1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

DHARMAWATHIE HAMINE, Appellant, *and* KIRA, Respondent

S. C. 237—D. C. Kegalle, 6,895

Vendor and purchaser—Covenant to warrant and defend title—Actio rei vindicatio instituted by purchaser—Notice to vendor—Dismissal of action—Duty of purchaser to appeal—Liability of vendor to pay damages.

Where a purchaser of immovable property fails to succeed in a vindicatory action instituted by him in respect of the property, his omission to appeal to the Supreme Court does not exempt the vendor from liability for damages for breach of his covenant to warrant and defend title, if the vendor was given sufficient notice of the action but did not induce the vendee to appeal.

APPEAL from a judgment of the District Court, Kegalle.

N. K. Choksy, Q.C., with *E. D. Cosme* and *O. M. da Silva*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *A. C. M. Uvais*, for the Plaintiff-Respondent.

July 28, 1955. BASNAYAKE, A.C.J.—

This is an action for damages in a sum of Rs. 3,500 for failure to warrant and defend title to a field called Kaththottiye Cumbura *alias* Andoluwe Kumbura which the plaintiff-respondent (hereinafter referred to as the respondent) purchased from the defendant-appellant (hereinafter referred to as the appellant). The respondent was never able to get possession of the field. He was first obstructed by one Chara. The respondent thereupon brought an action against him. In that action the respondent was declared entitled to the northern half of the field. When the respondent proceeded to take possession of the northern half to which he was declared entitled, two persons by name Sandara and Seelawathie obstructed him. He was thereupon compelled to institute a second action in the District Court, this time against Sandara and Seelawathie. The respondent failed in that action, but did not appeal. The instant action is the sequel to that failure.

The present appeal is by the respondent's vendor who has been cast in damages. Learned Counsel for the appellant contends that the notice served on her was defective in that she was not asked to intervene in the action. In support of his contention he has referred us to the case of *Appuhamy v. Singho et al.* [1]. He relies on the following passage in the judgment at page 98 :—

> "The demand to warrant and defend title need not necessarily be in writing, although, perhaps, it is the most convenient form of making the demand. The demand may be verbal where the vendor is asked by the vendee to intervene in the action and to establish the title that has been conveyed".

[1] *15 N. L. R. 97.*

He also relied on the case of *Jinadasa v. Duraya* [1]. In that case de Sampayo J. having referred to a passage from *Voet* 21, 2, 30, goes on to say :

> " The same passage in *Voet* shows that if the purchaser is defeated in the action and does not appeal, or, having appealed, does not press the appeal, in a case where the vendor has not intervened or undertaken the defence (absente venditore), he is likewise deprived of any remedy against the vendor ".

On the authority of that statement learned Counsel submits that the respondent should have appealed in the second action and as he did not appeal he is not entitled to the redress he claims in the instant action.

It is unsafe to rely on an isolated passage from *Voet* and base an argument thereon without examining the entire context in which it occurs. The passage in question occurs in the title " De Evictionibus et Duplae Stipulatione " (Bk. XXI, Tit. II)—" Of Evictions and Warranty of Title and the Covenant for Double Value ". None of the other commentators deals with this subject in as much detail as *Voet*. After discussing several aspects of eviction and warranty of title *Voet* goes on to say in paragraph 20 of that title :

> " It must now be observed that a person from whom a thing has been evicted cannot sue his *auctor* (i.e., vendor) or the other persons above mentioned on account of eviction unless he has given him timeous notice that the suit (for eviction) has been commenced, and, according to Our Usages, a copy of the plaintiff's libel ; not for the purpose of transferring the suit to him and to his *forum*, but rather in order that he may take part (intervene) in the litigation (*ut lite assistat*) and undertake the defence in the *forum* of the party sued, and establish his title . . . . This notice having been given, whether the " auctor " takes part in the suit in order to prevent collusion, or suffers that the purchaser constitute him " procurator in rem suam " (procurator in his own interest) or whether he does not openly associate himself with the suit, but supplies the defendant with assistance and proof for the assertion of the right,—or whether he does none of these after being cited once or oftener according to the usages of the place, but altogether neglects the suit (in all these cases) he (the purchaser) has recourse against his " auctor " after eviction provided the purchaser himself has not failed to defend it with all his power ; lest otherwise the " auctor " should be considered to have been defeated rather on account of absence than because he had a bad cause ".

The notice that should be given to the vendor need not be given through the Court. It can be given by the purchaser to the vendor in person [2] and may be given not only before but even after *litis contestatio* provided it be given before it is too late for the vendor to intervene, for until decree the vendor is entitled to an opportunity of defence [3]. Failure to give notice of proceedings to evict the purchaser is not fatal to an action

[1] *29 N. L. R. 155.*
[2] Voet *Bk. XXI, Tit. II, para. 21.*
[3] *Ibid. §§ 22 & 23.*

for breach of warranty if the purchaser can show a manifest want of right on the part of his "*auctor*" [1] or where it is agreed that notice need not be given or where the *auctor* has intentionally concealed himself in order to prevent notice being served on him [2].

It should be borne in mind that *Voet* discusses the subject of warranty of title and eviction mostly from the angle of the purchaser who is called upon to defend an action for eviction. The considerations governing the case of a purchaser who is called upon to defend an action in eviction cannot be applied indiscriminately to the case of a purchaser who plays not a passive but an active role in asserting his title by instituting legal proceedings. Judged by any standard the respondent is entitled to succeed.

The appellant was given notice of the second action which resulted in the respondent's eviction, both before and after its institution. She was not only summoned to give evidence but was also noticed through the Court in the following terms :—

"You are hereby summoned to appear in this Court in person on the 12th day of December 1949 at nine o'clock in the forenoon to give evidence on behalf of the plaintiff in the abovenamed action *and to warrant and defend the title conveyed by you to the plaintiff* in the above as per copy of plaint sent herewith.

"And you are not to depart thence until you have been examined or have produced the documents and the Court has risen or unless you have obtained the leave of the Court".

The appellant was called as a witness by the respondent in that action and was in Court throughout the proceedings.

Having had ample notice of the proceedings in which the respondent was evicted and after being afforded every opportunity of intervening in those proceedings the appellant is not entitled to escape her liability on the ground that the respondent did not appeal, without even endeavouring to show that he had a reasonable chance of success in an appeal and that she did all she reasonably could to bring that fact to his notice and induce him to appeal.

Learned Counsel for the respondent relied on two decisions of this Court, viz., *Wirawardane v. Ratnaike* [3] and *Punchi Appuhamy v. Rambukpotha* [4]. They do not call for any discussion as the view we have taken is in accord with those decisions.

For the above reasons we think that the appellant is not entitled to succeed in this appeal.

The appeal is accordingly dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed

[1] *Ibid* § 22.
[2] *Ibid* § 24.
[3] *22 N. L. R. 219.*
[4] *43 N. L. R. 333.*