

1948

*Present : Canekeratne and Dias JJ.*MENIKA *et al.*, Appellants, and DHAMMANANDA, Respondent*S. C. 518—D. C. Kandy, 982**Possessory action—Field not belonging to temple—Possessed as part of temporalities—Juristic possession—Right of Viharadhipathi to decree for ejectment.*

Where a field which did not form part of the property of a vihare was possessed by the viharadhipathi as part of the temporalities—

Held, that his possession was juristic possession and he was entitled to maintain a possessory action if ousted.*Terunmanse v. Don Aron* (1932) 34 *N. L. R.* 348 and *Dias v. Ratmapala Terunmanse* (1938) 40 *N. L. R.* 41 distinguished.**A**PPPEAL from a judgment of the District Judge, Kandy.*N. E. Weerasooria, K.C.*, with *A. L. Jayasuriya* and *W. D. Gunasekera*, for defendants, appellants.*E. B. Wikramanayake, K.C.*, with *C. R. Gunaratne* and *M. P. Spencer*, for plaintiff, respondent.*Cur. adv. vult.*

September 24, 1948. CANEKERATNE J.—

This is an appeal by the defendants from a judgment declaring the plaintiff entitled to a field and consequential relief.

It appears that Nawinne Dharmadasi the Chief Priest of Asgiriya Vihare, preached bana at a dagoba and shrine in Kondadeniya and that two dayakayas present at the preaching gave this field to this Chief Priest "for his supasa". He by document P 1 (1729 Saka year) conveyed this field to his pupil Potuhera Thero, then officiating priest to the Dalada Mandira. The plaintiff, the secretary of the Asgiriya Vihare, claimed that the title to the field devolved on him and brought the action against the first defendant his "andakaraya" and the second defendant who was assisting the first defendant. The defendants denied the title of the plaintiff and pleaded that one Hawadiya was the owner of the field and that the title thereto devolved on them.

In March, 1937, the plaintiff gave the cultivation of the field to the first defendant at the request of one Naida, his father-in-law; the second defendant is a brother of the first. The first defendant cultivated the field as the plaintiff's andakaraya till about March, 1943, when the plaintiff gave the cultivation to one Aruma. The defendants obstructed Aruma and prevented him from continuing the cultivation. The learned Judge came to the conclusion that the field in question was held by Potuhera Mahanayake Thero as pudgalika property and that it devolved on the plaintiff. Mr. Wikramanayake did not take up this position at the argument in appeal but supported the decree of the lower Court on the ground that the field was the Sanghika property of the donee on the deed of 1729 and that it devolved on the plaintiff as Sanghika property. Mr. Weerasooria contends that the action must fail,

inasmuch as the plaintiff has no title to the property, the title being in the Viharadhipathi of Kondadeniya Vihare. The respondent requested the Court to treat the action as a possessory action and allow the plaintiff to keep that part of the decree that directs that he be put and quieted in possession of the property, the defendants being ejected therefrom and being ordered to pay damages and costs. Mr. Weerasooria protested against such an application being entertained at this stage, especially as the objection to the maintainability of the action was taken at the earliest opportunity but the plaintiff failed to remedy the defect. It was further contended that the action cannot be maintained as a possessory action and he referred to the cases of *Terunnanse v. Don Aron*¹ and *Dias v. Ratnapala Terunnanse*².

On the substantial question whether this field belongs to the plaintiff or to the defendants the learned Judge has given strong reasons for holding in favour of the plaintiff and it would be impossible for an Appellate Court to set aside the finding on the question of possession and no attempt was made to challenge this finding. If at the trial the learned Judge who had full control of the record had amended the issue so as to suit the facts proved, he could have given a decree in favour of the plaintiff for possession unless the decisions quoted prevented him, for the plaintiff would have established a good cause of action for the ejection of the defendants.

Potuhera Nayake Thero, who was later Potuhera Mahanayake Thero, was the Viharadhipathi of Asgiriya Vihare and also of Kondadeniya Vihare which is said to be under the control of Asgiriya Vihare. He left two pupils Ratnapala and Panawa Deepankara. It is alleged that this field came to Ratnapala on his tutor's death. On September 5, 1944, an application was made by the plaintiff to add "as 3rd defendant the Viharadhipathi of Kondadeniya Vihare in view of the fact that the field in dispute falls within the plan of that Vihare". He was present in Court and expressed a willingness to be added. As defendants' Counsel objected to the addition of this party, the Judge appears to have questioned him and when he said he disclaims title to the field in dispute he (the Judge) made order in these terms "I do not think he is a necessary party to this action. Plaintiff may call him as a witness".

Possessory remedies were granted to persons who had juristic possession. A person must have not merely the *corpus*, but also the *animus* of possession: the will coinciding with the physical relationship. A person not only holds the thing in his hands, but intends to hold it for himself alone: it is his intention to exclude every one else from the thing. So far as the exclusion of others is concerned, he holds the thing in just the same way as if he were the actual owner, *i.e.*, as if he had legally sole control over it, whether he is really the owner or not, and whether again, in the latter case, he knows he is not the owner (as in the case of a pledgee or a lessee³) or believes himself to be the owner (as in the case of a *bona fide* possessor). Any one who intends to exclude every body else has the *animus domini*, (the will of an owner), just as much as the owner himself. The possession of the juristic possessor entitles him to a legal remedy quite irrespectively of his right⁴.

¹ (1932) 34 N. L. R. 348.

² (1938) 40 N. L. R. 41.

³ (1933) 35 N. L. R. 352; 1 *Cur. Law Rep.* 275.

⁴ (1911) 14 N. L. R. 317.

By P 6, dated December 30, 1853, Panawa Deepankara and Ratnapala, the two pupils of the Mahanayake, settled their disputes; Ratnapala was given the right to possess and enjoy the field in question. Ratnapala would take the property not for himself but in trust for his foundation, *i.e.*, his successors in the line of descent. There is evidence to show that since 1853, this field has been in the possession of Ratnapala and his successors: Ratnapala by P 7 dated April 2, 1869, gave over the Vihare and the lands including this field to his two pupils Piyaratna and Saranankara. In those days it was not uncommon for an incumbent to give over by deed his Vihare and the properties to the person whom he intended to be his successor. Saranankara by P 9 dated April 17, 1918, transferred the field to Piyaratna. The plaintiff is the successor of Piyaratna. The evidence shows that the plaintiff was in possession of this field as part of the temporalities that have come to him as a successor of Potuhera Mahanayake Thero. It is clear that since 1853 the Viharadhipathi of Kondadeniya Vihare has not exercised any rights over this field and that the present Viharadhipathi does not claim any rights. The plaintiff has been holding the field in just the same way as if he were the owner. What the sections as interpreted by the two cases seem to show is this: if there is any property belonging to a Vihare, it is vested in the trustee—who a trustee is can be ascertained from sections 4, 7, 8, 9, 10, 11 (1)—an action in respect thereof can be brought by the trustee only, a provisional trustee (section 11 (2)) may in some cases but not one called a *de facto* trustee. It thus presupposes that the property is one belonging to the Vihare, *e.g.*, a property that admittedly belongs to it or one that may be claimed to belong to it may fall within it. There is not even a superficial resemblance between those cases and the present one: the proposition advanced by the appellants does not even follow logically from them.

The plaintiff is entitled to be restored to the possession of this field. The judgment of the District Court is varied by deleting the declaration of title in favour of the plaintiff; he is entitled to keep that part of the decree ordering the ejection of the defendants, the placing and quieting him in possession, damages and costs. The appellants will pay the costs of appeal to the respondent.

DIAS J.—I agree.

Decree varied.