Present: Wood Renton C.J. and Shaw J.

1915.

SIRIATTU *v.* RAN MENIKA.

102—D. C. Kurunegala, 5,342.

Vendor and purchaser—Land sold free from encumbrances—Purchaser unable to obtain possession owing to existence of a usufructuary mortgage—Rescission of sale.

Defendants sold to plaintiffs a land, covenanting that it was free from all encumbrances; but in point of fact it was subject to a usufructuary mortgage, and the plaintiffs were unable to obtain physical possession.

Held (over-ruling the objection that the existence of such an encumbrance was not a defect in the thing sold, and constituted no ground for the rescission of the sale, but merely entitled the purchaser, on paying off the mortgage, to recover the amount and incidental expenses as compensation from his vendor), that the plaintiffs were entitled to a rescission of the sale.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the defendants, appellants.

No appearance for the plaintiffs, respondents.

Cur. adv. vult.

June 7, 1915. WOOD RENTON C.J.—

This case raises an interesting point of law. The defendants sold to the plaintiffs the field described in the plaint for a sum of Rs. 800, covenanting in their deed of agreement that the property was free from all encumbrances. It was, in point of fact, subject to a usufructuary mortgage, and the plaintiffs were unable to obtain physical possession of the lands. They bring this action, claiming in the alternative that vacant possession should be given to them, or that the purchase money should be returned and damages paid. The learned District Judge, after hearing evidence on both sides, has given the plaintiffs judgment in terms of the prayer in their plaint. The defendants appeal.

The District Judge has not entered into a question which was raised by the issues as to whether or not the plaintiffs were aware of the existence of the mortgage. He says that it does not matter whether they were so or not, in view of the express covenant for freedom from encumbrances. The defendants' counsel contended that under the Roman-Dutch law the existence of such an encumbrance as we have here to do with is not a defect in the thing sold, and constitutes no ground for the rescission of a sale, but merely entitled the purchaser, on paying off the mortgage, to recover the amount, and incidental expenses, as compensation from his vendors.

1915.

WOOD RENTON C.J.

Siriattu v. Ran Menika

(See *3 Maasdorp 161*, *Berwick's Voet 523*, and *Grotius 3, 5, 15*.) It is, in my opinion, unnecessary to consider in the present case the question whether this is the law of Ceylon in cases in which a deed of transfer is silent as to encumbrances, for I do not think that the passages on which the defendants' counsel relies have any application where a deed of sale contains an express covenant for freedom from encumbrances, and where the encumbrance that in fact exists is one that makes it impossible for the vendor to give to his purchaser vacant possession of the land in the sense in which that term has been defined in *Ratwatte v. Dullewe* [1] and similar decisions. I would dismiss the appeal, with costs.

SHAW J.—

The plaintiffs in this case, by deed No. 35,435 dated September 24, 1913, purchased from the defendants a field called Timbirigasmulla for the sum of Rs. 800. The deed contained a certificate by the vendors that the property sold was not subject to any mortgage security, and was free from all encumbrances. In fact it appears that the land is subject to a usufructuary mortgage for Rs. 150, and is in the possession of the mortgagee.

The plaintiffs have brought this action, claiming that the defendants may be ordered to give them quiet possession of the field, and damages, or, alternatively, that the defendants may be ordered to return the purchase money and pay damages.

The District Judge has ordered the defendants to give possession to the plaintiffs and to pay Rs. 200 damages, and in default of giving possession to repay the purchase money and pay Rs. 200 damages, and from this decision the present appeal is brought.

It is clear from the petition of appeal and from the evidence of the second defendant that the defendants' contention has been throughout that the plaintiffs should pay the Rs. 150 due on the mortgage out of their own pockets, in addition to the Rs. 800 already paid by them to the vendors.

In view of the terms of the deed this is obviously a dishonest contention, and one that cannot be supported; indeed, counsel for the appellants did not attempt to support it on the hearing of the appeal. It was contended, however, that the plaintiffs have mistaken their remedy, and that their proper course was for themselves to pay off the mortgage and to claim a return of the amount from the defendants, and various extracts from writers on Roman-Dutch law were cited to us with the object of showing that where land is sold, even with a covenant against encumbrances, and a servitude is found to exist, it does not give to the purchaser a right of rescission of the contract, but a right of damages only.

There appears to me to be no doubt that under the Roman-Dutch law a vendor is bound to make full and free delivery of the thing

[1] *(1907) 10 N. L. R. 304.*

sold (*Van Leeuwen 4, 19, 1; Voet 19, 1, 10; Maasdorp 152*), and in order to do this he is bound not merely to transfer to the purchaser the *dominium*, but to put him in actual possession (*Ratwatte v. Dullewe* [1]). It is true that according to some of the Dutch writers (*Van Leeuwen 4, 19, 5; Voet 19, 1, 6*) a purchaser is not entitled to cancel the sale when land has been sold without any mention of a servitude or other encumbrance upon it, and such a servitude or encumbrance is in fact found to exist, but this view of the law has not been accepted by the Courts in British Guiana (*see 21 S. A. L. 1*), and it does not seem to me that these expressions of opinion can be intended to conflict with the clear law that full and free possession must be given, and do not apply to such a servitude as a usufructuary mortgage, but must be restricted to such servitudes as rights of way, &c., which do not interfere with the actual possession of the property sold.

In the present case the appellants have failed to give possession of the property sold by them; the judgment appealed from is, in my opinion, therefore, correct, and I would dismiss the appeal, with costs.

Appeal dismissed.