

1942

Present : Hearne and Jayetileke JJ.

ZACHARIAN v. FERNANDO.

202—D. C. Kalutara, 22,075.

Compromise—Partition action—Agreement by defendant to sell his interests to plaintiff—Claim by plaintiff for covenant to warrant and defend title—Repudiation of compromise.

Where a partition action was settled on the terms that the defendant should transfer his interest in the land to the plaintiff and where the plaintiff asked the defendant to execute in his favour a deed of transfer containing a covenant to warrant and defend title,

Held, that the plaintiff was not entitled to ask for a covenant to warrant and defend title and that his refusal to accept a deed without such a covenant amounted to a repudiation of the compromise.

A PPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, K.C. (with him *U. A. Jayasundere* and *P. Malalgoda*), for second defendant, appellant.

N. Nadarajah, K.C. (with him *A. C. Nadarajah*), for plaintiff, respondent.

Cur. adv. vult.

July 31, 1942. JAYETILEKE J.—

The plaintiff instituted action No. 20,754 of the District Court of Kalutara against the first defendant and fifteen others for the partition of a land. The first defendant filed answer claiming a half share of the

land and certain other interests. On July 10, 1940, the action was settled on the following terms, which were entered on the record:—
“The first defendant consents to transfer all his interests to the plaintiff. Action withdrawn. It is dismissed without costs.”

This settlement is, in my opinion, a compromise as understood in law. According to *Voet*, transaction (compromise) is an agreement concerning a doubtful thing or an uncertain lawsuit; a non-gratuitous agreement, something being given, retained or promised (*Bk. 2, Ch. 15, Sec. 1*).

The parties are agreed that the true consideration for the compromise was a sum of Rs. 450 to be paid by the plaintiff to the first defendant on the execution of the transfer, though it was not mentioned to Court. The plaintiff verbally requested the first defendant to accept the sum of Rs. 450 and to execute in his favour a deed of transfer containing a covenant to warrant and defend the title. The first defendant was not willing to enter into the covenant suggested by the plaintiff. The plaintiff then decided to accept a deed of transfer without the warranty clause but changed his mind soon after and sent a telegram (D 1) to the first defendant's proctor, which reads:—“Cannot accept deed without conditions. Proceed action 20,754.”

A few days later, the plaintiff sent a letter of demand (P 3) to the first defendant calling upon him to execute a deed “according to the terms of agreement entered in case No. 20,754 D. C. Kalutara”. The first defendant sent a reply (P 4) to the telegram (D 1) and the letter of demand (P 3). in which he stated that he was obliged to accept another offer as the plaintiff had by his telegram (D 1) declined to purchase his interests. The plaintiff thereupon instituted the present action against the first and second defendants to enforce the compromise but did not ask that they should be ordered to enter into a covenant to warrant and defend the title.

The learned District Judge held that the second defendant had notice of the compromise and entered judgment against both defendants, ordering them to execute a transfer in favour of the plaintiff.

The questions which fall for decision in this appeal are whether the plaintiff was entitled to a covenant from the first defendant that he would warrant and defend the title and, if not, whether the refusal by him to accept a deed without that covenant constituted such a repudiation of the compromise as to constitute a breach.

Under the Roman-Dutch Law a vendor is under an obligation to warrant the purchaser against eviction. *Voet* says that responsibility for eviction finds scope in compromise where the possessor of the actual thing in dispute has transferred it to his opponent, having received something else for the compromise as if rather a sale than a compromise had taken place. (*Bk. 21, Ch. 2, Sec. 10*) (*Berwick's Translation, p. 506.*)

The warranty would ordinarily be implied unless it had been, in fact, expressed in the deed. There is a distinction between warranty express and implied and the liability of the vendor varies as there is a latent or patent defect in the thing sold.

VanLeeuwen says that if the purchaser knows from the beginning that the thing bought belonged to another or that another person has

some rights over it, the vendor is not even bound to restore the purchase price unless he has expressly stipulated that he would do so in case of eviction. (*Censura Forensis. Bk. IV., Ch. 19, Sec. 14.*)

In the absence of an express stipulation in the compromise, I do not think the plaintiff was entitled to insist on the first defendant entering into a covenant to warrant and defend the title.

By D 1 the plaintiff gave the first defendant clear and definite notice that he had abandoned his rights under the compromise and had decided to fall back upon his original position in action No. 20,754. The first defendant was, in my opinion, entitled to treat such notice as a breach of the compromise and to convey his interests to the second defendant.

I would set aside the judgment appealed from and dismiss the plaintiff's action with costs here and in the Court below.

HEARNE J.—I agree.

Appeal allowed.

