Present : Lyall Grant and Akbar JJ.

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NUGAWELA *v.* GEORGE

20—D. C. Kandy, 34,559

Sale—Action for purchase price—Plea of failure of consideration—Warranty of title—Vacant possession.

Where the plaintiff sued the defendant on a cheque given for the purchase price of an interest in land, it is open to the defendant to raise the defence of failure of consideration on the ground that the plaintiff had no title to the land sold by him.

PLAINTIFF sued defendant on a cheque which had been given as the purchase price of certain rights in land, but payment of which had been subsequently stopped. Defendant pleaded that there was a total failure of consideration, in that plaintiff had no right, title, or interest in the land. At the trial Counsel for defendant sought to raise certain issues with a view to proving this, but the District Judge disallowed them on the ground that on the execution of the deed plaintiff was entitled to immediate payment. Defendant appealed.

H. V. Perera, for defendant, appellant.—When a person is sued on a bill of exchange or cheque he can plead total failure of consideration. English law must apply (Chalmer's *Bill of Exchange, 8th ed., 114*).

It is not necessary for the purchaser to sue party in possession (*Ratwatte v. Dullewe* [1]).

Navaratnam, for plaintiff, respondent.—An examination of the documents, put in evidence, establishes the following facts :—

(1) On a purchase from all the co-owners the defendant is now the owner and possessor of the entirety of the land.

(2) Two of these co-owners had on an earlier deed transferred their rights to the plaintiff.

(3) The defendant obtained from the plaintiff a transfer of these very rights, with the knowledge that the deed, on which the plaintiff based his title, was executed during the pendency of a partition suit which was eventually abandoned.

(4) The execution of a deed of conveyance by the plaintiff, transferring the self-same rights, was the consideration for the cheque, payment of which defendant stopped.

In the light of the above facts it cannot be argued that there is a failure of consideration. Further, under our law a purchaser is under an obligation to pay the price, the moment his vendor

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executes a deed of conveyance, in pursuance of a contract of sale. On the score of any defect of title, discovered thereafter, the purchaser cannot withdraw from the sale and refuse to pay the price. The only primary obligation resting on the vendor is to give the purchaser " vacant possession ", which in the present case the defendant obviously has. The Full Bench ruling in *Jamis v. Suppa Umma et al.* [1] supports this submission. Clearly the question of title cannot be raised in these proceedings.

H. V. Perera, in reply.—Knowledge is no defence. In Roman-Dutch law a distinction must be drawn between a sale of a land and the sale of " the right, title, and interest. " In the case of sales by Fiscal the purchaser can in one instance refuse to pay, *i.e.*, where the debtor had no saleable interest. (Berwick's *Voet, p. 406.*)

In *Jamis v. Suppa Umma* case the vendor held subject to a *fidei commissum*. It is not a case of a complete failure of consideration.

March 21, 1929. LYALL GRANT J.—

This is an appeal from an interlocutory order made in the District Court of Kandy refusing to a defendant, sued on a cheque for the purchase price of an interest in land, the right to raise in defence the question of his vendor's title.

On October 31, 1926, the defendant and plaintiff executed a deed by which the plaintiff transferred to the defendant all his right, title, and interest in certain lands. The deed cited the plaintiff's title as contained in a deed of December 11 and 28, 1925, by which two of the common owners of the lands in question conveyed to him an undivided one-eighth share of the lands in question.

The defendant paid the price by cheque, but stopped payment before the cheque was cashed, and now refuses to pay on the ground that at the time of sale the vendor had no title to the land. In other words, he pleads no consideration.

The learned District Judge has held that, by the execution of the deed, whatever rights the plaintiff had in the land vested in the defendant, and that the former was entitled to immediate payment of the consideration. He says it only remains for defendant to get possession of the land, or if he should fail to do so, to call on the plaintiff to put him in possession, and that it is not open to him to question his vendor's title till he has been evicted.

Suppose, however, that the purchaser had, either before or after the transaction, bought the land from the true owner. In such a case he could not suffer eviction, and would not on the above reasoning be able to recover the money once paid although he received no consideration. I do not think the question can be decided so simply. The cases cited by the learned District Judge refer to instances where vacant possession had been given.

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

The defendant has averred in his answer that the plaintiff falsely and fraudulently represented to him that he had a good title to the land and that it was only after the execution of the deed that he discovered plaintiff had no title, and that the deed passed nothing at all.

Can the defendant be precluded from proving this averment, and if he succeeds in proving it, will he be liable to pay the price ?

I can find no law which makes it obligatory on a purchaser to implement his contract under such circumstances. When there is mistake induced by the fraud of one party, the contract can be avoided.

The issues actually framed of consent and propounded for decision are—

(1) Was the deed 294 of December 11, 1925, in favour of plaintiff's vendor executed pending a partition action in respect of the property conveyed ?
(2) If so, did the transfer by the plaintiff convey no title to the defendant ?
(3) If so, was the defendant entitled to stop payment of the cheque ?
(4) Was there a failure of consideration of the cheque ?
(5) Is it open to the defendant to raise the question of title in this case ?

These issues raise the question of mistake but not of fraud. I am not satisfied that if these issues are answered in defendant's favour he can be compelled to pay the purchase price. No case has been cited to us which goes so far.

Even if the defendant does not wish to stand by the issue of fraud raised in his answer, I think he ought to have an opportunity of proving that no consideration passed, that the vendor conveyed no title and was therefore not in a position to give vacant possession.

Payment by cheque is only conditional payment, and if the cheque is stopped before payment there is no payment of the price. The buyer has not performed his share of the contract, and the only question we are called upon to decide at present is whether delivery of a worthless deed constitutes such performance on the seller's part of the contract as to entitle him to call upon the buyer to perform his part.

In *Ratwatte v. Dullewe* [1] it was held by a Full Bench of this Court that apart from any express agreement a vendor of immovable property is bound to deliver vacant possession of the property sold to the vendee, and on his failure to do so the vendee is entitled to rescission of the sale and a refund of the purchase money.

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In the Full Bench case of *Jamis v. Suppa Umma* [1] the vendor had a partial interest, and the question at issue was whether the purchaser had a right to refuse to accept an offer of vacant possession.

The authorities cited in the judgment of *Jamis v. Suppa Umma* (*supra*) do not support the proposition that if the vendor cannot give vacant possession the purchaser is bound to pay the purchase price. On the contrary, it was there pointed out by Wood Renton A. C. J. that there was a primary obligation on the vendor to give the purchaser vacant possession and to warrant and defend the title after the purchaser has been placed in possession.

I would therefore set aside the judgment of the learned District Judge and return the case to the Court below in order that the defendant may have an opportunity of proving his averments. The appellant will have the costs of appeal and the costs of the argument in the Court below on this point. Remaining costs to be costs in the cause.

AKBAR J.—I agree.

Appeal allowed.