Present: Wood Renton C.J. and De Sampayo J. 1916

MISSO *v.* HADJEAR.

425—D. C. Colombo, 44,117.

Vendor and purchaser—Is a right of way an incumbrance?—Covenant that vendor has good title—May action be brought against vendor—for breach of warranty of title without suffering judicial eviction and giving notice?

A vendor is liable for eviction, whether the whole thing has been evicted or only a part, provided it be a part of the thing "and homogeneous with it." A real servitude is a homogeneous part.

In all such cases it is essential that the purchaser should, before he sues the vendor, be evicted by judicial decree. The condition as to notice to the vendor and judicial eviction is not dispensed with when the covenant to warrant and defend, which would ordinarily be implied, has been in fact expressed in the deed.

In the Roman-Dutch law there is no implied obligation on the part of the vendor to convey good title. His obligation is to give vacant possession and to warrant against eviction. Consequently any express warranty of title may with us be enforced without the preliminary condition of notice and eviction.

APPEAL from a judgment of the Acting Additional District Judge of Colombo (W. Wadsworth, Esq.). The facts are set out in the judgment.

A. St. V. Jayewardene, for the plaintiff, appellant.

E. W. Jayewardene, for defendant, respondent.

Cur. adv. vult.

1916.

Misso v. Hadjear

November 23, 1916. DE SAMPAYO J.—

The plaintiff was entitled, subject to a *fidei commissum* in favour of his children, to a sum of Rs. 19,488.48, which was in deposit in Court in a partition suit. With the leave of Court he invested that sum, together with Rs. 1,511.57 of his own money, in the purchase from the defendant of two lots of land called Wewalawatta and Delgaswatta, upon the deed No. 229 dated June 9, 1913. By the deed the defendant covenanted as follows:—

(1) " That he hath good and lawful right to sell and convey the said premises in manner aforesaid. "
(2) " That the said premises hereby sold and conveyed are free from all and any incumbrance whatsoever. "
(3) " That at all times he and his aforewritten shall and will warrant and defend the title hereby conveyed. "

On taking possession of the premises the plaintiff found that two adjoining landowners, named Don Marthelis Appuhamy and Don Paulis Appu, were using a footpath across the land, and he prosecuted them for trespass in the Police Court. In the course of the proceedings he also discovered that the defendant had previously prosecuted the same two persons, and that the Court had acquitted them on the ground that they had a right of way over the land. The plaintiff was obliged to submit to a verdict of acquittal, and was referred to his civil remedy. He accordingly brought this action against the defendant, alleging that Don Marthelis Appuhamy and Don Paulis Appu " are entitled to, and are in possession of, a right of way over the said premises, and that at the date of the sale aforesaid the defendant had no right to sell the lands absolutely," and he claimed Rs. 2,000 as damages.

At the trial the existence of the right of way was hardly disputed, and the District Judge in effect found that there was one, but dismissed the plaintiff's action on the ground (1) that the covenant to the effect that the premises were free from incumbrance had no reference to servitude of way, and (2) that, as regards the covenant as to title, the plaintiff could not maintain an action until he had suffered eviction in an action between him and the disputants, of which the defendant should have had notice.

I do not think that much advantage is to be gained by discussing the abstract meaning of the term " incumbrance. " In the largest sense it means any kind of burden on or diminution of the title, and in a narrower sense it is generally employed to indicate a mortgage or charge upon the property. In this particular instrument I am inclined to think it is used in the latter sense. The covenant as to freedom from incumbrance is associated with two other covenants, which appear to me to contain the whole compass of obligations of the vendor with regard to the title itself, and is intended, I think, to protect the vendee against such special claims

as those of mortgagees. However that may be, I think the plaintiff's case need not necessarily depend on the construction of that covenant. Before dealing with the other covenants, I may state that under the Roman-Dutch law a vendor is liable for eviction, whether the whole thing has been evicted or only a part, provided it be a part of the thing "and homogeneous with it," and a real servitude is a "homogeneous part." See *Voet 21, 2, 16,* and *Maasdorp's Institutes, vol. III., p. 161.* But, of course, in all such cases it is essential that the purchaser should, before he sues his vendor, be evicted by judicial decree. I do not think that the condition as to notice to the vendor and judicial eviction is dispensed with when the covenant to warrant and defend, which would ordinarily be implied, has been in fact expressed in the deed. It has no doubt been held by Hutchinson C.J. and Wendt J., in *Vanderpoorten v. Scott,*[1] that an express covenant to warrant and defend excludes the covenant implied by law, and that the purchaser's remedy is upon the express covenants only, but both in that case and in the case of *Ukku Menika v. Dingiri*[2] compliance with the rule as to notifying the vendor to warrant and defend title and as to eviction by judicial decree was insisted on. I think, therefore, that if the plaintiff in this case had to depend on the third covenant stated in the deed to the effect that the defendant would warrant and defend the title, he might not be able to succeed, as he had not suffered judicial eviction. But, in my opinion, he is not obliged to confine himself to that covenant or the covenant regarding freedom from incumbrances. For there is the first covenant, which, I think, amply suits his purpose. The defendant thereby entered into a warranty of title by covenanting that he had good and lawful right to sell and convey the premises. In this connection I may refer to a point decided by the District Judge and repeated in the argument before us. Great reliance was placed on a passage in *Voet 21, 2, 16,* and it was strenuously contended that by the deed under consideration the defendant had not sold the land *uti optimus maximusque est,* and that he had not therefore warranted that the land was free from servitudes. After stating that if in the sale of a thing it was specially agreed that other things, such as servitudes, were to be accessories of the thing sold, an action might be brought on account of eviction of these, the passage in question proceeds as follows:—

"*Simili ratione, si fundus,* uti optimus maximusque est, *distractus fuerit, et vicinus servitutem evincat, tanquam per istum fundum sibi constitutam, auctorem de servitutis istius evictione obligatum habet: id enim ista formula agitur ut prædium præstetur liberum ab omni servitute; adeoque cum prædio libertas quoque ab oneribus nominatim comparata censetur.*"

[1] *(1908) 11 N. L. R. 147.*

[2] *(1908) 4 A. C. R. 15.*

Mr. Berwick in his translation puts in the gloss, " *i.e.* free from servitudes " within brackets, after the expression *uti optimus maximusque est*. It is clear, however, that the learned translator does not mean that " free from servitude " is the exact equivalent of *uti optimus maximusque est*. All that is meant surely is that, when a property is sold in such a way as to vest full and absolute *dominium* in the purchaser, freedom from such burdens as servitudes is also necessarily warranted. There may be under the civil law, or under the Roman-Dutch law, some form of conveyance in which the expression *uti optimus maximusque est* is used to express the idea of conveying such full and absolute *dominium*. But if in our practice we have some other form to convey the same idea, I think the principle stated by Voet should apply. Now I have no doubt that a deed of sale, with such covenants as I have quoted, must necessarily be intended to pass full and absolute *dominium*. If this is right, then the passage in *Voet*, so far from helping the defendant in regard to his obligation to deliver the property free from servitudes, is an authority against him. But it is not necessary to pursue this point further. The question, as I have said, is whether the plaintiff may not maintain an action directly on the express covenant for good title contained in the deed. I think he can. In the Roman-Dutch law there is no obligation on the part of a vendor to convey good title. His obligation is to give vacant possession and to warrant against eviction, and the necessity of notice and judicial eviction is concerned with that obligation only. See *Morrice's English and Roman-Dutch law 142*, and *3 Maasdorp's Institutes 133 and 134*. Consequently any express warranty of title may with us be enforced without the preliminary condition of notice and eviction. *Vanderpoorten v. Scott* (*supra*) is an authority for that proposition. See particularly the judgment of Wendt J., *ad fin.*, where he points out that in that case the defendant did not covenant that he had good title. The opinion of the learned Judges was that if he had done so it would not have been necessary to go into the question whether he had been noticed to warrant and defend the title which he had conveyed to the plaintiff.

I think, therefore, that the plaintiff may maintain this action for damages for breach of warranty of title quite apart from any breach of the covenant to warrant and defend the title. The breach is established by the finding of the District Judge, which I see no reason to disturb, that Don Marthelis Appuhamy and Don Paulis Appu had a right of way over the land. It was said that the plaintiff, before his purchase, knew, or ought to have known, the existence of the servitude. Even if that be so, it does not relieve the defendant of his liability on the express covenant. The measure of damages is rightly stated to be the difference between the price actually paid and the price which the property would have fetched if the existence of the right of way had been disclosed. As the

plaintiff, according to the terms of the deed, has only a life interest in the property, the District Judge considered the question of damages in that point of view only, and said that if any damages were due to plaintiff he would assess them at Rs. 100. But I think that, whatever the plaintiff's interest might be, as he was the sole purchaser from the defendant, he is entitled to damages on that basis, though it might be that he would be obliged to refund to the Court the whole or part of the amount to remain in deposit subject to the *fidei commissum*.

I would set aside the judgment appealed from and send the case back for the purpose of determining the amount of damages. The plaintiff should have the costs of the trial in the Court below and of this appeal.

WOOD RENTON C.J.—I agree.

Sent back.