Present: Lascelles C.J. and Wood Renton J. 1913.

BABAIHAMY *v.* DANCHIHAMY *et al.*

32—D. C. Galle, 11,323.

Sale—Vacant possession—Compromise by purchaser—Right to sue vendor for damages.

If a vendor does not give vacant possession to the purchaser, the purchaser would not be under any obligation to take preliminary steps against the persons who had ousted him, or to give to his vendors notice to warrant and defend the title which they had purported to convey, but would have an immediate right of action against them for their failure to implement the primary obligation of the contract of sale. On the other hand, if vacant possession was given, the first duty of the purchaser who had been ousted by third parties would be to avail himself of the remedy which the law gives him against such parties, and thereafter, when he had suffered judicial eviction, to call upon his vendors to warrant and defend title.

The acceptance by a purchaser of a compromise in an action brought by him against third parties who had ousted him would throw on the purchaser himself the burden of showing that the settlement arrived at was the best thing that could be done under the circumstances with which he had to deal.

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THE facts appear from the judgment.

A. St. V. Jayewardene, for the defendants, appellants.—The respondent compromised the action in the Court of Requests on his own responsibility. He is not, therefore, entitled to sue the defendants (his vendors) for damages. Counsel cited *Voet 21, 2, 30.*

Zoysa (with him *Vernon Grenier*), for the plaintiff, respondent.—The respondent had no alternative but to compromise the case under the circumstances. The defendants were noticed to warrant and defend the plaintiff's title, but they took no part in the case, and left the plaintiff alone to fight the case. The plaintiff was unable to establish his title in the Court of Requests case, and the compromising of the case was the best thing to do under the circumstances.

The District Judge has held that the plaintiff was not given vacant possession by the vendors; in such a case the plaintiff has an immediate cause of action against the vendors for damages (*Ratwatte v. Dullewe* [1]).

Jayewardene, in reply.—There is no material on the record to support the finding of the District Judge that vacant possession had not been given. Counsel cited *Gurunnanse v. Don Hendrick.*[2]

February 28, 1913. WOOD RENTON J.—

The parties to this action have so far been content to rest their respective cases in the District Court on the pleadings, on certain issues of law which were framed, at the hearing, and on documentary evidence that was adduced. The plaintiff-respondent alleges that the appellant sold a land to him by deed dated October 17, 1910; that he was prevented from taking possession of the land by certain third parties; that he sued them in case No. 6,461 of the Additional Court of Requests of Galle, calling upon his vendors to warrant and defend title; that the latter failed to do so; and that his action in the Court of Requests was dismissed. On the strength of these allegations, he claims damages against the appellants in the present action. The appellants in their answer denied that there was any express condition in the deed of sale which bound them to warrant and defend the respondent's title in the Court of Requests action, and they say that the notice issued to them in that action was bad in law; that the respondent has debarred himself from any remedy against them by having compromised it, and, further, that when he informed them of the dispute they offered to take back the land and to repay him his money. Four issues were framed at the trial, raising respectively the following questions:—The existence of the

[1] *(1907) 10 N. L. R. 304*

[2] *(1910) 13 N. L. R. 225.*

alleged covenant to warrant and defend title; the eviction or non-eviction of the respondent by process of law; the validity of the notice to warrant and defend title; and the effect of the compromise by the respondent in the Court of Requests action. No *vivâ voce* evidence was adduced on either side, and the learned District Judge has given judgment in favour of the respondent substantially on the following grounds. He holds that there was a covenant to warrant and defend title; that the vendors did not in the present case give to the respondent that vacant possession which imposed upon him any duty to serve a notice on his vendors to warrant and defend title; that the notice actually given was good in law; and that the compromise in the Court of Requests action was the only reasonable step that the respondent could take under the circumstances. The appellants' counsel to-day has not disputed the existence of an express covenant by the vendors to warrant and defend the title conveyed by the deed of October 17, 1910, or that the notice to warrant and defend title was formally sufficient. But he argues that the learned District Judge had before him no materials on which he was entitled to hold that vacant possession of the land in question had not been given, or that the compromise was effected under circumstances which would prevent it from barring the respondent's present claim. It is no doubt possible, by comparing the pleadings in the present action with those in the Court of Requests action, and by examining the arguments of counsel, to draw the inference which the District Judge has in fact drawn from the scanty materials on the face of the record as it stands. But in view of the fact that the respondent himself has come into Court on a footing which is only intelligible on the ground that circumstances imposing upon him the duty of giving notice to warrant and defend had arisen, I do not think that it would be fair to dispose of the action without further inquiry in the District Court. There seems to be very little doubt now as to what the law applicable to cases of this kind is. If in point of fact vacant possession was not given, the respondent would be under no obligation to take preliminary steps against the persons who had ousted him, or to give to his vendors notice to warrant and defend the title which they had purported to convey, but would have an immediate right of action against them for their failure to implement the primary obligation of the contract of sale. On the other hand, if vacant possession was given, the decision of this Court in *Gurunnanse v. Don Hendrick*[1] is an authority binding upon us that the first duty of the purchaser who had been ousted by third parties would be to avail himself of the remedy which the law gives him against such parties, and thereafter, when he had suffered judicial eviction, to call upon his vendors to warrant and defend title. It is clear also from the passage cited to us from *Voet 21, 2, 30*, that the acceptance by a purchaser in the

[1] *(1910) 13 N. L. R. 225.*

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position of the present respondent of a compromise in an action brought by him against third parties who had ousted him would be evidence from which the inference might be drawn that he had not done his best to defend the vacant possession secured to him by his vendors. I think that the making of a compromise under such circumstances would throw on the purchaser himself the burden of showing that the settlement arrived at was the best thing that could be done under the circumstances with which he had to deal. On this ground I would propose to set aside the decree of the District Judge in favour of the plaintiff-respondent, and send the case back for trial of issues; in the first place, as to whether or not the applicants had given to the respondent vacant possession of the property sold to him by the deed of October 17, 1910, and in the next place, whether the respondent's consenting to judgment in the Additional Court of Requests, Galle, No. 64,611, was a reasonable compromise under all the circumstances. The burden of rebutting the presumption, which I think the mere making of a compromise would create against him, will lie on the respondent. In view of the fact that there has been no contest at the argument of the appeal here to-day, either as to the existence of the covenant to warrant and defend, or as to the formal sufficiency of the notice to warrant and defend, I do not think that there ought to be any further inquiry in regard to either of these points. They may fairly be regarded as finally settled between the parties. I would propose that all costs, including the costs of the present appeal, should abide the event. The learned District Judge, after having held an inquiry into the issues above stated, will adjudicate finally in the action.

LASCELLES C.J.—

I entirely agree, and have nothing to add.

Sent back.