

1944

*Present: Howard C.J. and Wijeyewardene J.*RATNAYAKE, Appellant, and ASIYATH UMMA *et al.*, Respondents.77 & 78—*D. C. Matara, 15,167.*

Sale—Purchase of several lands under one conveyance—Failure to give vacant possession of two lands—Claim for rescission of sale of those two lands—Roman-Dutch law.

Plaintiff sold five allotments of land to the defendant by deed wherein she acknowledged receipt of the entire consideration. The evidence showed that the sale of the second and third lands was not dependent on the sale of the remaining lands and that an amount representing the purchase price of the second and third lands was retained in the hands of the vendee until the title to those is "cleared and peaceful possession delivered over".

Held, that it was open to the defendant to claim a rescission of the sale of the second and third lands alone on the ground that he had not been given vacant possession.

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

N. E. Weerasooriya, K.C. (with him *C. J. Ranatunga*), for defendant, appellant in No. 77, and defendant, respondent in No. 78.

H. V. Perera, K.C. (with him *W. W. Mutturajah*), for plaintiffs, respondents in No. 77, and plaintiffs, appellants in No. 78.

Cur. adv. vult.

October 9, 1944. WIJEYWARDENE J.—

The first plaintiff (wife of the second plaintiff) sold five allotments of land for Rs. 12,500 to the defendant by deed D 3 of 1942 wherein she acknowledged receipt of the entire consideration.

The plaintiffs instituted this action stating that the first plaintiff was paid only Rs. 8,300 and that a sum of Rs. 4,200 was due to her.

The defendant pleaded that Rs. 8,300 paid by him to the first plaintiff represented the purchase price of the first, fourth and fifth allotments and that it was agreed that the balance Rs. 4,200 was to be paid to the first plaintiff on the defendant being given vacant possession of the second and third allotments mentioned in the deed. The defendant pleaded further that the first plaintiff had failed to give him vacant possession of these two lots.

I see no reason to disturb the finding of the District Judge that the first plaintiff has not given vacant possession of the second and third lands.

The questions that arise for determination are—

- (1) Whether the defendant could claim a rescission of the sale only in respect of second and third lands or he should claim rescission of the sale of all the lots as argued by the plaintiffs?
- (2) What sum could be claimed by the defendant in respect of the rescission of sale?

The facts of the case relevant to these questions are briefly as follows:—

The five allotments of land were under mortgage to a third party at the time of the sale. The mortgage debt amounted to about Rs. 9,000. The defendant was willing to give only Rs. 8,300 out of the consideration and wanted to retain in his hands the balance Rs. 4,200 until he was given vacant possession of the second and third lands. Though the first plaintiff wanted Rs. 9,000 to pay off the mortgage, the defendant was not prepared to advance to him an additional Rs. 700 out of the sum of Rs. 4,200 which he was going to keep in his hands on account of the second and third lands. He, however, accommodated the defendant by lending Rs. 700 on a promissory note carrying interest. The notary who attested the deed D 3 stated in the attestation clause "at the instance of both the parties" that "the balance amount (Rs. 4,200) was retained by the vendee for payment when the title to the second and third-named lands is cleared and peaceful possession delivered over". The total extent of all the allotments is about thirty-one acres and the consideration Rs. 12,500 was reached on an average assessment of Rs. 400 an acre. On that basis of assessment, the purchase price of the second and third lands would amount to Rs. 4,200 approximately. These facts coupled with the evidence led by the defence show that the sale of the first, fourth and fifth lands was not dependent on the sale of the second and third lands though all the lands were dealt with in one instrument. It is, therefore, open to the defendant to claim a rescission of the sale of the second and third lands alone on the ground that he had not been given vacant possession. I think, moreover, that we should adopt in this case the principle underlying the opinion expressed by Voet that "if a number of things have been sold together for one (lump) price, the obligation for eviction is multiplied according to the number of the things, and as many actions are given as there are things evicted which were included in the single sale," (*Voet 21.2.35 Berwick's Translation*).

As regards the second question I am of opinion that the defendant is entitled to retain in his hands the sum of Rs. 4,200. The evidence referred to by me leads me to the conclusion that this amount was fixed as the price for the two lands in question. Different opinions have been expressed by the Roman-Dutch law authorities on the question whether a purchaser who is judicially evicted from a land is entitled to recover only the value of the land at the time of the eviction if such value is less than the purchase price. (*See (1939) Norman on Purchase and Sale in South Africa (second edition) page 314.*) The view favourable to the

first plaintiff is that " the compensation payable diminishes if the *res vendita* has fallen in value in the purchaser's hands ". The plaintiff, however, led no evidence on that point.

I would allow appeal No. 77 and enter decree—

- (a) directing the defendant to execute a conveyance reconveying to the first plaintiff the right, title, and interest in the second and third lands conveyed to him by the first plaintiff by deed D 3.
- (b) granting the defendant costs in the District Court and in appeal No. 77 as against the plaintiffs.

I dismiss appeal No. 78 but I make no order as to costs of that appeal.

HOWARD C.J.—I agree.

*Appeal No. 77 allowed.
Appeal No. 78 dismissed.*

