

1952

Present : Rose C.J. and Gratiaen J.

K. H. L. M. L. LATIFA UMMA, Appellant, and K. O. A. JEMALDEEN,
Respondent

S. C. 267—D. C. Kegalle, 5,911

Sale of immovable property—Covenant to warrant and defend title—Eviction by judicial process—Failure of vendee to give vendor notice of the legal proceedings—Action by vendee for recovery of purchase price—Claim that vendor had no shadow of title—Standard of proof required.

Certain immovable property was sold with a covenant to warrant and defend title. The vendee, who was subsequently evicted by judicial process by a third party, sought to recover the purchase price from the vendor. He conceded that he had failed to give notice to the vendor of the legal proceedings which resulted in the eviction, but contended that his vendor had no shadow of title to the property conveyed and that therefore it would have been superfluous to have noticed him of the proceedings.

Held, that, in order to establish that the vendor had no shadow of title to the property conveyed, a very high standard of proof was required. It was not sufficient merely to adduce a situation from which it might be suspected or inferred that the vendor's title was unsound.

APPPEAL from a judgment of the District Court, Kegalle.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *M. I. M. Haniffa* and *C. R. Gunaratne*, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1952. ROSE C.J.—

In this matter the appellant by deed P1 dated 8th May, 1946, purported to sell certain lands to the respondent. It is common ground between the parties that vacant possession was given to the respondent. In due

course an action was brought against the respondent by a third party who claimed to be the true owner. It appears that the respondent, without notifying the appellant of his predicament, agreed to judgment being entered against him and thereafter gave up possession of the land to the claimant. He now seeks to recover his purchase money from the appellant on the ground of total failure of consideration.

There is some evidence on the record which would seem to indicate that oral notice of an informal nature was in fact given to the appellant of the case referred to. Counsel for the respondent, however, stated in the District Court that he was not basing any claim on a failure to warrant and defend title, and the learned District Judge in his judgment does not advert to the matter. That being so the appeal was argued before us upon the basis that no notice in fact was given.

The appellant's position is that to enable a purchaser to maintain an action of this kind it is necessary that he should have given notice to the vendor of the legal proceedings which resulted in the eviction; and that in the absence of such notice a vendor is entitled to ask for the purchaser's action to be dismissed. The respondent, on the other hand, contends that he has satisfied the exception which is referred to in *Fernando v. Jayawardena*¹, in that he has shown that his vendor had no shadow of a title to the property, and that therefore it would have been superfluous to have noticed him of the proceedings.

It is true that there is some evidence on the record which tends to show that the appellant's title to the land conveyed in P1 is not sound. In particular exhibit P9 indicates that in the District Court of Kegalle, there were administration proceedings in regard to the intestate estate of Ena Lebbe, the grandfather of the appellant, in which an inventory of lands was filed, including the lands in suit purported to be sold by P1. The parties to this application were the heirs of Lebbe, and for that reason did not include the appellant who according to Muslim Law had no claim to be regarded as an heir. It is evident from the record, however, that at one stage the appellant intervened to file objections by a certain date. In the event no such objections were filed and presumably the appellant took no further part in the proceedings, about which no further information is available in the record of the present case.

While I have some sympathy for the respondent, I consider that he has fallen short of proving that his vendor had "no shadow of a title" to the property conveyed. It seems that in order to bring a party within the benefits of the exception referred to in the above case, a very high standard of proof is required and that it is not sufficient merely to adduce a situation from which it might be suspected or inferred that the vendor's title was unsound.

For these reasons I am of the opinion that the appeal should be allowed with costs here and below and the plaintiff's action dismissed.

GRATIAEN J.—I agree.

Appeal allowed.

¹ (1896) 2 N. L. R. 309.