Present: Bertram C.J. and De Sampayo J.

1920.

FERNANDO *et al. v.* SUMANGALA TERUNNANSE *et al.*

278–279—D. C. Colombo, 52,026.

Sale ad quantitatem—*Sale* ad corpus—*Sale stating that land contained 30 acres—Reference to plan and boundaries.*

Where a sale is made *ad quantitatem* and not *ad corpus*, compensation must be paid for any deficiency.

Where there is a mention of the quantity sold, but at the same time boundaries are pointed out, it should ordinarily be deemed to be a sale *ad corpus*; if there is considerable deficiency such as to suggest that there has been a mistake in the pointing out of the boundaries, then compensation must be paid.

THE facts are set out in the judgment of the District Judge (P. E. Pieris, Esq.) :—

By P 1 of April 12, 1918, the second defendant undertook to sell to the first plaintiff an undivided half of Viharewatta at Koratota. The extent of the entire land is given in P 1 as about 57 acres, and from this an extent of 5 acres was to be excluded. The vendor undertook to have a survey made within a month, and the vendee undertook to pay Rs. 150 an acre for the land. The second defendant duly produced a plan marked P 3 made by a surveyor, Mr. Frida. This gave the land to be sold as of 30 acres and 20 perches. On July 18 second defendant and the first defendant, the owner of the other half, executed the transfer P 2 in favour of the plaintiffs. In the transfer the plan P 3 is referred to, and the consideration was calculated on the acreage shown

[1] *(1915) 18 N. L. R. 464.*

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there. The plaintiffs thereupon had the land cleared and prepared for rubber planting, when their superintendent discovered from the number of rubber holes dug that the land could not be of the extent described in P 3. A fresh survey was thereupon made by Mr. Senaratne. At the time when he went to the land, the entirety of what had been sold was cleared. He was accompanied on the land by the second defendant, who lives on the reserved portion of the land. The second defendant stated that what he sold was what had been cleared. Of course, the second defendant denies all this, and I consider his denial to be false. Mr. Senaratne found that the correct extent of the land sold was 17 acres and 23 perches only. He found that Frida's plan took in on the north-west about 4 acres from the villager's lands and about 8 acres on the east from the land of the late Hon. Mr. James de Alwis. The boundaries of this latter land were worked by a drain, a dam, and rock marks. There were the pickets of an older survey, which has been made by order of this Court for the partition of Mr. de Alwis's land. He could find no trace of any survey along the north-west and eastern boundaries along the lines shown in Frida's plan. Frida himself was not called by the second defendant. It is very probable that Frida made no survey at all, but merely enlarged a lot which seems to appear in a Crown village plan D 1. The failure to call Frida has cast an unpleasant odour of fraud round the actions of the second defendant. It may well be that he was not called merely in his (Frida's) own interests. This much is clear. The second defendant made it out that the land he was selling was nearly 30 acres, he was to be paid by the acre, and when the land is cleared it is found to be about 17 acres. There is no doubt whatever that the second defendant admitted that what was cleared fully represented what he sold, and that the properties of Mr. de Alwis's estate and of the villagers had been taken into Frida's plan to make up the 30 acres. There is evidence, which I accept, that the second defendant actually saw the eastern boundary of his land being demarcated for the purpose of the partition survey.

There can be no question that the second defendant must refund the excess he has paid. As to the first defendant, the case is different. There is nothing to show what exactly was the agreement entered into with him. There is nothing to show that he did not sell the land in the lump for a fixed figure. It is clear that no one had a precise idea as to the acreage. The earliest deed where the acreage of the land is given is in the first defendant's transfer to himself and to the second defendant in his capacity of executor to Sobitha Unnanse. That deed is D 5 of 1915, and the extent seems to have been given at a guess. The first defendant is not friendly with the second. There is no reason to suspect fraud on his part. It is not even as if he were the party who was anxious to bring about the sale. It is evident he was only induced to sell by the persuasion of plaintiff's messengers. I see no reason for holding him in any way liable.

No doubt, it is the fact that the plaintiffs are in possession of the 8-acre lot on the east. But that is under an agreement of sale entered into with the owners of Mr. de Alwis's land.

The second defendant must refund to the plaintiffs one-half of the excess which has been paid, namely, Rs. 973·50. He must also pay them a further sum of Rs. 100, being damages incurred by them in clearing the land through over-payment consequent on the misrepresentation

of the second defendant. He will further pay interest at 9 per cent. per annum from the date of the institution of this action till payment in full, as well as the plaintiffs' costs.

On the other hand, the plaintiffs' action as against the first defendant is dismissed, with costs.

A. St. V. Jayawardene, for the appellant in No. 278.

Samarawickreme, for the second defendant, appellant, in No. 279.

H. J. C. Pereira, for the respondent in No. 278.

F. M. de Saram, for the respondent in No. 279.

February 12, 1920. BERTRAM C.J.—

This is a case in which two co-owners by a common deed sold a certain piece of land stating that it contained 30 acres, and defining its boundaries partly by reference to lands of adjoining properties and partly by a plan. In the case of the second defendant that deed was preceded by a notarial agreement, in which the acreage was stated at an even larger figure, namely, 37 acres, and the price was fixed at so much per acre, and in which it was further stipulated that a plan should be prepared. The plan prepared did, in fact, include an extent of 30 acres, but this extent was arrived at by including land which was not the property of the defendants. The question whether the land so included was the property of the defendants was not fought out at the trial as specifically or fully as it might have been. But I think that the learned District Judge had every justification for finding, as he does, on this point, more particularly in view of the fact that the surveyor who made the plan was never called by either of the defendants. What, then, is the position ?

The learned District Judge draws a distinction between the first and the second defendant. The second defendant actively and positively represented that the extent of the land was 30 acres. There was no such representation made by the first defendant, except in the deed itself. The learned District Judge, therefore, thought himself justified in entering up judgment against the second defendant, but not against the first defendant.

In this Court Mr. Jayawardene has challenged the distinction made by the District Judge by a reference to paragraph 7 of Book XVIII., Title 1, of Voet, where the principles of this question are very clearly explained, and where it appears that, if a sale is made *ad quantitatem* and not *ad corpus*, compensation must be paid for any deficiency. Voet there clearly explains what is meant by a sale *ad quantitatem* and what by a sale *ad corpus*. He specifies three cases in which a sale may be considered a sale *ad corpus*, even though there are words of quantity in the agreement. One of these cases is the case in which there is a mention of the quantity sold, but at the same time the boundaries are pointed out. Such a case

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would ordinarily be considered a sale *ad corpus*, but he proceeds to add that, if there is considerable deficiency such as to suggest that there has been a mistake in the pointing out of the boundaries, then compensation must be paid.

Now, it appears to me that this case is precisely the case thus indicated by Voet. There is such a substantial discrepancy as to suggest a mistake in pointing out the boundaries, and what is more, it is proved, in fact, that such a mistake has been made.

Mr. Pereira suggested that the passage relied upon by Mr. Jayawardene had no reference to a case in which the *corpus* was agreed between the parties, and, indeed, that all these passages only applied to cases in which the quantity has been wrongly computed, I do not think that this is a correct contention in view of this specific case discussed by Voet, viz., the case in which there has been a mistake in the indication of the boundaries. There thus appears to be specific authority entitling the plaintiff to succeed against both defendants.

Mr. Pereira has pressed upon us the further consideration that we must look at the substance of the matter, and that, so far as the first defendant was concerned, in his mind it was simply a sale of his interest in the particular property, and that his mind was never addressed to the acreage of that property at all.

I think, however, that, when a man has executed a deed setting out the terms of a transfer, we must look at that deed to find out what was the nature of the transfer, and that is the only basis on which Voet's principles can be applied.

Mr. Samarawickreme, who appears in a cross-appeal on behalf of the second defendant, challenges altogether the position assumed by the learned District Judge, and says that the whole action has been wrongly conceived; that if, in fact, the deed did include strips of land which did not belong to the vendors, the proper course for the purchasers would be to resist the claim on the part of the persons claiming to be entitled to those strips, and, if they were ejected, to come upon their vendors under their warranty to defend title. That no doubt is technically correct. But I think it is too late to assume this position in this Court. The issue framed in the Court below contained no such contention, and the parties having gone to trial on the basis of these issues, I think it is too late to take up the technically correct attitude in this Court.

In the circumstances, I am of opinion that the appeal of the plaintiff as against the first defendant must succeed with costs, and that the appeal of the second defendant must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal No. 278 allowed.

Appeal No. 279 dismissed.