1964 *Present :* **Abeyesundere, J., and Sirimane, J.**

M. SAMUEL, Appellant, *and* K. M. P. K. CHETTIAR and another, Respondents

S. C. 100/61—D. C. (Inty.) Kegalla, 8337

Vendor and purchaser—Sale of different lands in one transaction—Is it a sale of an incertum juris *?—Failure of purchaser to obtain possession of some of the lands—Right to recover proportionate share of purchase price—Period of prescription—Prescription Ordinance, ss. 6. 10.*

A purchaser of different lands under the same deed of sale is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has been unsuccessful in obtaining vacant possession.

The vendor's obligation to deliver vacant possession to the vendee is in law an implied part of the written contract of sale and therefore the period of prescription should be determined by reference to section 6 of the Prescription Ordinance, which specifies a period of six years.

APPEAL from a judgment of the District Court, Kegalla.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *S. R. de Silva*, for the Plaintiff-Appellant.

C. R. Gunaratne, for the Defendant-Respondent.

June 26, 1964. ABEYESUNDERE, J.—

In this case the defendant has sold to the plaintiff four allotments of land and certain undivided shares in five other lands by deed marked P1, dated 27.8.1946, for the sum of Rs. 2,900/–. The plaintiff, unable to get vacant possession of the properties he had purchased, instituted actions against the persons in possession thereof for declaration of title and for recovery of possession. He did not succeed in the majority of his actions and he sued the defendant in the present action for the recovery of the sum of Rs. 2,650/–, being the consideration paid to the defendant, less the sum representing the value of the land of which possession had been taken by the plaintiff before this action was instituted. In the course of the trial the plaintiff stated that he obtained possession of another land after the institution of this action and that therefore he restricted his claim to the sum of Rs. 2,400/–. He computed this sum on the basis that he could not take possession of seven lands in extent equal to 80 lahas and that the value of a laha was Rs. 30/–. He also stated that when he made his purchase under deed P1 the sum of Rs. 2,900/–, which was the consideration for the purchase, was determined at the rate of Rs. 30/– per laha. This evidence of the plaintiff was not contradicted by the defendant.

The learned District Judge who tried this action dismissed it on the ground that what was sold was an *incertum juris* and that therefore under the Roman-Dutch Law the purchaser was not entitled to recover the purchase price or any part thereof upon his failure to get possession of the property purchased. The plaintiff has appealed from the judgment and decree of the learned District Judge.

The sale of an *incertum juris* is dealt with in Book XXI, Title 2, Section 31 of Voet's Commentary on the Pandects (Gane's Translation, Volume 3, page 686). To determine the nature of the *incertum juris* referred to in the said section 31, reference may be made to Book XVIII, Title 1, Section 13 of the said Commentary, where the things that may be sold are classified and discussed by Voet. In that section Voet makes the following observation :—".....for it has been held that there can also be a purchase of an expectation, a hazard and the cast of a net, so that the expectation takes the place of the thing." The *incertum juris* referred to by Voet is what Justinian in the Digest calls the *incertum rei* (Digest XVIII, Title 4, Section 11). In the present case what has been sold and purchased is not an expectation or a hazard as, for instance, the cast of a net, but a thing itself. Voet also discusses the question of the sale of a thing as distinguished from the sale of the uncertainty of a right. In Book XXI, Title 2, Section 31 of his Commentary Voet states as follows :—'But if when the seller was selling not the uncertainty of his right but simply the thing, he expressly arranged "not to be held liable for eviction", he is not indeed forced when the thing is evicted to pay damages ; unless in this case also he knowingly sold what was another's. But he is nevertheless fast bound to restore the price received, because a *bonae fidei* contract does not admit of this covenant that the purchaser should lose the thing and the seller should keep the price.' It is relevant to the matter I am considering now to quote the following views of Voet in regard to the case where a buyer knowingly buys a *res aliena* :—" In this connection it should be broadly noted that he who has knowingly bought a thing which was not the vendor's has indeed no action for damages on eviction, unless he has specially taken care that security for eviction is given him ; but that nevertheless the knowledge in the purchaser that the thing was another's does not prevent his recovering, when eviction has ensued, the price which he gave. It is not fair that the seller should be enriched to the loss of the purchaser." (Book XXI, Title 2, Section 32)

In accordance with the afore-mentioned views of Voet, this Court has held in the case of *Silva v. Silva* [1] that even where a purchaser knew that the vendor had a disputed title and bought the land on speculation, he is entitled to recover the price actually paid by him to the vendor but is not entitled to recover damages.

[1] *(1920) 22 N. L. R. 377.*

I therefore hold that the plaintiff is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has failed to get possession. I accept the evidence of the plaintiff in regard to the value of the lands of which he has been unsuccessful in obtaining possession. I hold that he is entitled to recover the sum of Rs. 2,400/–.

The defendant has filed objections to the decree of the learned District Judge on the ground that the learned District Judge should have answered in favour of the defendant the issue relating to prescription. Mr. C. R. Gunaratne, Advocate, appearing for the defendant, argued that the cause of action for the recovery of part of the purchase price paid by the plaintiff arose on the date of the execution of the deed P1. He contended that the obligation to deliver vacant possession was imposed on the vendor, namely, the defendant, not by the deed P1 but by the common law and that therefore the period of prescription was 3 years as provided in section 10 of the Prescription Ordinance.

I do not agree with this view of Mr. Gunaratne. The vendor's obligation to deliver vacant possession to the vendee is in law an implied part of the written contract of sale and therefore the period of prescription should be determined by reference to section 6 of the Prescription Ordinance. The said section 6 specifies a period of six years. I find support for my view in the decision of this Court in the case of *Dawbarn v. Ryall* [1]. That decision is one of the Full Bench. In that case Lascelles, C.J., expresses the following view :—"The circumstance that the obligation on the part of the seller to give quiet possession of the thing sold depends upon a condition which the law considers as inherent in a written contract of sale does not make that obligation any the less dependent on the written contract of sale. Without the written contract of sale this obligation would not exist, and such an obligation, in a case where immovable property is concerned, would not be proved without production of a formal written contract of sale."

The learned District Judge is therefore correct in holding that the action of the plaintiff is not prescribed. Consequently I dismiss the objections of the defendant to the decree entered by the learned District Judge.

I set aside the judgment and decree of the learned District Judge and enter judgment for the plaintiff in a sum of Rs. 2,400/–. The plaintiff is entitled to the costs of the action and also the costs of this appeal.

SIRIMANE, J.—I agree.

Appeal allowed.

[1] *(1914) 17 N. L. R. 372.*