1937 *Present :* **Poyser and Soertsz JJ.**

CHELLAPPAH *v.* McHEYZER *et al.*

274—D. C. Colombo, 46,747.

Warranty—Express covenant to warrant and defend title—No warranty of title—Remedy of purchaser—Roman-Dutch law.

Where in an agreement for the sale of land there is an express covenant to warrant and defend title, the purchaser is not entitled to withdraw from the sale on the ground of a defect of title in the vendor.

Where there is an express warranty of title the purchaser is entitled to refuse to complete the sale if he is able to show that the vendor has not the good title he warranted.

An express warranty of title occurs when a vendor in so many words warrants that he has a good and lawful title.

***James v. Suffa Umma* (17 N. L. R. 33) followed.**

***Fernando v. Perera* (17 N. L. R. 161) and *Babapulle v. Umma* (4 C. W. R. 420) distinguished.**

THE plaintiff brought this action against the second defendant-appellant and another defendant, a licensed auctioneer, alleging that the defendant-appellant through the other defendant put up for sale two allotments of land of which he was declared the purchaser. He alleged that in compliance with the conditions of sale he paid to the auctioneer two sums of money which represented one-tenth of the purchase price of the two allotments. He averred that the first defendant (the auctioneer) at the sale declared that a good, valid, and marketable title would be made out for the said allotments. Alternatively he pleaded that the defendants impliedly agreed to make out and convey a good, valid, and marketable title. The second defendant in his answer denied that any representation with regard to a good, valid, and marketable title was made either by him or the first defendant. He pleaded that the plaintiff had made default in the payment of the balance purchase price and that under the terms of the conditions of sale he forfeited the one-tenth purchase price he had paid and also became liable to pay the difference between the price at which he had bought the two lots and the price realized at the subsequent sale and he claimed the difference.

The learned District Judge held that there was an express warranty of title and gave judgment for the plaintiff.

N. E. Weerasooria (with him *Corea*), for second defendant, appellant.—An express warranty of title must be distinguished from an express covenant to warrant and defend title. A vendor whether he says so expressly or not is bound to warrant and defend title. He is not obliged to convey good title but merely to give vacant possession. (*James v. Suffa Umma* [1].) We are prepared to give vacant possession.

H. V. Perera (with him *E. B. Wikramanayake*), for plaintiff, respondent.—There was a statement by the auctioneer that the appellant had a good and marketable title. Plaintiff bought on that representation. That amounts to a warranty of title. At any rate, if the representation

[1] *17 N. L. R. 33*

was false, the contract is voidable. The Judge has found that it was false. The appellant cannot on his own showing convey the title. See *Misso v. Hadjiar* [1], *Fernando v. Perera* [2].

N. E. Weerasooria, in reply.—The issue as to the false representation was abandoned at the trial.

Cur. adv. vult.

April 19, 1937. SOERTSZ J.—

The plaintiff brought this action against the defendant-appellant and another defendant, alleging that on certain notarially attested conditions of sale, the defendant-appellant, through the other defendant who is a licensed auctioneer, put up for sale certain allotments of land, and that at that sale he the plaintiff was declared the purchaser of two of those allotments at the prices of Rs. 3,800 and Rs. 3,700. He stated that in compliance with the conditions of sale which he signed, he paid to the auctioneer the sum of Rs. 582 and Rs. 627.50, which represented one-tenth of the purchase price of the allotments he had bought, plus the expenses of the sale. He averred that the first defendant (that is, the auctioneer) at the said sale declared that "a good, valid, and marketable title would be made out for the said allotments and that they would be conveyed free of incumbrances, and that till the execution of valid conveyances in favour of the plaintiff, the first defendant would hold the purchase price in his hands". Alternatively, he pleaded "that the defendants *impliedly* agreed to make out and convey a good and valid and marketable title free of all encumbrances, and that there was an implied obligation on the part of the first defendant to refund the purchase price to the plaintiff, in the event of deeds of conveyance not being executed in favour of the plaintiff". The plaintiff further averred that "the defendants were neither able to make out a good, valid, and marketable title, nor to convey the said allotments free of encumbrances". He therefore prayed for judgment against the defendants jointly and severally or in the alternative for the said sum of Rs. 1,209.50.

The defendants filed separate answers. The first defendant pleaded that there was a misjoinder of parties and of causes of action and also stated that he was under no obligation to make out any title, or to convey the allotments to the plaintiff, but that the second defendant was prepared to convey those allotments to the plaintiff and to place him in possession on payment of the balance purchase amount. He prayed that the plaintiff's action be dismissed.

The second defendant, in his answer, denied that the first defendant made "any representation that a good, valid, and marketable title would be made out for the said allotments and that they would be conveyed free of encumbrances". He stated further that the first defendant had not his authority to make such a representation. He pleaded that the plaintiff had made default in the payment of the balance purchase price and that under the terms of the conditions of sale, he forfeited the one-tenth of the purchase price he had paid, and also became liable to pay the difference between the price at which he had bought the two lots, and the price realized at the subsequent resale and he claimed this difference, a sum of Rs. 2,100 in reconvention.

[1] *19 N. L. R. 277.*

[2] *17 N. L. R. 161.*

The case went to trial on a number of issues, but it must be particularly noticed that before the plaintiff's Counsel began his case, the plaintiff consented to his action against the first defendant being dismissed with costs which were fixed at Rs. 475. The District Judge thereupon made the following note :—As a result of the settlement of the case with regard to the first defendant, the following issues go out—1, 2, 3, 13 (*a*) and (*b*). Issues 1, 2, 3, are these :—1—Did the first defendant at the auction sale of the lots referred to in the plaint represent that a good, valid, and marketable title would be given for the said allotments of land ? 2—Did the first defendant represent at the said sale that the said allotments of land would be conveyed free of all encumbrances ? 3—Did the first defendant represent that till the execution of a valid conveyance in favour of the plaintiff, he would hold the part of the purchase price in his hands ?

Once these issues were discarded the important issues left were :—4—Did the defendants *impliedly* agree to give and convey a good, valid, and marketable title free of all encumbrances ? 5—Was there an *implied* obligation on the part of the defendants to refund the purchase price to the plaintiff in the event of a good, valid, and marketable title not being given to the plaintiff ? 6—Were defendants unable to give a good, valid, and marketable title ? (This should have been amended to. Was second defendant . . . . ?) 7—Was second defendant unable to convey to plaintiff the said lots free of all encumbrances ? 12—Was the second defendant under any obligation to make out a good, valid, and marketable title . . . . or to convey . . . . to plaintiff free of all encumbrances ? 15—Was the second defendant ready and willing to convey the said lots to the plaintiff on payment of the balance purchase price and to place him in possession of the said lots ?"

After trial, the learned District Judge answered these issues as follows :—Issue 4—Yes. Issue 7—Yes. Issue 12—Whatever the obligation the defendant made an express warranty. Issue 15—In view of my finding on issue 10, this issue does not arise. Issue 10 was—Did the defendants waive their rights under clauses 5 and 6 of the condition of sale ? and the answer to it was "There was no valid agreement entered into". He entered judgment for the plaintiff for Rs. 750 to which the plaintiff's claim had been reduced in consequence of his case against the first defendant being dismissed and he rejected the second defendant's claim in reconvention.

On appeal, Counsel for the second defendant did not press his client's claim in reconvention, very properly in my opinion, for the so-called resale had been obviously staged for the purpose of enabling the second defendant to make this claim. It ended on a Gilbertian note when the second defendant himself became the purchaser of what was already his property.

The sole point, then left for consideration on this appeal, is whether on the facts of this case, the plaintiff is entitled to recover the part of the purchase price he paid on the day of the sale. The trial Judge has answered that question in the affirmative basing his judgment on two grounds, namely, (1) that there was an *express warrantly of title* given by or on behalf of the vendor, and the vendor was now found not to have a

complete title, (2) that there was a misrepresentation by the second defendant's agent, the auctioneer, 'that a good, valid, and marketable title would be made out for the said allotments and that they would be conveyed free of encumbrances'. In regard to (1) 'express warranty of title the facts found by the trial Judge are that although clause 10 in the conditions of sale originally stipulated that the vendor would not warrant and defend title that stipulation was waived before the sale and the vendor undertook to warrant and defend title. That appears to be a correct finding, but the difficulty arose when from it the Judge drew the inference that there was an express warranty of title. If I may say so, there appears to have been a certain confusion of ideas in the mind of the trial Judge in regard to the meaning of an express undertaking to warrant and defend title and a warranty of title. He appears to have thought that where there is a definite undertaking in a document that the vendor will warrant and defend title, there is an express warranty of title. But that of course is not so. An express warranty of title occurs when a vendor in so many words warrants that he has a good and lawful title. Whereas in every contract of sale, other than one in which the vendor definitely states that he will not warrant and defend title, there is implied, if it is not expressed, an undertaking to warrant and defend title if and when it is challenged. In the present case, clearly there is no express warranty of title but only an explicit undertaking to warrant and defend it. In regard to the alternative averment in the plaint, that there was an implied warranty of title, Burnside C.J. commented strongly when it was advanced in the case of *Silva v. Ossen Saibo*[1]. He said "I do not hesitate to assert on the research which I have made, that this alleged doctrine of implied warranty in every sale, if enforced in its integrity, would involve results so grotesque and ridiculous as could not be accepted by any one, who may even pretend to set it up, as touching the title to land among the peasantry of this Colony". But assuming although not conceding, that there is such a warranty of title implied in certain cases, we are at once confronted in this case with the ruling of Hutchinson C.J. and Wendt J. in *Vander Poorten v. Scott*[2], that where there is an express convenant by which the vendor undertakes to warrant and defend title, *no further or other covenant can be implied. Expressum facit cessare tacitum.* The purchaser must be taken to have intended to rely on the express convenant only. See also *Misso v. Hadjiar*[3]. In the present case, as I have already observed clause 10 as amended at the sale contains an express covenant to warrant and defend title and consequently "no further or other covenant can be implied".

In this view of the matter, this case falls to be governed by the principle enunciated in *James v. Suffa Umma*[4]. In that case two of the three Judges, Wood Renton A.C.J. and De Sampayo J., Ennis J. dissenting, held that a purchaser of land at an auction sale, who has signed notarily attested conditions of sale agreeing to complete the purchase, is not entitled to withdraw from the sale on the ground of any defect of title of the vendor, and that in the absence of fraud on the part of the vendor, or of any express warranty of title he is entitled to get only vacant possession. "In the Roman-Dutch law there is no obligation

[1] *2 C. L. R. 29.*
[2] *11 N. L. R. 147.*
[3] *19 N. L. R. 277.*
[4] *17 N. L. R. 33.*

on the part of the vendor to convey good title. His obligation is to give vacant possession, and to warrant against eviction". But, of course, if there has been fraud, the purchaser is always entitled to obtain a rescission of the sale, for fraud vitiates every contract. Or, if there has been an express warranty of title the purchaser is entitled to refuse to complete the sale if he is able to show that the vendor has not the good title he warranted.

In the present case, no fraud has been or can be alleged and there is no express warranty of title. The vendor is prepared to give vacant possession, but the purchaser would have none of it because, he says, that the vendor's title 'does not total a unit' and that a certain Mrs. Gooneratne is claiming an interest in the land. Now although a vendor's paper title may not account for all the shares that go to make a unit he may be able to make out a good prescriptive title. In this case, there is evidence to show that the vendor has been in possession of this land for long over the prescriptive period. Mrs. Gooneratne herself says "I am the niece of the defendant. I know the lands which were sold. My uncle was in possession of those lands . . . . By possession, I mean the lands belonged to him. I did not claim a share of the land". Later she adds in regard to one lot of land "Lot 61E 2A adjoins my block and forms part of my block. My uncle had to make arrangements with me in reference to that land . . . . He agreed to pay me Rs. 1,000". The second defendant's evidence on this point is "Mrs. Gooneratne had to join me in the conveyance. I would have had to pay her something. She stipulated for a payment of Rs. 1,000. If she pressed, I would have had to buy her off, but I do not think she would have done so". Now, in Roman-Dutch law, there is nothing to prevent a vendor from selling the property of another provided, of course, he does not do so fraudulently, and is able to give the purchaser vacant possession, and to warrant him against eviction. So that even on this question of title it is not possible to hold that the second defendant was not in a position to convey a good title if the law imposed that obligation on him. Much less is it possible to say that he was acting fraudulently and not *bona fide*, when he put up these lands for sale as lands in respect of which he could give vacant possession and warrant against eviction. The case of *Fernando v. Perera*[1] is easily distinguishable. There the vendor stipulated that he had a good title and undertook to execute "a good and valid conveyance of the said premises free from all encumbrances". The Judges who decided that case followed an English case, *Lysaght v. Edwards*[2], and held that a stipulation to execute *a good and valid conveyance* meant a conveyance not only sufficient in form or substance, but also a conveyance effective in law to convey unfettered ownership. In regard to this it is not necessary, on this occasion, to say anything more than that there is no such undertaking in the present case, but only an undertaking that "on payment of the balance, the *vendor shall execute a conveyance*". Similarly, the ruling in the case of *Babæpulle v. Umma*[3], if it is sound, is a ruling on an entirely different set of facts. That was a sale held on an order of Court, and that case was distinguished by the Judges who delivered that judgment from the case of *James v. Suffa Umma* (*supra*) on

[1] *17 N. L. R. 261.*

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

[3] *4 C. W. R. 420.*

the ground that in that case the sale was one *inter partes* and the purchaser accordingly had his remedy against the vendor on the covenant to warrant and defend title in the event of an ejectment, whereas in the case before them the purchaser would have no remedy if evicted. The case of *Marikar v. Aron Perera*[1] is, in fact, a reassertion by the two Judges who decided *James v. Suffa Umma* (*supra*) of their ruling in that case. Wood-Renton C.J. said in the course of that judgment that " the clause in the conditions of sale which imposes on the first defendant an obligation to execute a conveyance does not involve any warranty of title ".

If I may say so with great respect the cases of *Fernando v. Perera* (*supra*) and *Babapulle v. Umma* (*supra*), if they do not amount to attacks on the soundness of the decision in *James v. Suffa Umma* (*supra*), are at least intended to reduce as much as possible the scope of a decision which appears strange when viewed in the light of the principles of the law of England. Indeed, in *Fernando v. Perera,* Pereira J. concludes his judgment with the observation that " under the laws of England it is, in general, sufficient if the vendor shows he has a good title by the time fixed for the 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. 'I can see no objection to allow ourselves to be governed by this reasonable and equitable rule.' " But, surely the objection to such a course is that we are under the Roman-Dutch law on these questions 'relating to the tenure, or conveyance or assurance of, or succession to any land or other immovable property, or any estate right or interest therein', and according to that law, the correct view with great deference appears to be that taken by Wood Renton A.C.J. and de Sampayo J. in *James v. Suffa Umma.* At any rate, that is a ruling by a Divisional Bench and we are bound by it in this case in which it is not possible to pretend that the facts can be properly distinguished.

In regard to the second ground upon which the trial Judge based his judgment—misrepresentation—he says, " plaintiff was induced to sign the conditions of sale by the misrepresentation (it matters not whether it was innocent or wilful) made by the agent of the second defendant ". But, here, he has lost sight of the fact that the allegations of misrepresentation were abandoned before the trial commenced, when issues 1, 2, and 3 were dropped. Those issues must be taken to have been dropped because the plaintiff realized that he could not substantiate the matters involved in them.

The averments in paragraphs 3 and 4 of the plaint have the air of a text copied out of the report of the case of *Fernando v. Perera* (*supra*). At any rate, the plea in paragraph 3 was abandoned and I have already dealt with the plea in paragraph 4.

The judgment of the learned trial Judge cannot therefore be sustained on either of the grounds upon which it is based. Respondent's Counsel did not seek to support it on any other ground nor do I see that it can be so supported. The result is that the plaintiff is unescapably enmeshed in his contract, and by the operation of clause 6 he must forfeit the part purchase price he paid. I would therefore allow the appeal and dismiss the plaintiff's action.

[1] *2 C. W. R. 45.*

In regard to costs, the second defendant-appellant will receive the costs of appeal taxed in the class Rs. 200 and under Rs. 750. He will also receive in that class costs incurred by him in filing answer. For the rest each party will bear his own costs, for I find that a settlement of this case appears to have been prevented by the second defendant-appellant insisting on his claim in reconvention and that claim has now been dismissed.

Appeal allowed.

POYSER J.—I agree.