

1931

Present: Akbar J.

DINGIRI AMMA v. MUDIYANSE *et al.*

115—C. R. Matale, 521.

*Sale—Deed of transfer with stipulation of good title—Action for failure to warrant and defend and for breach of covenant—Condition of notice and eviction—Roman Dutch law.*

Where a deed of transfer contained an express covenant that the vendor had "legal right to dispose of the land," the express warranty of title may be enforced without the preliminary condition of notice and eviction.

**I**N this action the plaintiff sued the defendants for the recovery of half the purchase money and damages consequent on failure of the defendants to warrant and defend title conveyed by their father, Ranhamy.

Ranhamy sold the entirety of the northern 12 lahas paddy sowing of Kanatiangekumbura on deed No. 442 of September 21, 1921, to plaintiff. Ranhamy expressly covenanted that he had good and lawful title to the premises. In 1928, plaintiff was ousted from the eastern 6 lahas by the heirs-at-law of Punchirala, brother of Ranhamy. Plaintiff then instituted case No. 19,250, C. R. Matale, against the heirs-at-law of Punchirala for declaration of title to this eastern block. Ranhamy being then dead plaintiff duly noticed heirs-at-law of Ranhamy, the present respondents, to warrant and defend the title conveyed by Ranhamy. The respondents took time to file their statements but did nothing further in that case. On the trial date, plaintiff settled the action as he discovered that Ranhamy had in 1917, as first defendant in No. 12,299 C. R. Matale, filed answer and given evidence on oath to the effect that he and the heirs-at-law of Punchirala were in common possession of this land.

The Commissioner of Requests dismissed the action, holding that the heirs-at-law of Ranhamy were not bound by the covenant made by Ranhamy, and, further, that in law plaintiff could not maintain this action because of the compromise in case No. 19,250. The plaintiff appealed.

*D. S. Jayavickrama*, for plaintiff, appellant.—Where there is an express covenant as to title, it may be enforced without the preliminary condition of notice and eviction—*Misso v. Hadjaar*. Purchaser or his heirs may sue the vendor or his heirs when the obligation arises from convention. *Voet XXI., 2, 17*. Express covenant as to title may be enforced against the heirs of the vendor. *25 Hals. 469*.

Heirs are bound by obligation of ancestor, though they are not expressly named in the contract, except where the obligation is personal to the ancestor, or arises *ex delicto*. *Walter Pereira (1913) 594*.

*D. S. L. P. Abeyesekere*, for defendants, respondents.—Plaintiff having compromised case 19,520, cannot maintain this action.

In any case, plaintiff should have instituted a possessory suit (*Jinadasa v. Duraya* <sup>2</sup>).

*Jayavickrama*, in reply.—In *Jinadasa v. Duraya (supra)* the case of an express covenant as to title was not considered.

November 2, 1931. AKBAR J.—

By deed No. 442 of September 21, 1921, one Ranhamy sold to the plaintiff 12 lahas of a certain paddy field for a sum of Rs. 300 and by this deed he covenanted that he had "full power and legal right to sell and dispose of" the above field. He further undertook to settle all disputes if any and bound himself and his heirs to procure any deeds or other writings relating to the said premises, if required. These are the express covenants in the deed. The plaintiff was ousted from the eastern 6 lahas in 1928 by the heirs-at-law of one Punchirala, a brother of the above-mentioned Ranhamy. The plaintiff-appellant thereupon brought case No. 19,250 for declaration of title and recovery of possession of these 6 lahas, and, Ranhamy being dead, the plaintiff noticed the heirs-at-law of Ranhamy, who are the defendants in this case and respondents to this appeal, to warrant and defend the title conveyed by Ranhamy. Although the respondents took time to file their statements, they did nothing further in that case. On the date of the trial of that case, it was discovered that Ranhamy had in 1917, as first defendant in a case No. 12,299, filed answer and also given evidence to the effect that he and the heirs of his deceased brother Punchirala were in possession of this field. As a result of this discovery the plaintiff admitted the title of Punchirala's heirs to  $\frac{1}{2}$  of the field. In this action the plaintiff sued the heirs of Ranhamy for recovery of half the purchase money, not only on the ground that the defendant had failed to warrant and defend the plaintiff's title, but also on the ground of a breach of an express covenant by Ranhamy contained in deed No. 442 that he had good and lawful right to sell the whole field. All the facts I have stated above were admitted at the trial. The parties went to trial only on these issues.—

1. Was plaintiff justified in instituting a *rei vindicatio* action in C. R. 19,520, instead of a possessory-suit?
2. Has plaintiff, having compromised C. R. 19,520, any cause of action against these defendants?

<sup>1</sup> 19 N. L. R. 277.

<sup>2</sup> 20 N. L. R. 153.

3. If the answer to the above issues is in the affirmative, to what damages, if any, is plaintiff entitled? Damages are admitted to be as claimed, if plaintiff succeeds on the law.

There was a long legal argument by counsel and the learned Commissioner dismissed the plaintiff's action with costs holding that Ranhamy had not bound himself and his heirs, &c., to warrant and defend title of the premises conveyed and that he had expressly omitted to do so "because he wished to avoid making his children liable for the sins of their father". He also held on the authority of the case of *Jinadasa v. Duraya*<sup>1</sup>, that the plaintiff having compromised her action in C. R. 19,520 she had forfeited any right she might otherwise have had to sue her vendor. In these remarks of the learned Commissioner, he omitted to notice that the plaintiff had expressly amended his plaint on June 17, 1931, adding a cause of action on the express covenant by Ranhamy that he had good and lawful right to sell the whole field. So that the plaintiff claimed to recover the sum mentioned in the plaint not only on the failure to warrant and defend title, but also on the breach of the express covenant of title. The case of *Jinadasa v. Duraya* (*supra*) was an action *de evictione* for a breach of the undertaking to warrant and defend title. The obligation to give vacant possession and to warrant against eviction and the necessity of notice and judicial eviction as pointed out by De Sampayo J. in the case of *Misso v. Hadjaar*<sup>2</sup>, were obligations and requirements under the Roman-Dutch law. As Mr. Justice de Sampayo further pointed out, in the Roman-Dutch law, there was no obligation on the part of a vendor to convey good title. So that the remarks of the learned Commissioner with regard to the point that the plaintiff had forfeited her right to claim a refund of a part of the purchase money because she had compromised her action in case No. 19,520 can only have application to the covenants under the Roman-Dutch law and can have no application to an express covenant of title given as in this case. Mr. Justice Sampayo made this quite clear when he stated as follows:—"Consequently any express warranty of title may with us be enforced without the preliminary condition of notice and eviction. *Venderpoorten v. Scott* is an authority for that proposition. See particularly the judgment of Wendt J., 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." In the view that I take that the case should be retried, it is not necessary for me to state my opinion on the questions of law discussed by the Commissioner. The three issues that were framed by the learned Commissioner are therefore inadequate to decide this case. The issues suggested by the Proctor for the plaintiff on June 10, 1931, must be added to the three issues accepted by the learned Commissioner and the case must go back for a retrial before another Judge. The decree and the judgment will be set aside and the case sent back for trial on the

<sup>1</sup> 20 N. L. R. 158.

<sup>2</sup> 19 N. L. R. 277.

three issues accepted in this case and issues marked Nos. 5 and 6 suggested by the plaintiff's Proctor on June 10, 1931, with liberty to the parties to add any other issues arising on the pleadings. The plaintiff's appeal will be allowed with the costs of the appeal only. The costs already incurred will abide the further result of this case.

*Appeal allowed.*

