Present: Shaw J. and De Sampayo J.

1917.

SULAIKAMUMMAH *et al. v.* AHAMADULEVVAI.

167—D. C. Batticaloa, 4,391.

Sale of land subject to fidei commissum—*Action for breach of warranty by donee of purchaser—"Encumbrance."*

A donated certain property to his three sons, B, C, and D, burdened with a *fidei commissum* in favour of the survivor of them. B in 1893 sold his one-third share to C. In 1912 C donated the one-third share so purchased to respondents (wife and children of C). After the death of C, B, who was then the only surviving son of A, ejected the respondents by action, on the ground that the property, including the share sold by him to C, passed to him under the *fidei commissum* as the sole surviving son of A.

The respondents brought this action against B for damages for breach of warranty of title.

Held, that though the respondents were not the legal representatives of the purchaser (C), but his donees, they were entitled to sue for damages for breach of warranty.

The existence of the *fidei commissum* was a breach of the covenant that the land "was free from all encumbrances."

THE facts are set out in the judgment.

E. W. Jayewardene (with him *Arulanandan*), for appellant.

Bawa, K.C. (with him *Balasingham* and *M. W. H. de Silva*), for respondents.

cur. adv. vult.

February 15, 1917. SHAW J.—

One Meera Lebbe Isma Lebbe donated certain property to his three sons, burdened with a *fidei commissum* in favour of the survivors of them.

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The appellant, one of the sons, by deed of January 11, 1893, purported to sell to another brother, Adam Lebbe, his one-third share. Adam Lebbe, by deed of April 22, 1912, donated the one-third share so purchased to the respondents.

After the death of Adam Lebbe, the appellant, who was then the only surviving son of Meera Lebbe Isma Lebbe, the original donor, ejected the respondents, by action D. C. Batticaloa, No. 4,193, on the ground that the property passed to him under the *fidei commissum*, and that Adam Lebbe could not pass any interest in the property to the respondents.

The respondents have now retaliated by bringing an action against the appellant for breach of warranty of title in his conveyance to Adam Lebbe of January 11, 1893. The District Judge has decided that the appellant, by the deed of January 11, 1893, agreed to warrant and defend title as absolute owner, and that the plaintiffs, the assignees from Adam Lebbe, are entitled to sue for the breach of warranty, and has deferred his finding as to the amount of the damages.

I think the decision is right. The deed purports to be an absolute transfer to Adam Lebbe, his heirs, administrators, and assigns of the undivided one-third share of the land, and provides that the one-third " shall from this day for ever be possessed and enjoyed by the said Ismail Lebbe Marikar Adam Lebbe Marikar, his heirs, administrators, and assigns as purchased property according to their will and pleasure, and declaring that the share of land hereby sold, transferred, and set over is free from all encumbrances, and that any disputes or objections arising shall be warranted and defended by me, Ismail Lebbe Marikar, the transferor. " In fact, the transferor had not a good title to the one-third, as he only had a life interest in the one-third, unless he survived his brothers, and the one-third was not free from encumbrances, in that it was burdened with the *fidei commissum* in favour of the surviving son of Meera Lebbe Isma Lebbe. I am unable to accede to the contention that the deed only purported to convey such rights as the transferor had, in view of the clear wording of the clause set out above. In view of the direct contract in the deed of January 11, 1893, with the assigns of the purchaser, and the recent decision of this Court in *Hadjiar v. Don*,[1] I am of opinion that the present action lies at the suit of the plaintiffs, and that there has been a breach of the warranty is clear, for in the words of Lascelles C.J. in *Fernando v. Perera*:[2] " How can property which is burdened with a *fidei commissum*—the most troublesome of all encumbrances—be described as free from encumbrance? "

I would dismiss the appeal with costs, and remit the case to the District Court for the assessment of the damages.

[1] *(1916) 19 N. L. R. 212.*

[2] *(1914) 17 N. L. R. at page 164.*

DE SAMPAYO J.—

The facts leading up to this case are as follows. The field called Periavelly belonged to one Ismail Lebbe, who by deed dated February 24, 1877, gifted it to his three sons, (1) Adam Bawa, (2) Ahamado Lebbe, the defendant, and (3) Meera Lebbe, subject to a life interest in his wife, Asiatumma, and subject also to the condition that on the death of any of the three sons the share of the deceased should devolve on the survivors, and that they should "not *otty*, mortgage, transfer, or otherwise alienate the said property or any part of it to others." By deed dated January 11, 1893, while Asiatumma was still alive, the defendant sold his third share to his brother Adam Bawa, and entered into certain covenants as to title, which will be presently mentioned more in detail. Asiatumma died in February, 1912, and Adam Bawa by his deed dated February 22, 1912, donated two-thirds share of the land (*i.e.*, his original share and his purchased share) to his wife, the first plaintiff, and his sons, the second plaintiff and Ismail Lebbe. The last named has since died, and the second plaintiff is the administrator of his estate. Adam Bawa having himself died, the defendant in 1915 raised the action No. 4,193—D. C. Batticaloa against the plaintiffs, claiming a third share of the land, on the footing that by virtue of the condition in Ismail Lebbe's deed of gift the two-thirds share, to which Adam Bawa was entitled at his death, devolved upon himself and his remaining brother Meera Lebbe, and that the gift of Adam Bawa was invalid and inoperative. On an appeal to this Court the defendant's contention was upheld, and a decree was entered in his favour for one-third share as claimed. The plaintiffs have thereupon brought the present action against the defendant for damages for breach of the covenants contained in his deed of sale in favour of Adam Bawa. The District Judge, on the issues thus arising, held in favour of the plaintiffs and set the case down for trial as to the amount of damages, and the defendant has appealed.

The defendant in the deed by which he sold the third share to Adam Bawa recited the terms of the original deed of gift, and stated that the donees were thereby only prohibited from disposing of the land to strangers, and that "alienation in any manner could be effected between them," and proceeded to sell to his brother Adam Bawa his third share for the sum of Rs. 833, the receipt of which was acknowledged. He further covenanted as follows: "And so the undivided one-third share of the land aforesaid, with rights of outlet, inlet, &c., appertaining to it, and all interests that I, the said Ismail Lebbe Marikar Ahamado Lebbe Marikar, have in the same shall from this day for ever be possessed and enjoyed by the said Ismail Lebbe Marikar Adam Lebbe Marikar, his heirs, administrators, and assigns as purchased property according to their pleasure, and declaring (*sic*) that the share of land hereby sold, transferred, and set over is free from all encumbrances, and that any disputes or

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objections arising shall be warranted and defended by me, Ismail Lebbe Marikar, the transferor." The deed was in Tamil. The translation from which the above passage is taken does not appear to be quite perfect, but the sense and the intention of the grantor are sufficiently plain. It is to be noted that the only reservation made in the deed is the life interest of Asiatumma, and no allusion is made to the condition that the interest sold was to devolve on the surviving brothers on the death of the grantee, Adam Bawa. On the contrary, the deed in form and substance purported to convey absolute title to the third share. It is true that, as already decided by the Court in the previous action, the deed did not in law take away the effect of the condition in the original deed of gift, but that was manifestly not the view of the defendant himself or Adam Bawa at the time. In the previous action the plaintiffs had to yield to the legal result of facts, but the question now is whether the plaintiffs are not entitled to sue for damages on the covenants contained in the defendant's deed.

The claim is resisted on behalf of the defendant on several grounds. It is, in the first place, contended that the defendant sold and conveyed good title to such interest as he had, and that the fact of the third share reverting to the defendant and the other brother was due, not to his own fault, but to a disability of Adam Bawa himself, and *Voet 21, 2, 2* is cited in support of this contention. This passage in *Voet* has, I think, no application whatever to the present case. What he there says is that eviction is not considered to have taken place if the purchaser is deprived of the thing by the exercise of *retractus legalis* by third parties, such as the agnates of the vendor. What this retraction means will be seen from *Voet 18, 3, 9*. It appears that the agnates of the owner of property had a right of pre-emption given to them by the law or *retractus legalis* as distinguished from a right of pre-emption created by contract or *retractus conventionalis*, whereby they could claim the property from the vendee, and Voet says that, when this right is exercised by the agnates, the deprivation cannot be ascribed to the fault of the vendor, but is due to a circumstance arising from a provision of the law. Even in such a case the same passage shows that the vendee is entitled to recover the price, though not *id quod interest* or damages. The appeal, therefore, cannot succeed on this point.

It is also contended that the defendant did not covenant for good title, but only agreed to warrant and defend the title against disputes and objections, and that as Adam Bawa knew of the possible disputes and objections, no action can be maintained. I have already stated that the whole tenor of the deed shows that the defendant intended to sell the property absolutely. He not only conveyed it to Adam Bawa and "his heirs, administrators, and assigns," but covenanted that they should possess it "for ever", and that it was "free from all encumbrances." The last phrase in

the context, whatever limited meaning it may have in other deeds, refers not merely to mortgages or charges, but also to all such burdens as *fidei commissa*, which may affect the title, for as Lascelles C.J. said in *Fernando v. Perera*:[1] "How can property which is burdened with a *fidei commissum*—the most troublesome of all encumbrances—be described as free from encumbrance?" The defendant followed this up by covenanting that he would warrant and defend title against all disputes and objections. These are express covenants, and therefore even knowledge of defects on the part of Adam Bawa will not affect the liability of the defendant. It may be added, however, that there is no reason to infer such knowledge, but rather that both the defendant and Adam Bawa, as the peculiar language and form of the deed itself shows, persuaded themselves that there were no such defects. In my opinion this argument also fails.

The last point taken requires more serious consideration. It is argued that only Adam Bawa or his legal representative, and not singular successors like the plaintiffs, who are donees, could maintain an action for eviction, and *3 Maasdorp's Institutes 162* has been cited. This passage is founded on *Voet 21, 2, 17*, which lays down that "the particular successors, &c., for instance, second purchasers, cannot sue unless cession of action has been made to them by the first purchaser" (*Berwick's translation, 2nd ed., page 524*). See also *Voet 21, 2 21*, where the principle is said to be the absence of privity of contract. A similar point arose in *Hadjiar v. Don*,[2] in which Ennis and Schneider JJ. held that, where the covenant was not with the vendee alone, but with him and his assigns, there was purity of contract between the vendor and the vendee's assigns, and that an action could be brought by the latter without cession of action. The question, however, appears to relate to the practice of conveyancing and form of contract rather than to the obligations of a vendor in respect of successors from the vendee, and I share the doubt expressed by Schneider J. in the above case whether the passages cited from *Voet* have any application at the present day in Ceylon. However this may be, the authority of the decision in *Hadjiar v. Don* (*supra*), with which, if I may say so, I quite agree, disposes of the argument on behalf of the defendant.

There is no question on the facts as to the breach of the covenant for good title, and as regards the covenant warranting and defending the title against disputes and objections, the defendant was himself the disputant and objector, who successfully evicted the plaintiffs, so that he cannot be heard to say that there was no breach of that covenant. I would dismiss the appeal, with costs.

Appeal dismissed.

[1] *(1914) 17 N. L. R. at page 164.*

[2] *(1916) 19 N. L. R. 212.*