

# THE NEW LAW REPORTS OF CEYLON

## VOLUME LIII

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Present: Gratlaen J. and Gunasekara J.

MOHAMMADO CASSIM, Appellant, and MAHMOOD LEBBE  
et al., Respondents

S. C. 436—D. C. Kandy, 2,610

Res judicata—Actio rei vindicatio brought against one of two co-owners—Other co-owner not joined as party—Decree does not bind latter.

Sale of land—Actio de evictione—Is prior judicial eviction necessary?

A decree operates as *res judicata* as between the parties only or those claiming through them. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such a party.

A vendee must have suffered eviction by judicial process before he can sue his vendor for damages for breach of warranty against eviction. He cannot avail himself of the judicial eviction of a co-vendee.

**A**PPEAL from a judgment of the District Court, Kandy.

The 1st and 2nd plaintiffs jointly purchased from the defendant a certain land. Some months later two persons successfully sued the 1st plaintiff (but not the 2nd plaintiff) for a declaration that they were the lawful owners of a portion of the property. The 1st plaintiff was ejected under that decree. The plaintiffs thereupon jointly sued the defendant in the present action for damages for breach of his covenant to guarantee them against eviction.

*N. E. Weerasooria, K.C.* with *H. W. Tambiah* and *J. W. Subasinghe*, for the defendant appellant.—The judgment of the District Judge, in so far as it affected the rights of the 1st plaintiff to sue and claim damages on the sale, cannot be challenged. But the judge was wrong in decreeing the return of the consideration paid in respect of the half share of the 2nd plaintiff who had suffered no judicial eviction. In the earlier action only the 1st plaintiff was made defendant and the decree was against 1st plaintiff only. The 2nd plaintiff was no party and his rights were not adjudicated upon and he was not bound by the decree in that action. Therefore no cause of action accrued to the 2nd plaintiff to sue the defendant on the sale. To succeed in an *actio de evictione* there must be proof of an eviction by due process of law—*Voet: 21.2.1; Alagiawanna v. Don Hendrick*<sup>1</sup>; *James v. Suppa Umma*<sup>2</sup>; *Ramalingam Chettiar v. Mohamed Adjoowad*<sup>3</sup>; *Chellappa v. McHeyzer*<sup>4</sup>. [Counsel was stopped.]

<sup>1</sup> (1910) 13 N. L. R. 225.

<sup>2</sup> (1915) 17 N. L. R. 33.

<sup>3</sup> (1939) 41 N. L. R. 49.

<sup>4</sup> (1937) 38 N. L. R. 393.

*C. Thiagalingam, K.C.*, with *V. Arulambalam*, for the plaintiffs respondents.—Although 2nd plaintiff was not a party in the earlier action he was still bound by the decree. Section 207 of the Civil Procedure Code is not exhaustive of the law of *res judicata*—*Dingiri Menika v. Punchi Mahatmaya*<sup>1</sup>. As to what is meant by “parties” see *Spencer Bower*: “*Res Judicata*”, 1924 ed. pp. 126-128. “Party” means not only a person acknowledged as such but also a person cognizant of the proceedings. The question whether an absent party is bound by an earlier decree is a mixed question of fact and law—*Wytcherly v. Andrews*<sup>2</sup>. In the present case the evidence given by the defendant makes it clear that the earlier case was fought not only by the 1st plaintiff but also by his brother the 2nd plaintiff. On the question whether a judgment against one co-purchaser is “*res judicata*” against another co-purchaser, see *Lingangowda Dod-Basangowda Patil v. Basangowda Bistangowda Patil*<sup>3</sup> and *Ch. Gur Narayan v. Sheolal Singh*<sup>4</sup>.

In the second place, it is submitted that where the vendor warrants that he has good title to the property the vendee need only prove that the vendor had not good title. Judicial eviction is not necessary in the present case. *Jamis v. Suppa Umma (supra)* and *Chellappa v. McHeyzer (supra)* are not applicable to the facts of the present case. [Counsel cited *Ramalingam Chettiar v. Mohamed Adjoowad*<sup>5</sup>; *Maasdorp: Institutes of South African Law, 1913 ed., Vol. 3, p. 165*, *Nathan: Common Law of South Africa, Vol. 3, p. 757*; *Berwick's Voet, p. 173*.]

Judicial eviction is not mere physical eviction. It need not be dispossession by order of Court. The certainty of eviction by a Court of Law is sufficient to constitute judicial eviction.

[Counsel cited *Norman's Purchase and Sale in South Africa, 2nd ed., p. 301*.]

*N. E. Weerasooria, K.C.*, in reply.—The basis on which 2nd plaintiff came into court must be considered. The plaintiff clearly shows that he came into court on the basis of a judicial eviction. The definition in *Voet*: 21.2.1 is clear. “Eviction is the recovery by judicial process of our property which the opponent has acquired by *iustus titulus*.”

*Cur. adv. vult.*

June 20, 1951. GRATIAEN J.—

On 26th March, 1943, plaintiffs, who are brothers, jointly purchased from the defendant a land called Gurugama Kumbura for a consideration of Rs. 3,000. The transaction was admittedly implemented by the plaintiffs being placed in possession of the property, and, by arrangement between the brothers, the 1st plaintiff occupied the property for their joint benefit. Six months later, however, two persons named Rabiya Umma and Mohamed Lebbe successfully sued the 1st plaintiff (but not the 2nd plaintiff) in D. C., Kandy, No. L. 1,116, for a declaration that they were the lawful owners of a portion of the property. The

<sup>1</sup> (1910) 13 N. L. R. 59.

<sup>2</sup> (1871) L. R. 2 P. and M. 327.

<sup>3</sup> A. I. R. (1927) P. C. 56.

<sup>4</sup> A. I. R. (1918) P. C. 140.

<sup>5</sup> (1939) 41 N. L. R. 49.

1st plaintiff unsuccessfully contested the action, having given due notice to the defendant to warrant and defend the title conveyed to him. Degree was in due cause entered against the 1st plaintiff declaring Rabiya Umma and Mohamed Lebbe entitled to the extent in dispute. He was also condemned in damages and costs. The 1st plaintiff was ejected under this decree. The 2nd plaintiff was not a party to that action and his interests in the disputed extent, though precisely similar to those of his brother, were not adjudicated upon. Since the date of this decree both plaintiffs have in fact enjoyed possession of only that part of the property conveyed to them which was not affected by the decision in favour of the successful parties in D. C., Kandy, L. 1,116.

The plaintiffs have jointly sued the defendant in the present action for damages for a breach of his express covenant under the deed of conveyance to guarantee them against eviction from the property. This covenant is not a warranty of title but is in effect only an express warranty against eviction which is normally implied in contracts for the sale of land. After trial the learned District Judge entered judgment in favour of both plaintiffs for the sum of Rs. 2,051. Of this sum Rs. 1,222.35 represents the value of the joint interests of the plaintiffs in the extent which is now in the possession of Rabiya Umma and Mohamed Lebbe. The additional sum awarded represents the damages awarded against the 1st plaintiff and the costs incurred by him in the earlier action.

Mr. Weerasuriya, who argued the defendant's appeal, conceded that the judgment, in so far as it affected the interests of the 1st plaintiff, could not be challenged. The 1st plaintiff was judicially evicted from a part of the land in proceedings of which the defendant had due notice. On that basis the damages payable to the 1st plaintiff on his own account in the present action would amount to Rs. 1,440.63½ the value of his half share in the extent from which he was evicted being only Rs. 611.17½ and not Rs. 1,222.35.

Mr. Weerasuriya argues that no cause of action accrued to the 2nd plaintiff to sue the defendant in these proceedings because he was not a party to the earlier action and therefore suffered no *judicial eviction* from any part of the property conveyed to him. Mr. Thiagalingam has submitted in reply (1) that the 2nd plaintiff was in effect judicially evicted under the decree in the earlier action and (2) that in the alternative no judicial eviction need be proved having regard to the circumstances of this particular case. I shall consider each of Mr. Thiagalingam's submissions in turn.

In regard to the first proposition, it is conceded that the 2nd plaintiff cannot be regarded as having been judicially evicted in the earlier action to which he was not a party unless the decree entered against his brother operated as *res adjudicata* against him as well. The general principle is that "if parties litigate a question in a Court of competent jurisdiction, such parties or those claiming through them, cannot afterwards reopen the same question in another Court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such a party."

Vide *Spencer v. Williams*<sup>1</sup>, where Lord Penzance said "every man is the guardian of, and is entitled to litigate, his own right, and it is the commonest principle of justice that a man should not be robbed of his right by the fact that another, insisting upon the same right for his own purposes, has entered upon a litigation which has ended unfavourably for him." The 2nd plaintiff's title, which was not derived from the 1st plaintiff but from their common purchaser, was not adjudicated upon and was never in jeopardy in the earlier action. Indeed, if one applies the test of mutuality which is legitimate in such cases, I do not see how, if the result of the action had been the other way, Rabiya Umma and Mohamed Lebbe could effectively have been confronted with a plea of *res adjudicata* if they later sued the 2nd plaintiff for a declaration of their rights in the property as against him. *Wytcherley v. Andrews*<sup>2</sup>, and the decisions of the Privy Council in *Ch. Gur Narayan et al. v. Sheelal Singh et al.*<sup>3</sup>, and *Lingangowda Dod-Basangowda Patil et al. v. Basangowda Bistangowda Patil et al.*<sup>4</sup>, relied on by Mr. Thiagalingam stand on a different footing, because in each of these cases the unsuccessful party to the earlier litigation was held, for one reason or another, to have represented not only himself but also the person who was seeking to re-agitate the same issue in a subsequent action.

There remains the question whether in applying the Roman Dutch Law which governs the case, it is open to a party to rely on any form of eviction other than eviction *by judicial process* under a decree to which he was bound.

As far as I have been able to discover, it has always been assumed in this Island that, for the purposes of an *actio de evictione*, the plaintiff is required to prove that the whole or part of the property of which he was placed in possession under a contract of sale had been recovered from him by a third party *by judicial process* "per *judicem facta recuperatio*". Voet: 21.2.1. It is only necessary in this connection to refer to the Full Bench decisions of this Court in *Alagiawanna v. Don Hendrick*<sup>5</sup> and *Jamis v. Suppa Umma*<sup>6</sup>.

After the argument was concluded Mr. Thiagalingam submitted to me in chambers a passage from *Norman's Purchase and Sale in South Africa (2nd Edition)* at page 301 which indicates that, according to *Grotius*, 3.15.4 and *Van Leeuwen (Cens. For. 1-4-19-11)* a purchaser can, without resorting to litigation, give up the property and claim damages in an *actio de evictione* against his vendor "where it is clear that the claimant's right is a good one". I have examined the authority referred to in this text book, and find that the Courts in South Africa have recognized this principle and to that extent taken a view which goes beyond the rulings of our Courts. In *Numan v. Meyer*<sup>7</sup>, de Villiers C.J. held that the purchaser need not wait till his title is judicially interfered with if he undertakes to prove beyond doubt that the right

<sup>1</sup> (1871) L. R. 2, P. and D. 230 (40 L. J. P. and M. 45).

<sup>2</sup> (1871) 40 L. J. P. 57.

<sup>3</sup> A. I. R. (1918) P. C. 140.

<sup>4</sup> A. I. R. (1927) P. C. 56.

<sup>5</sup> (1910) 13 N. L. R. 225.

<sup>6</sup> (1913) 17 N. L. R. 33.

<sup>7</sup> (1905) 22 S. C. 203.

of the claimant to whom he handed over possession was obvious. If the purchaser succeeds in establishing such proof, says the learned Judge, "it would, to my mind, be a needless formality to insist upon two actions being brought". It is sufficient to say that, even if this principle did apply in Ceylon, the 2nd plaintiff has not raised any issue or led any evidence upon which the Court could properly hold that the title of Rabiya Umma and Mohamed Lebbe was without doubt superior to his title. Indeed, the action was based upon the assumption that both the plaintiffs had been judicially evicted in the earlier action. In any event it is not competent to this Court to refuse to follow the earlier Full Bench decisions to which I have referred. In my opinion, therefore, the 2nd plaintiff has no cause of action against the defendant.

I would make order amending the decree by ordering the defendant to pay to the 1st plaintiff only a sum of Rs. 1,440.63½. The 1st plaintiff is entitled to his costs in the lower Court, and the 2nd plaintiff will bear his own costs. I also think that in the circumstances of the case there should be no order as to the costs of this appeal.

GUNASEKARA J.—I agree.

*Decree amended.*

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