

1948

Present : Basnayake J.

CHELLIAH KURUKKAL, Appellant, and VENGADASALAM,
Respondent

S. C. 219—C. R. Point Pedro, 1,180

Vendor and purchaser—Claim by third party—Compromise with claimant by purchaser—Action against vendor for damages—Vendor need not pay.

A purchaser of land who effects a compromise with a claimant without going through with the trial has not been evicted by process of law and cannot claim damages from his vendor.

APPPEAL from a judgment of the Commissioner of Requests, Point Pedro.

H. W. Tambiah, for the defendant appellant.

P. Navaratnarajah, for the plaintiff respondent.

Cur. adv. vult.

April 20, 1948. BASNAYAKE J.—

The defendant-appellant (hereinafter referred to as the defendant) sold to the plaintiff-respondent (hereinafter referred to as the plaintiff) by deed No. 18985 dated November 13, 1943, for a sum of one thousand

¹ See *Kinkar Wasudeo Joshi v. Registrar, Co-operative Societies, Bombay-Poona A. I. R. Bombay (1946) p. 346.*

² (1948) 49 N. L. R. 405.

³ (1947) 48 N. L. R. 113.

rupees three lands described in the schedule thereto. Before he purchased them the plaintiff, who is a resident of the locality in which they are situated, knew that they had been mortgaged to the defendant who purchased them at the sale in execution of a mortgage decree in his favour. In fact, the plaintiff had shares in two of them, the first and the third in the schedule, and was acquainted with their history for about ten years. The conveyance in favour of the plaintiff was in the following terms :—

“ Know all men by these Presents that I, Ulagakurunathakurukkal Chelliah Kurukkal of Kerudavil for and in consideration of the sum of Rupees One thousand paid by Veluppillai Vengadasalam of Thanakkarakurichchy and received by me, do hereby sell, transfer and convey unto the said Vengadasalam the properties described in the schedule hereunder.

“ The properties described in the schedule hereunder belong by virtue of transfer deed in my favour bearing No. 319 dated September 25, 1942, and attested by K. Ramalingam, Notary, and by possession. I deliver herewith the said deed.”

In consequence of the disturbance of his possession of the three lands by the persons named Ponnammah, Seethevan, Wallipillai and Thampar Kathiravelu, on July 4, 1944, the plaintiff instituted D. C., Jaffna, Case No. 2155/P against them in which he asked—

- (a) that the lands be declared his property,
- (b) that the defendants be ejected therefrom,
- (c) that he be placed in possession,
- (d) that the first three defendants be adjudged and decreed to pay him Rs. 25 as damages and continuing damages at Rs. 5 per mensem till possession is restored to him.

On September 21, 1945, the date fixed for the trial of the case, counsel for the first and second defendants in moving for a postponement on the ground that he was not ready stated that a proposal to settle the case had fallen through only the previous day. A postponement was granted on payment of the day's costs and the trial was fixed for January 25, 1946.

On January 10, 1946, nearly eighteen months after the institution of the action, the proctor for the plaintiff moved that notice be issued on his vendor to warrant and defend his title. On January 12, 1946, notice was issued on the defendant requiring him to appear on January 19, 1946, and to warrant and defend his title, and on January 19, 1946, the case was called but the defendant was absent, although the notice had been served. For some reason which does not appear on the record the case was called on January 21, 1946, and was settled. On that day the plaintiff and the four defendants were present in person, but only the plaintiff and the first and second defendants were represented by counsel. The terms as recorded by the learned District Judge read :—

“ Of consent. Enter judgment for plaintiff declaring entitled to share of 1st land, 3/64 share of the 2nd land and $\frac{1}{2}$ share of the 3rd land with damages fixed at Rs. 100 ; no costs.”

The plaintiff thereafter on April 10, 1946, instituted the present action against the defendant claiming a sum of three hundred rupees as damages suffered by him in consequence of the defendant's failure to warrant and defend his title to two of the lands. The case went to trial on the following issues :—

- (1) Has plaintiff suffered eviction in respect of the shares mentioned in paragraph 5 of the plaint in Case No. 2155/P, D. C., Jaffna ?
- (2) What damages if any has plaintiff sustained ?
- (3) Was plaintiff aware of the defect in the defendant's title to the land conveyed to him ?
- (4) If so, can plaintiff maintain this action ?

Except for the plaintiff's evidence no oral testimony was offered by either side. The learned Commissioner gave judgment for the plaintiff with costs. The present appeal is from that order.

The following points emerge from the facts I have stated above :—

- (a) the compromise appears to have been discussed and arranged even before the purchaser noticed the vendor.
- (b) the vendor was noticed at a very late stage in the proceedings even after the first trial date and nearly eighteen months after the commencement of the case.
- (c) the vendor did not appear to defend.
- (d) there is nothing to show that the purchaser's action was one that could not be maintained or was so hopeless that no useful purpose would be served by going on with the trial.
- (e) the purchaser was a co-owner of two of the lands purchased by him.
- (f) the purchaser was a resident of the locality and knew the history of the lands for about ten years prior to his purchase.

The real question that arises for decision is whether the purchaser is prevented from recovering damages from the vendor by reason of the fact that he effected a compromise with the claimants without going through with the trial.

I shall now proceed to discuss the law applicable to that question first by reference to the opinions of the Roman Dutch jurists such as Voet and Huber. Then I shall discuss some of the decisions of this Court which are relevant to this topic.

Voet says¹ :—

“ Also [these actions fail] when the purchaser, before being condemned has voluntarily given up the thing to the plaintiff, or has compromised with him, or agreed to arbitration, or has submitted to the jurisdiction of an incompetent judge, or has referred the dispute to his adversary's oath, and has thus lost the thing by the ruling of an incompetent judge

¹ 21.2.30 *Berwick's Translation*, p. 536.

or arbitrator. Also when the purchaser has not appealed when defeated in the suit, the vendor being absent ; or has appealed indeed, but has abandoned the appeal ; contrary to what obtains if the vendor had been present, for in that case the duty of appealing lies on him if he thinks that this step should be taken. ”

On the very same point Huber says ¹ :—

“ 70. Similarly the buyer has no claim for eviction if he has deliberately or negligently allowed himself to be overcome, or if he has referred the matter to arbitration (*goede mannen*) and has been condemned by them ; for he was not entitled to refer the matter to the prejudice of the seller, but ought to have abided the ordinary course of law.”

The fact that the vendor was noticed to warrant and defend his title only at a very late stage in the proceedings does not affect the purchaser's right to receive damages for eviction, for it is sufficient if notice is given even before decree. [Voet 21. 2. 23.] But it is advisable that the purchaser should notice his vendor at the earliest point of time, for in certain circumstances delay to notice him may prejudice the vendor in his defence and may afford him a ground of complaint. The purchaser's knowledge of the history of the land, or the fact that he owned a share in the land, so far as the evidence goes does not affect his right to bring an action founded on eviction because there is nothing to show that he was aware of any defect in the vendor's title, or that Ponnammah or any other person had a right over it. A purchaser's right to bring an action founded on eviction ceases only when he was aware that the property was that of a third party, or that another had a right over it ; unless he had stipulated that in case of eviction he should be allowed to have his recourse against the seller ².

The above citations from Voet and Huber establish that a purchaser who has compromised with the claimant is not entitled to succeed in an action founded on eviction. The purchaser in this case settled the present action without going to trial and even before the date fixed for the trial of the action. There is nothing to show that this course was taken because his suit was so hopeless that it could not be maintained. On the other hand, even fourteen months after the action had been filed, the first and second defendants were not ready for their defence and were condemned to pay the day's costs. They were represented by counsel and if their defence was one that was irresistible there seems to be no necessity to gain further time. A noteworthy feature of the compromise is that it was first mentioned to court not by the purchaser's pleader but by counsel for the first and second defendants in that case. This is not by any means an indication of the strength of the defence against the purchaser's action and I think it is even permissible to regard it as an indication of weakness of the defence. There is also the circumstance that it was after the talks for a settlement had commenced that the

¹ Huber's "Jurisprudence of My Time", Vol. I., Sec. 70, p. 425.

² Huber's "Jurisprudence of My Time", Vol. I., Sec. 67, p. 425.

purchaser moved for notice on the vendor. In this connection I wish to quote the words of De Sampayo J. in the case of *Jinadasa v. Duraya*¹ wherein he says :

“ Whether or not the vendor in pursuance of the notice comes in and defends the title, the purchaser is bound to make a proper defence himself, and do his best in the case. A corollary of this rule is the further condition that the purchaser should not so conduct the case as to make it useless or impossible for the vendor to intervene and defend his title. ”

It appears from the following passage of *Van Leeuwen*² that it is not open to a purchaser to concede a claim lightly if he means to bring an action on the ground of eviction against the vendor :—

“ except where the right of the claimant clearly appears, and that the vendor had no right to the thing sold and the purchaser takes it upon himself to prove this, in which case the vendor will likewise without any previous notice be obliged to make compensation. ”

In view of these considerations the purchaser is not entitled to succeed in his action, because he has not been evicted by process of law. He has willingly lost the shares he has conceded in the lands and cannot at the same time complain that he has been evicted. There is no legal obligation on the vendor in these circumstances to pay the plaintiff's claim. The case of *Kandiah v. Visuvalingam*³ can be distinguished from this case. There the vendor was made a party to the proceedings in which the purchaser was asserting his title. When he did not appear he was summoned as a witness on payment of his expenses which he actually received. He was present on the first day of trial and the case having been adjourned for a further date he failed to appear. When the purchaser, after all his efforts, failed to get the vendor to assist him he intimated to court that he could not proceed in the absence of the vendor.

The case of *Menika v. Adakappa Chetty*⁴ also deals with a different set of facts. At the first trial of that case the vendor did not appear though noticed. The case went up in appeal and came back for re-trial. At that stage the purchaser found that his case had no chance of success and confined his claim to compensation for improvements. Pereira, J. held that the purchaser's conduct did not amount to a compromise but that it was a limitation of the contest to certain points only when the others were found to be untenable.

The appeal is allowed with costs and the judgment of the learned Commissioner is set aside. The plaintiff's action is dismissed with costs.

Appeal allowed.

¹ (1918) 20 N. L. R. 158 at 159-160.

² *Van Leeuwen's Roman Dutch Law, Kotze's Translation, 2nd Edn., Vol. II., p. 139, Sec. 3.*

³ (1935) 15 Ceylon Law Recorder 25.

⁴ (1913) 17 N. L. R. 93.