

1942

Present : Howard C.J. and Hearne J.

GUNASEKERE v. KANNANGARA.

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49—D. C. Galle, 37,216.

Action quia timet—Purchase by defendant at Fiscal's sale of plaintiff's property—No Fiscal's transfer to defendant—Plaintiff not entitled to sue defendant.

The defendant at a Fiscal's sale became the purchaser of a land previously transferred to the plaintiff. The plaintiff was in possession and the defendant had not obtained a Fiscal's transfer at the time when the present action was instituted by the plaintiff.

Held, that the plaintiff was not entitled to maintain an action *quia timet*.

A PPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him E. B. Wikremanayake, U. A. Jayasundera and A. C. Alles), for defendant appellants.

C. V. Ranawake (with him H. A. Koattegoda), for plaintiff respondent.

Cur. adv. vult.

January 28, 1942. HOWARD C.J.—

This is an appeal by the defendant from a judgment of the District Judge of Galle in favour of the plaintiff with costs. The only point that arises for our consideration is whether the learned Judge was right in coming to the conclusion that the action which was *quia timet* was maintainable. The plaintiff in his plaint asked to be declared entitled to an undivided extent of one-fourth acre of the land described in the schedule, a plantation made by him and a tiled house. The plaintiff derived title to this property from one Charles Perera Siriwardene. The defendant at a Fiscal's sale on July 3, 1937, became the purchaser of the interests previously transferred to the plaintiff on January 5, 1937. The plaintiff was in possession and the defendant had not at the time when the action was instituted by the plaintiff obtained a Fiscal's transfer. In the Court below it was contended that the defendant would obtain a Fiscal's transfer and try to eject the plaintiff from the land and the house. In coming to the conclusion that a *quia timet* action would lie the learned Judge relied on the case of the *Ceylon Land and Produce Company, Limited v. Malcolmson*¹ and *De Silva v. Dheerananda Thero*². In considering whether the defendant has committed an actionable wrong reference must be made to the definition of "cause of action" in section 5 of the Civil Procedure Code. This definition is worded as follows :—

"Cause of action is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury".

In *Ceylon Land and Produce Co., Ltd. v. Malcolmson* (*supra*) the defendant took and registered a mortgage of a land belonging to another from a third party, put the mortgage in suit and obtained a decree thereon.

¹ 12 N. L. R. 16.

² 28 N. L. R. 557.

It was held that the true owner had a sufficient cause of action against such person to maintain an action *quia timet*. In his judgment Wood-Renton J. stated that the defendant by registering his mortgage and obtaining a decree for its sale on the footing that he was the owner placed on the plaintiff's registered title a real blot which would gravely and immediately prejudice their power of dealing with the land. The act of the defendant was both a "denial" of the plaintiffs' rights and the "infliction of an affirmative injury" upon them.

In *De Silva v. Dheerananda Thero* (*supra*) it was held that the trustee of a Buddhist temple may maintain an action *quia timet* to set aside a deed by which a priest, claiming by virtue of pupillary succession, transferred land belonging to the temple, even though the trustee's enjoyment of the land has not been interfered with. Lyall Grant J. in his judgment stated that the plaintiff had ample reason to fear that the deed of transfer might be used to his prejudice. The priest had a residence on the land, by the execution of the deed he had made a definite claim that that residence was independent of the plaintiff and if the plaintiff did not now assert his rights, he might be taken in future as having acquiesced in the possession.

It appears to me that there is a wide divergence between the facts in the present case and those in the two cases I have cited and on which the District Judge relied. In *Ceylon Land and Produce Co., Ltd. v. Malcolmson* (*supra*) there was by the registration of a competing document a definite blot on the plaintiff's title. This was one of the deciding factors in that case. In *De Silva v. Dheerananda Thero* (*supra*) the defendant asserted a claim independently of the plaintiff. In the present case the defendant has merely bought at a Fiscal's sale the right and title of the judgment-debtor. He has not obtained a Fiscal's conveyance. He has not asserted title to the plaintiffs' land. An attempt was made to contend that the visit of the Surveyor to the land was an assertion of the defendant's rights. I do not consider that such a contention is sound. The survey was made by the Fiscal acting under the provisions of section 286 of the Civil Procedure Code. He must be regarded as the agent of the Fiscal and not of the defendant. I do not think the act of the defendant in buying at the Fiscal's sale amounted either to a "denial" of the plaintiffs' rights or the "infliction of an affirmative injury" on them.

Apart from the facts in the two cases cited by me being distinguishable from those in the present case I am fortified in the decision at which I have arrived by the perusal of other authorities. In *Fernando v. Silva*¹ Phear C.J., in his judgment, stated that suits *quia timet* ought always to be scrutinized most closely, because although there are no doubt many cases where it is right that a court of equity should enable a suitor, notwithstanding he has at the time no substantial ground of suit, to obtain a present declaration of title in anticipation of some cause of action occurring in future in the shape of an invasion of property or infringement of title, on some occasion when he may have difficulty in establishing his right, yet suits of this class are certainly not to be encouraged. In that case A, the mortgagee, not in possession of certain property, obtained a decree against B, his mortgagor, for realization of the security, and in execution of this decree caused the mortgaged property to be sold to a third person. C,

¹ 1 S. C. C. 27.

claiming to be in possession as owner of the portion of the property so sold, brought a suit against A and B for declaration of title and asking to be quieted in possession, but failed to show that he had been in any degree molested in the enjoyment of his property. It was held that he had no cause of action. If the purchaser of the plaintiffs' property from the defendants ever attempted on the footing of that purchase to disturb her in the enjoyment of it, she would be able on that future occasion, as she was then, to establish her title to the property whatever it may be.

In *Fernando v. Fernando* the second defendant who owned two-thirds share of a land mortgaged his first share to the first defendant who obtained a decree for sale. It was held that the action of the plaintiff, who owned the remaining one-third share, in bringing an action to have it declared that he had a right to compensation was premature.

In the case of *Raki v. Cassie Lebbe* Wood Renton J. stated that it was not possible or desirable to attempt to lay down any general rules as to the classes of cases in which *quia timet* actions are maintainable. Each case must be decided on its own merits and special facts.

I am satisfied that in the circumstances of this case there is no occasion to allow a *quia timet* action. The appeal is therefore allowed and the action dismissed with costs in this Court and the Court below.

HEARNE J.—I agree.

Appeal allowed.

