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

M. K. M. POTUHERA, Appellant, *and* D. B. UKKU MENIKA *et al.*, Respondents.

S. C. 269—D. C. Kurunegala, 6,193/M

Vendor and purchaser—Speculative purchase— Express warranty of title—Right of purchaser to claim damages.

Where a purchase of land was speculative and the purchaser knew that the title of the vendor might be defective—

Held, that the purchaser, when evicted, was not entitled to claim damages from the vendor even though the deed of sale contained an express warranty of title.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *D. S. Nethsinghe* and *P. Ranasinghe*, for Plaintiff-Appellant.

No appearance for Defendants-Respondents.

Cur. adv. vult.

December 5, 1955. BASNAYAKE, A.C.J.—

On deed No. 3088 of 6th December, 1942, attested by C. P. Senanayake, Notary Public (hereinafter referred to as P1), the plaintiff-appellant (hereinafter referred to as the appellant), purchased from the six defendants to this action (hereinafter referred to as the respondents) for a sum of one thousand rupees an undivided three-fourth share of all their rights in five different allotments forming one block of land of a total extent of about 50 acres or 5 pelas kurakkan sowing extent. The deed which is in Sinhalese contained the following warranty according to the translation produced by the appellant. The relevant clause in the original is also set out below :

"We the said vendors for ourselves, our heirs, executors, and administrators hereby further covenant to and agree with the said vendee, his heirs, executors, administrators and assigns to confirm this sale in all manner to warrant and defend this should any dispute arise against this and also to execute any deeds, assurances, etc., at the expense of the said vendee or his heirs, etc. if reasonably requested for the further confirmation of this sale in respect of the said Premises ".

" එම දේපළවත් ඉන් යම් කොටසක්වත් එහි එල ප්‍රයෝජනාදියක්වත් මෙම විකිණීමට විරුද්ධව අත්සනුවීමට හේතුවූ යම් කිසි ක්‍රියාවක් මීන් පෙර නොකළ බවද මෙයින් ප්‍රතිඥාව කරමින් මෙම විකිණීම සියලු ආකාරයෙන්ම සවිකර දෙන හැවියටද, මීට විරුද්ධව යම්කිසි වියවුලක් පැමිණියොත් එහිදී වග උත්තර කියා නිරවුල්කරදෙන හැවියටද, එකී දේපළ සම්බන්ධව මීට අදලවූ මෙය වඩා ස්ථිර වීමට හේතුවූ යම්කිසි ඔප්පු තිරප්පු ආදියක් ඉහතකී ගැනුම්කාර මහත්මයා විසින් හෝ උන්නැහේගේ උරුමක්කාරයින් විසින් ඔවුන්ගේ වියදමින් සාදවා දෙනලෙස

කරුණු සහිතව ඉල්ලා සිටියහොත් එබඳු ඔප්පු කිරීම්පු ආදිය සාදවා දෙන හැටියටද, ඉහතකි විකුණුම්කාර අපි අප වෙනුවට සහ අපේ උරුමක්කාර පොල්මඃකාර අද්මිනිස්ත්‍රාසිකාරයන් වෙනුවටත් එකී ගැනුම්කාර මහත්මියා සහ උන්නැහේගේ උරුමක්කාර පොල්මඃකාර අද්මිනිස්ත්‍රාසිකාර බලකාර ලැබුම්කාරයන් සමඟ මෙයින් වැඩිදුරටත් පොරොන්දුවී බැඳුනෙමු ".

On 30th March 1943, the appellant instituted a partition action in the District Court of Kurunegala on the ground that the common and undivided possession of the land was attended with inconvenience and that it was desirable and expedient that a partition thereof be effected under the Partition Ordinance. He claimed 3/4 of the land and assigned 1/4 to the six defendants named by him as parties to the action. The appellant valued the land at Rs. 2,500 for the purpose of the action. The extent to which the appellant was conversant with the details of the title he claimed is shown by the following paragraphs of the plaint (P2) which set out the devolution of title to the land :

" 2. Herath Mudiyanselage Mudalihami Korale to an undivided half share and Herath Mudiyanselage Mutu Menike and Dingiri Menika to the remaining half share in equal shares were the original absolute owners and proprietors and in possession of all that allotments of land called (here follows a description of the land).

" 3. Being so seized and possessed of an undivided half share thereof the said Mudalihamy Korale died intestate leaving him surviving as his only heirs-at-law children namely (1) Dingiri Banda and (2) Ukku Menika who succeeded to his estate, which including the said share of the said premises was administered.

" 4. Being so seized and possessed of an undivided quarter share thereof the said Mutu Menika died intestate leaving her surviving as her only heirs-at-law her four children namely (1) Kiri Banda Vidane (2) Punchi Banda (3) Appuhami and (4) Ukku Banda who succeeded to her estate which including the said share of the said premises was not liable to be administered.

" 5. Being so seized and possessed of three undivided quarter share thereof the said Dingiri Banda and Ukku Menika (referred to in paragraph 3 hereof) and Kiri Banda Vidane, Punchi Banda, Appuhamy and Ukku Banda in and by Deed of sale No. 3088 dated 6th day of December, 1942, sold the same to I. T. M. Kiri Mudiyanse Potuhera alias K. M. Potuhera, the plaintiff abovenamed who thereupon became entitled thereto and to the possession.

" 6. Being so seized and possessed of an undivided quarter share thereof the said Dingiri Menika died intestate leaving her surviving as her heir-at-law her child Mutu Menika who died leaving her surviving as her heirs-at-law her children, namely (1) Kalu Banda, (2) Ranmenika, (3) Dingiri Banda, (4) Wimalagnana Thero, (5) Kiri Menika and (6) Dingiri Menika, the defendants abovenamed who succeeded to her estate which including the said share of the said premises was not liable to be administered.

" 7. All the plantations have been made by the defendants ".

After interlocutory decree had been entered various claimants, about 38 in number, intervened and claimed the land for themselves to the exclusion of the appellant. After a trial in which the claims of the appellant, the defendants, and the intervenient-defendants were investigated, the appellant's action was dismissed on 8th December, 1949.

In the course of the proceedings of the partition action the appellant noticed the respondents to warrant and defend his title. They participated in the proceedings but did not succeed in establishing the title. The appellant did not appeal from the decree dismissing his claim in the partition action because he said he had no money. Neither did the respondents appeal. Upon the failure of the partition action, the appellant instituted the present action for breach of warranty against the respondents, claiming damages in a sum of Rs. 10,000 including the purchase price of Rs. 1,000. Their defence to the claim of damages was that the appellant purchased the land as a matter of speculation knowing that their title was defective, doubtful, and uncertain. They, however, admitted their liability to return the purchase price.

The appellant's position is that by questioning the respondents, his vendors, he satisfied himself that they had title to the land although they had no documents of title. These are his very words on this point:

> "Before I purchased this land I investigated the title, but I did not look for any deeds in the Land Registry. No documents were given to me by my vendors. I went to Katumuluwa and made inquiries from the vendors and satisfied myself that the vendors had title".

The version of the respondents was that the appellant himself came and informed them that they were entitled to the lands in question and offered to buy them, assuring them that they were entitled to these lands by paternal inheritance, despite their professing ignorance of that fact.

The learned District Judge has found that the appellant's purchase was speculative and that he purchased the lands knowing that the title of the respondents was defective. He gave the appellant judgment in a sum of Rs. 1,000 being the amount of the purchase price; but dismissed his claim for damages.

Learned Counsel for the appellant contended that the dismissal of the claim for damages is wrong. He submitted that the case of *Silva v. Silva* [1] does not hold that a speculative purchaser is not entitled to claim damages in a case where the vendors have given an express warranty as in this case. It is true that the judgments contain no reference to the nature of the deed in question and do not discuss the difference between an implied warranty and an express warranty. It is correct to say that ordinarily a vendor who fails to warrant and defend the purchaser's title is liable to refund the purchase price even if there is no express warranty of title in the deed of conveyance [2]; but generally speaking damages do not become payable by the vendor to an evicted purchaser in the case of a

[1] *22 N. L. R. 377.*

[2] *Voet Bk. XXI Tit. II s. 32 & s. 31; Censura Forensis, Bk. IV, Part I, Ch. XIX, para. 11.*

transaction made in good faith unless there is an express warranty in that behalf [1]. The general propositions I have stated apply to the sale of a thing such as a definite land or allotment and are subject to a number of exceptions which do not arise on the facts of this case.

This is a case of the sale of not so much of a thing as of some uncertain claim which the vendors had in the land. It is sale of some " doubtful and uncertain " right at the instance of the purchaser, who claimed to know the respondents ' rights thereto and which the vendors professed to be ignorant of. This class of uncertain and doubtful title is commonly known as village title and purchasers of such " title " know that they are purchasing something doubtful and uncertain for as a rule the documents that go to support it are unsatisfactory and of doubtful value. The plaint in the partition action bears out the claim of the respondents that it was the appellant who represented that they had a claim to the land by inheritance. That they honestly acted on such representation and executed the conveyance in favour of the appellant has been established. The learned Judge accepts the version of the respondents. In doing so he says—

> " The second defendant impressed me as an unsophisticated villager while the plaintiff obviously does not belong to the class of cultivators, though he calls himself a cultivator. "

Now both according to Voet [2] and Pothier [3] the vendor is not liable even to refund the purchase price in a case such as this, where he has only professed to sell an *incertum juris* (a doubtful right) acting in good faith, doubting indeed his own right, " but without the certain knowledge and consciousness that the thing was another's ". In such a case even an express warranty in the deed or instrument does not make the vendor liable in damages.

In the instant case there are two reasons why the appellant is not entitled to succeed. One is that the respondents only professed to sell an *incertum juris* acting in good faith doubting their own right but without the certain knowledge and consciousness that the thing was another's ; and the other is that it was the appellant who claimed to know the respondents' rights to what they sold. It may reasonably be inferred from his studied omission to ask for documents of title and his neglect to search the Land Registers that the defects which finally resulted in his eviction must have been known to the appellant. Those defects he did not make known to the vendors. In such a case he is not entitled to damages even when there is an express warranty.

The appeal is therefore dismissed.

WEERASOORIYA, J.—I agree.

Appeal dismissed.

[1] *Voet Bk. XXI Tit. II s. 31.* [2] *Voet Bk. XXI Tit. II s. 31.*
[3] *Pothier—Contract of Sale —s. 187 p. 116.*