called upon the defendants to take steps to clothe themselves with proper authority to sell the land in order that they might execute the promised conveyance in favour of the plaintiff. This they omitted to do. It has been argued that the plaintiff was bound to take a conveyance from the defendants, however defective their title was found to be, and that his only remedy was to claim to be put and placed in possession of the land and to obtain a warranty of title by the defendants. I have always understood the Roman-Dutch law to be that, in the event of an actual sale of land, the purchaser cannot claim a cancellation of the contract owing to any defect of title in the seller, but that he had to satisfy himself with the possession and the liability of the vendor to warrant and defend his title in the event of an attempted ouster ; but in the present case no sale has yet been effected, and the respondents rely upon the decision in the case of *Jamis v. Suppa Umma et al.* [1]

[1] *(1913) 17 N. L. R. 33.*

In that case it was held by a majority of the Court, my brother Ennis dissenting, that when a purchaser signed the usual conditions of sale at an auction he could not refuse to complete the purchase, and he was not entitled to withdraw from the sale on the ground of any defect of title in the vendor. That case does not appear to me to have any application to the present, because both the concurring Judges say, in effect, that if the conditions of sale conferred upon the purchaser any express rights and had stipuldated to convey good title, the seller might be bound to satisfy the purchaser that he had good title (pp. 48, 43). In the present case it is expressly stipulated in the agreement sued upon that the vendors should "execute a good and valid conveyance of the land free from all encumbrances in favour of the purchaser," and that stipulation, according to the authority cited by the appellant's counsel—*Lysaght v. Edwards* [1]—meant not merely that the seller was to execute a formal conveyance in accordance with legal requirements, but that he should be in a position to make a good title according to his undertaking to sell and transfer the parcel of land referred to in the deed of agreement. Once released of the necessity of applying to this case the decision of the majority of the Court in the case of *Jamis v. Suppa Umma et al.*[2] mentioned above, I see no difficulty whatever in answering the question involved in this case. The authorities relied on by the respondents' counsel (*Voet 18, 1, 14; Berwick's Trans. of Voet 19; Maasdorp's Institutes, vol. IV., pp. 133, 134; Voet 19, 1, 11; 2 Burge 540, 521*) all go to show that when, under the Roman-Dutch law, a sale of land has taken place, the rights of the vendee are no more than to compel the vendor to place him in possession of the property sold, and also to warrant and defend his title when necessary, and, in the event of a legal eviction, to recover from the vendor compensation for the loss sustained. And when it is said that, under the Roman-Dutch law, the purchaser cannot decline to accept vacant possession of the thing sold on the ground that his vendor's title is defective, it must be remembered that the rule has reference to the particular form of sale prescribed by the Roman-Dutch law, and that, in its incidents, our form of sale by notarial conveyance is essentially different. This difference is clearly indicated in the learned judgments of Cayley C.J. and Berwick J. in the well-known case of *Appuhamy v. Rang Menika*,[3] which was not cited in the course of the argument on the present appeal, and does not appear to have been cited in the case of *Jamis v. Suppa Umma et al.*[2] referred to above. There Cayley C.J., having pointed out the similarity between the Roman-Dutch law as to the requirements for passing *dominium* from a vendor to a purchaser, observed as follows:—"The Dutch law followed the Roman law in requiring a *traditio* or delivery to perfect the sale of real property, but it

[1] *2 Ch. D. 499, 507.*

[2] *(1913) 17 N. L. R. 33.*

[3] *2 S. C. C. 61.*

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introduced two important changes: (1) The *vera traditio* was superseded altogether, and the only *traditio* recognized was a symbolical one called *effestucatio*, by which the delivery of the land was symbolized by the delivery of a twig or stalk of some plant accompanied by certain formulæ; and (2) this symbolical delivery could only be effected before a judicial tribunal and in the presence of proper judicial officers..... No other form of delivery, in fact, was recognized except the symbolical *effestucatio*, which took place in *judicio coram judice et cum eo præsentibus judicialibus*. ..... In later times the term *effestucatio* became obsolete, and the act of delivery was called *opdracht* or transport." Then, as regards the effect of our Ordinance No. 7 of 1840, he added: "The usage of this Colony does not require the act of transfer to be passed before a judicial officer. All that the Ordinance of Frauds requires is that the conveyance shall be executed before a notary public and two witnesses, and the delivery of a deed so executed has always been treated, until recently, as a constructive delivery of the land itself, and to have the same operation in transferring the *dominium* as the Dutch *opdracht* or transport." I may, in passing, observe that the words "until recently" are used above with reference only to a *dictum* that the learned Judge was over-ruling by the judgment from which the quotation is made. Berwick J. observed: "By our (that is the Roman-Dutch) law the contract of sale is 'completed' (not 'implemented,' for our law makes that distinction) by consent and not by delivery. The *traditio* or delivery takes place after the sale ..... The delivery of a deed of transfer of land executed before and attested by a public notary in accordance with the provisions of Ordinance No. 7 of 1840 is a constructive delivery of the land itself" (see p. 67). So that the authorities cited by the respondents' counsel in support of the proposition that under the Roman-Dutch law the vendee cannot refuse to take delivery of the property sold on the ground of defect of title would, under the law on the subject now governing this Colony, apply to the period of time between the execution of the deed of conveyance and the delivery of the deed. But, in the present case, we are not concerned with any such period of time. Here, on February 10, 1913, an agreement was entered into for the sale, within a month from that date, of the parcel of land mentioned in the agreement. While nothing in the direction of the actual sale has yet been done, the discovery is made that the seller's title is defective. Is the purchaser bound to pay the balance purchase money and accept the defective title? The English law, of course, has no application in this Colony to a case like this, but in the absence of any other laws applicable, I think it is quite permissble to look to the English law for guidance. Under the law of England it is "in general sufficient if the vendor shows that he has a good title by the time fixed for completion of the contract of sale, but if it appears before

that time that he has not a title, and is not in a position to obtain one, the purchaser can repudiate the contract (*The Laws of England, vol. XXV., p. 342*). I can see no objection to allowing ourselves to be governed by this reasonable and equitable rule.

In my opinion, the judgment appealed from cannot be sustained, and I agree to the order proposed by my Lord the Chief Justice.

Set aside.