

1956 *Present*: H. N. G. Fernando, J., and T. S. Fernando, J.

W. G. D. KIRIGERIS APPUHAMY, Appellant, and
M. H. M. NAZIR, Respondent

S. C. 143—D. C. Tangalle, G, 325

Vendor and purchaser—Actio venditi—Issue of non-delivery.

When immovable property is sold, the *actio venditi* for the purchase price would be available to the vendor only when delivery of the property has been made to the purchaser. The purchaser may, therefore, raise the issue of non-delivery even if it was not pleaded in the answer.

APPPEAL from a judgment of the District Court, Tangalle.

D. R. P. Coonetilleke, with *A. K. Premadasa*, for the defendant-appellant.

B. A. G. de Silva, for the plaintiff-respondent.

Cur. adv. vult.

June 25, 1956. H. N. G. FERNANDO, J.—

This was an action for the recovery of a sum of Rs. 1,000, being the balance amount of the purchase price of a land sold to the defendant by the plaintiff. The failure to pay the balance was admitted, but the defendant alleged in his answer that his rights to the property sold had been disputed in another action filed against him in the same Court, and pleaded that the money was being retained pending the determination of that action. The evidence adduced at the trial indicated however that the defendant was also relying upon a somewhat different ground, namely that the plaintiff had not placed him in possession of a boutique on the land.

This question of non-delivery was raised in an issue suggested by the defence, but the issue was withdrawn upon objection, presumably taken on the ground that it was not pleaded in the answer. I do not think that such a plea was necessary. The plaintiff averred that the defendant had purchased the land but did not allege that he had obtained delivery of the property sold. But the *actio venditi* for the purchase price lies when delivery has been made to the purchaser and he fails to make payment. (*Wille: Principles of South African Law, 2nd Edn. p. 364.*) "If he (the purchaser) has not paid the price and his title is threatened, he is entitled to refuse payment until the vendor gives security against eviction". (*Norman on Purchase and Sale in South Africa, 2nd Edn. p. 305.*) To succeed in the present action the plaintiff should have proved due

delivery, and the question of delivery was therefore rightly raised for determination. The objection to that issue and its subsequent withdrawal had the result that there was no adjudication upon a relevant question.

I would therefore set aside the decree under appeal, and remit the case to the District Court for a trial *de novo*, with a direction that an issue as to delivery be admitted, together with any other relevant issue. In the circumstances, I think each party should bear his own costs of the first trial and of this appeal.

T. S. FERNANDO, J.—I agree.

Decree set aside.

