

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

1. D. S. Kumarasinghe (Deceased),
- 1A. Liliyan Kumarasinghe, (Deceased)
- 1B. Lakmal Samantha Kumarasinghe,
2. Ajith Nilanjan Kumarasinghe,
3. Lakmal Samantha Kumarasinghe,
No. 633, Trincomalee Street,
Matale.

Defendant-Respondent-Appellants

SC/APPEAL/66/2022 Vs.

CP/HCCA/KANDY/FA/27/2017

DC/MATALE/4533/92/L

Konara Mudiyanselage Piyadasa.

No. 102, Malwatta Road,

Matale.

Presently at,

No. 51, Ward Place,

Colombo 07.

Plaintiff-Appellant-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice Sobhitha Rajakaruna

Counsel: Kuvera de Zoysa, P.C. with Asanka Ranawaka and
Samuditha Kumarasinghe for the 1st, 2nd and 3rd
Defendant-Respondent-Appellants.

Samantha Ratwatte, P.C. with Lalanika Kankanamge and
Madhurya Bandara for Plaintiff-Appellant-Respondent.

Argued on: 07.02.2025

Written Submissions:

By the Appellants on 17.10.202

By the Respondent on 23.09.2022

Decided on: 05.03.2025

Samayawardhena, J.

The plaintiff filed this action on 10.08.1992 in the District Court of Matale against the defendant seeking a declaration of title to the land described in schedule A to the plaint, the ejectment of the defendant from the land described in schedule B to the plaint (which is a portion of the land described in schedule A), and damages. The 2nd and 3rd defendants, who are children of the 1st defendant, were later added as parties. The defendant sought dismissal of the plaintiff's action. After trial, the District Court dismissed the plaintiff's action on the ground that the plaintiff lacked the requisite title to institute the action against the defendant, as his title Deed marked P1 was a conditional transfer. It was also held that the defendant had prescribed to the land. On appeal, the High Court of Civil Appeal of Kandy set aside the judgment of the District Court on both grounds. This Court granted leave to appeal to the defendant on the following question of law:

Did the High Court err in law by failing to appreciate that the plaintiff did not get title to the land, as the condition appended to the operative part of Deed P1 was not fulfilled by the vendor?

By Deed P1, executed on 05.10.1988, the vendor transferred the land to the plaintiff for valuable consideration. At the time of this transfer, the

defendant was already in possession of the land. Prior to the transfer, on 06.11.1984, the vendor had instituted Case No. 3383/L against the defendant, seeking a declaration of title and ejectment. Accordingly, Deed P1 was executed, as stated therein, “*Subject however to the condition that I the said vendor should prosecute the action filed for the ejectment of one Kumarasinghe (the defendant in the instant case) from the said premises and obtain vacant possession.*” At the trial in Case No. 3383/L, the defendant raised an issue contending that the vendor could not maintain that action against him, as she had already transferred the land to the plaintiff by Deed P1. The vendor withdrew the action on 17.01.1992, with liberty to file an action against the defendant by the new owner (the present plaintiff), if necessary. The defendant’s counsel did not object to the withdrawal of that action, subject to that condition. A certified copy of Case No. 3383/L was marked at the trial as P5.

Drawing attention to the above-quoted part of Deed P1, the argument advanced before this Court by the defendant is that Deed P1 is a conditional transfer and, as the condition was not fulfilled by the vendor, title did not pass to the vendee (the plaintiff in this action), thereby rendering the plaintiff incapable of instituting this action against the defendant. According to this argument, title still remains with the vendor. However, in the previous case, the argument of the defendant was that title had passed to the vendee upon the execution of Deed P1. This inconsistent stance amounts to an attempt to approbate and reprobate, a practice that should not be countenanced by the apex Court.

The part quoted from the Deed does not make it a conditional transfer. The vendor has thereby only reiterated her common law obligation to warrant and defend the title in express terms. Upon the execution of a Deed of Transfer of immovable property in accordance with the law, title vests in the vendee, irrespective of whether possession is physically

delivered. Consequently, the vendee *inter alia* acquires the right to institute legal proceedings for the ejectment of any party in possession of the land who lacks a lawful entitlement to remain. In this whole process, it is the duty of the vendor to warrant and defend the title of the vendee. If the vendor fails to discharge this duty when he is called upon to do so, the vendee can sue the vendor for damages.

Walter Pereira in his monumental work, *The Laws of Ceylon*, 2nd Edition (1913), at page 651 states “*A vendor is bound to warrant his title, although he has given no express covenant for that purpose.*” The learned author further states at page 652 that “*there is under the Roman-Dutch Law, implied in every contract of sale a warranty by the vendor that the purchaser shall have the absolute and dominant enjoyment of the goods.*” In *Chellappah v. Mcheyzer* (1937) 38 NLR 393, Soertsz J. reaffirmed this principle, stating at page 396: “*Whereas in every contract of sale, other than one in which the vendor definitely states that he will not warrant and defend title, there is implied, if it is not expressed, an undertaking to warrant and defend title if and when it is challenged.*”

In *Appuhamy v. Appuhamy* (1880) 3 SCC 61 the Full Bench of the Supreme Court presided over by Cayley C.J. held:

The execution and delivery of a conveyance of land, the property of the vendor, if in conformity with the Ordinance of frauds, transferred the title to the land to the purchaser, although no corporeal delivery or actual possession of the land had followed. And that by virtue merely of the title so created, the purchaser might maintain an action seeking for a declaration of title against a third party in possession without title or under a weaker title.

In *Punchi Hamy v. Arnolis* (1883) 3 SCC 61 the Full Bench of the Supreme Court presided over by Burnside C.J. held:

A purchaser of land who has a conveyance from his vendor, but has never had any possession, may maintain an action to eject from the land a third party claiming title adversely to the vendor.

This principle has been applied in *Latheef v. Mansoor* [2010] 2 Sri LR 333 wherein Marsoof J. held at 352:

*The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindictory action, as it is trite law in this country since the decisions of the Supreme Court in *Punchi Hamy v. Arnolis* (1883) 5 SCC 160 and *Allis Appu v. Edris Hamy* (1894) 3 SCR 87 that even an owner with no more than bare paper title (nuda proprietas) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription.*

In *Andris v. Siman* (1889) 9 SCC 7 it was observed that, in an action *rei vindicatio*, if the plaintiff seeks ejectment of the defendant on paper title, “*title lies in deed only, and possession is not necessary to perfect it*”. Burnside C.J. held “*if the plaintiff having failed to prove possession and ouster, had relied on his paper title only to entitle him to possession, then the question to be determined would have been whether the plaintiff had succeeded in establishing a good paper title to the land as against the defendants, whose actual possession was sufficient until the plaintiff had proved good title.*”

As held by Wigneswaran J. in *Luwis Singho and Others v. Ponnamperuma* [1996] 2 Sri LR 320 at 324-325:

But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that;

- (i) *the Plaintiff is the owner of the land in question i.e. he has the dominium **and**,*
- (ii) *that the land is in the possession of the Defendant (Voet 6:1:34)*

Thus even if an owner never had possession of a land in question it would not be a bar to a vindictory action.

The principle that the delivery of possession is not an indispensable requirement to pass title to the vendee was affirmed in a recent judgment of mine in *Harison Pinto v. Piyaseeli Fernando* (SC/APPEAL/57/2016, SC Minutes of 11.09.2023):

It is true that it is the duty of the vendor to deliver possession of the property to the vendee at the time of the sale, and warrant and defend the title when a third party challenges the title of the vendee. However, merely because the vendor does not deliver possession of the property to the vendee at the time of the sale, the sale does not become ineffective or unenforceable against third parties, nor does the vendee become a speculative buyer. The vendee can either sue the vendor seeking rescission of the sale and a refund of the purchase price together with damages or sue the trespassers for a declaration of title and ejectment, and defend his title with the assistance of the vendor.

The cases cited on behalf of the defendant were cases where the dispute had arisen between the vendor and the vendee, and are therefore not very helpful to decide the case at hand. The defendant heavily relies on *Ratwatte v. Dullewe* (1907) 10 NLR 304 in support of his case. As seen

from page 309 of the judgment, “*The facts in the case are that the plaintiff bought the property at a public auction on conditions of sale by which on the payment of the purchase money the defendant agreed to execute a conveyance, and that on payment of the full purchase money the purchaser should enter into possession of the property.*” On the same page Middleton J. stated: “*I have no doubt therefore that if the plaintiff here and accepted the conveyance tendered by the defendant, he might maintain his action against Dullewe (the third party in possession) for declaration of title, and might have called upon his vendor to warrant and defend the title conferred. In fact, I think it would be his proper and only remedy; but here the purchaser has not accepted the conveyance.*” In Ratwatte’s case too, the dispute was between the vendor and the vendee, rather than between the vendee and a third party, as in the present case. The above quotation makes it clear that it was at least an implied condition of that sale that “*on payment of the full purchase money, the purchaser should enter into possession of the property.*” Since a third party was in possession, “*the purchaser has not accepted the conveyance.*”

However, no such situation arises in the present case. The plaintiff paid the full purchase price to the vendor and he accepted the Deed, knowing very well that the defendant was in unlawful possession of the land. The plaintiff also knew that a case had already been filed by the vendor to eject the defendant, as stated in the Deed itself. Therefore, the facts in Ratwatte’s case and the present case are not comparable, notwithstanding that the views expressed by Hutchinson C.J. were highlighted in support of the defendant’s argument.

As I observed in *Kumara v. Kanthi* [2021] 1 Sri LR 398 at 403 “*A principle laid down in a case shall be understood in the context of the peculiar facts and circumstances of that particular case. Such principles have no universal application unless the facts and circumstances are on all fours.*”

Cases must be decided based on the unique facts and circumstances of each case.

The facts in *Balasuriya v. Appuhami* (1914) 17 NLR 404 are similar to those in the instant case. In *Balasuriya*'s case, the defendants sold the land by a Deed wherein they expressly undertook to warrant and defend the title conveyed to the plaintiff. Admittedly, the defendant vendors failed to put the plaintiff in physical possession of the land, and the plaintiff was resisted by certain individuals in his attempt to take possession. As a result, the plaintiff instituted an action against those individuals, calling upon the vendors to warrant and defend his title against the defendants in that case. The vendors failed to do so, prompting the plaintiff to file an action for the recovery of the loss incurred due to the vendors' failure to warrant and defend his title to the land. One of the defences raised by the vendors was that the plaintiff should have sued them in the first instance, rather than incurring the expense of suing the alleged trespassers. This Court held that:

It is competent to a purchaser of land, although he has not been placed in possession of the land sold by the vendor, to sue a trespasser in ejectment calling upon the vendor to warrant and defend title, and if defeated in the action, to sue the vendor for damage.

Walter Pereira J., one of the most erudite and eminent judges of that time, with the concurrence of Lascelles C.J., explained the law at page 405 and cited *Ratwatte v. Dullewe* in support of the above conclusion:

*As I have endeavoured to explain in my judgment in the case of *Fernando v. Perera* (1914) 17 NLR 161 under our law the contract of sale of land is complete on the execution of a notarial conveyance followed by the delivery of the conveyance by the vendor to the*

purchaser, and it is now well-settled law (see Appuhamy v. Appuhamy 3 S.C.C. 61) that it is not necessary that the purchaser should be placed in physical possession of the land sold to enable him to sue a third party in ejectment. That being so, it was quite competent to the plaintiff in the present case to sue, as he did, the defendants in case No. 10,310, and call upon the present defendants (vendors) to warrant and defend his title. In some of the cases cited there are no doubt dicta showing that in a case like the present the vendee might, in the first instance, sue the vendor, requiring him to give him physical possession of the land sold, but there is nothing in those cases to show that that is the vendee's only remedy, or that the vendee might not sue the so-called trespasser in ejectment calling upon the vendor to warrant and defend his title, and that, having failed in the action, he might not sue the vendor for the loss sustained by him. On the other hand, in the case of Ratwatte v. Dullewe (1907) 10 NLR 304 Middleton J, says: "I have no doubt that if the plaintiff had accepted the conveyance tendered by the defendant he might maintain his action against Dullewe (that is, the alleged trespasser) for declaration of title, and might have called upon his vendor to warrant and defend the title conferred." That is exactly what, in effect, happened in the present case, and I have no hesitation in saying that the plaintiff's claim is well founded.

I am in respectful agreement with the above dicta of Walter Pereira J. and have nothing more to add.

I answer the question of law on which leave to appeal was granted in the negative. The judgment of the High Court dated 27.06.2019 is affirmed and the appeal is dismissed. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Sobhitha Rajakaruna, J.

I agree.

Judge of the Supreme Court