

KULARATNE
v
SAMARAWICKREMA AND ANOTHER

COURT OF APPEAL
AMARATUNGA, J.
CALA 35/2000
D.C. COLOMBO L/19507
MARCH 5, 2003

Civil Procedure Code, section 18 – Addition of a party – Vendor undertaking to warrant and defend title – Express covenant – Is there a necessity to give notice through court? – Duty to warrant against eviction by superior title.

The plaintiff-respondent filed action seeking declaration of title and an order to place him in peaceful and undisturbed possession. The defendant-petitioner denied the claim of the plaintiff, and made an application to add his vendor under section 18 as a party to the action. He did not object, but the plaintiff objected. The trial court held with the plaintiff.

Held:

1. It is not an implied condition in the contract of sale that a vendor should make a good title, but he must give vacant possession to the purchaser.

2. If he fails to do so, if after delivery the purchaser is evicted by superior title the vendor is liable in damages.
3. The duty is to warrant against eviction by superior title.

Per Amaratunga, J.

"When there is an express covenant in a deed to warrant and defend title and if the purchaser is sued by another party claiming title, the purchaser should give notice of the action to his vendor to enable him to perform his obligation to defend the purchaser's title. There is no necessity to give notice through court.

4. It is desirable therefore that no impediment unless it is absolutely necessary should be allowed to stand in the way of his intervening.

Per Amaratunga, J.

"When a relevant case is cited to a judge, it is his duty to carefully consider it and decide whether the law laid down in that case is applicable to the case before him; if he decides that, that case has no application to the case before him, an appellate court would like to see his reasons on record, unless it is obvious that the case has no relevance to the case at all."

APPLICATION for leave to appeal with leave being granted.

Cases referred to:

1. *Weerawardhana v Ratnaike* (1922) 22 NLR 219
2. *Silva v Daniel Ram* (1872-1876) 62
3. *Suse Appu v Attapatu Kankanama* 5 SCC 213, 22 NLR 221
4. *Menika v Adacappa Chetti* (1915) 17 NLR 93
5. *Jinadasa v Duraya* (1918) 20 NLR 158
6. *Arumugam Coomaraswamy v Andiris Appuhamy* (1985) 2 SriLR 219
7. *Perera v Lokuge* (2000) BLR 8 (SC)

Rohan Sahabandu for defendant-petitioner

Asoka Gunasekera for respondent-respondent

Plaintiff-respondent - respondent absent and unrepresented

October 31, 2003

AMARATUNGA, J.

This is an appeal with leave granted by this court. The plaintiff-respondent (hereinafter called the plaintiff) filed action in the District Court of Kandy against the defendant-petitioner (hereinafter called the defendant) seeking declaration of title to the land described in the second schedule to the plaint and for an order to place the plaintiff in peaceful and undisputed possession of the said land. In his plaint the plaintiff has set out the source of his title to that land. 01

The defendant filed answer denying the claim of the plaintiff and set out his title which was distinct and different from the title pleaded by the plaintiff. According to the answer of the defendant, his immediate predecessor in title was L.R. Senaratna (the respondent-respondent who will hereafter be referred to as the respondent) from whom he purchased this property, by deed No. 38509 dated 29/11/1996, for valuable consideration. By the said deed the respondent has undertaken to warrant and defend the title conveyed by him to the defendant. 10

It is not an implied condition in the contract of sale that a vendor should make a good title. But he must give vacant possession to the purchaser. If he fails to do so, if after delivery the purchaser is evicted by superior title the vendor is liable in damages. R.W. Lee -*An Introduction to Roman Dutch Law* 1953 5th Edition p. 294. The duty is to warrant against eviction by superior title. When there is an express covenant in a deed to warrant and defend title and if the purchaser is sued by another party claiming title, the purchaser should give notice of the action to his vendor to enable him to perform his obligation to defend the purchaser's title. There is no necessity to give notice through Court, but in this case the defendant has issued notice to his vendor, respondent Senaratna, through Court and on such notice, the latter has appeared in Court. 20 30
Vide journal entry No. 14 of 11/8/1999.

The defendant has then made an application to Court to add respondent – Senaratna under section 18 of the Civil Procedure Code as a party to the action. The respondent has not objected to

this application but the plaintiff has objected to it. After considering the objections of the plaintiff and the submissions of both parties the learned Judge has refused the defendant's application to add the respondent as a party. This appeal, with leave of this Court, is against that order.

The reason given by the learned Judge for refusing the application of the defendant was that the defendant has failed to satisfy Court as to why it was necessary to add the respondent as a party. The learned Judge has stated that if the defendant's desire is to get the respondent to defend the title conveyed by him, the defendant could call the respondent as a witness. The defendant has submitted that if his title gets defeated in the action the respondent would become liable to be sued in damages and for that reason the respondent should be added as a party. The learned Judge has stated that that was not a good reason to add the respondent as a party to the action under section 18 of the Civil Procedure Code. 40 50

This identical question has been considered and decided in 1920 in the case of *Weerawardane v Ratnaike*¹. In that case the defendant sold and conveyed a land to the plaintiff. Third parties brought an action to get the land partitioned among themselves. The plaintiff intervened in the action and gave notice to the defendant and called upon him to warrant and defend title. The defendant did not get himself added as a party to the action but only gave evidence as a witness for the plaintiff. The plaintiff failed to establish his title and the third parties were declared entitled to the land. The plaintiff then sued the defendant for damages, the failing to warrant and defend title he has conveyed. The defendant's defence was that he was not at liberty to intervene in the action, as a partition action could be among co-owners only and therefore he was not liable for the plaintiff's eviction. 60

This defence was rejected by Schneider A.J. in the following words. "In my opinion, the defence is unsustainable. In practice a vendor of any of the parties to an action is allowed to intervene in a partition action for the purpose of warranting and defending the title he has conveyed. There is nothing I can see against the practice. Such intervention cannot create confusion or complexity. The intervenient's interests are identicle with those of the purchaser 70

who is already a party. His intervention would not therefore, bring into the action any new element or interest. On the other hand, it seems to me expedient that such intervention should be allowed. A vendor has a right on receiving notice to make himself a party to the action, in order, as Voet 21.2.20 puts it, to 'prevent collusion' *It is desirable, therefore, that no impediment, unless it is absolutely necessary, should be allowed to stand in the way of his intervening. The practice received sanction in the provisions of section 18 of the Civil Procedure Code and it has been recognized by this Court since 1872.* In this connection I might mention the cases of *Silva v Daniel Ram*² and *Suse Appu v Atapattu Kankanama*³ at 221, (emphasis added). 80

A photocopy of the entire passage I have cited above had been incorporated in the written submissions tendered to the District Court on behalf of the defendant, but the learned Judge has merely brushed it aside with the remark that the decision should be considered and taken in the light of the circumstances of that case. It is to be borne in mind that when a relevant case is cited to a Judge, it is his duty to carefully consider it and decide whether the law laid down in that case is applicable to the issue before him. If he decides that that case has no application to the issue before him, an appellate court would like to see his reasons on record, unless it is obvious that the case has no relevance to the issue at all. 90

In *Menika v Adacappa Chetty*⁴ Pereira, J. has laid down in the following words the duty of a vendor who receives notice that his vendee's title is being challenged in an action. "On receipt of that notice it (is) clearly the duty of the (vendor) to apply to the Court to have himself added as a party to the case, or otherwise render to the defendants in that case all the help that it (is) within his power to render, and defend the title of his vendee's against attack made on it by the plaintiffs". Those words were cited with approval by De Sampayo J. in *Weerawardana v Ratnaike* (*supra*). In *Jinadasa v Duraya*⁵ De Sampayo, J. has stated that "the object of the notice was to enable the vendor to intervene in the action and undertake the defence....or otherwise to assist in the litigation." 100

The cases cited above clearly indicate that a vendor, who has received notice of an action where the title conveyed by him to a party is being challenged, has the right to intervene as a party to such action. He has a direct interest in the result of the action. If the vendee's title is defeated the vendor may become liable to be sued for damages or for the return of the purchase price. If he is allowed to intervene and successfully defend the title conveyed by him he can avoid an action for damages. One of the reasons for the addition of parties is the desire to avoid a multiplicity of actions. *Vide Arumugam Coomaraswamy v Andiris Appuhamy*⁶; *Perera v Lokuge*⁷. The learned Judge has failed to consider this aspect. 110

In this case the respondent has not made an application to be added as a party. But he has stated that he had no objection to the application to add him as a party. If he is added as a party he is entitled to rights available to a party to an action. He can suggest issues, summon witness, lead evidence, cross examine witnesses and address and make submissions to Court. Those are the advantages the defendant will gain by adding the respondent vendor as a party. The learned Judge has not taken those matters into consideration when he concluded that without adding the respondent as a party, the defendant could call him as a witness. The learned Judge has failed to consider the correct legal principles relevant to the application of the defendant and his decision is therefore liable to be set aside. I allow the appeal, set aside the order refusing to add the respondent vendor as a party to the action and direct the learned Judge to add L.R. Senaratna as a party to the action and proceed with the case according to law. The defendant is entitled to costs of this appeal payable by the plaintiff-respondent. 120 130

Appeal allowed; District Court directed to add respondent.