1951 *Present :* **Dias S.P.J. and Gratiaen J.**

PEERIS *et al.*, Appellants, *and* SAVUNHAMY, Respondent.

S. C. 121—D. C. Galle, 2,596

Actio rei vindicatio—*Burden of proof—Boundaries—Statements in deeds between third parties—Evidentiary value—Evidence Ordinance, s. 32—Finding of fact—Power of appellate Court to reverse it .*

Where, in an action for declaration of title to land, the defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium.

For the purpose of identifying the land in dispute, statements of boundaries in title deeds between third parties are not admissible under section 32 of the Evidence Ordinance.

A finding of fact may be reversed on appeal if the trial Judge has demonstrably misjudged the position.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, K.C., with *H. W. Jayewardene* and *J. W. Subasinghe*, for the defendants appellants.

A. L. Jayasuriya, with *E. A. G. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1946) 2 A. E. R. 592.*

April 26, 1951. DIAS S.P.J.—

In this case the plaintiff seeks to vindicate title to an undivided $\frac{1}{8}$th share of a land which she calls Godellewatta, or Godaparagahawatta, or Edogewatta, in extent about $2\frac{1}{2}$ acres. She has no title deeds for her share, and her claim is based entirely on prescriptive possession. She sued the three defendants who are brothers. The 1st defendant put the plaintiff to proof of her title, asserting that he and his predecessors in title had been in exclusive possession of the land in dispute for a period of over a century. He produced a deed 1D1 of 1842 and a deed 1D2 of 1945. The other defendants make no claim to the land.

In her plaint, dated July 8, 1946, the plaintiff asserted that she was ousted by the three defendants " about three months ago ", *i.e.*, about April 8, 1946.

In the course of her evidence the plaintiff stated on oath : " The defendants disputed my title to this land about one and a half months before I filed plaint, but I cannot remember the exact date. Before this dispute the defendants did not possess this land ". It will be observed that this evidence is in the teeth of the ouster pleaded in the plaint. It is clear that the ousters pleaded by the plaintiff are fictitious. She produced two documents P6 and P6A.

P6 is an extract from the local headman's diary where the complaint made by the plaintiff of this alleged ouster has been recorded. P6 shows that on June 25, 1946, the plaintiff appeared before the headman and stated " that the above named defendants are in forcible possession of the land Godellewatta *alias* Godaparagahawatta . . . . *for a period of about a year* ". P6A is to the effect that the headman proceeded to the land and questioned the 1st defendant who denied the alleged ouster and claimed that he had been in possession of the land in dispute for ten years. There are two significant points which emerge from P6. In the first place, the ouster pleaded by the plaintiff is proved to be false from her own document. The alleged ouster did not take place in April, 1946, but for about one year prior to June 25, 1946, the defendants had been in forcible possession. In the second place, it will be observed that, while the plaintiff's whole case at the trial was that the land originally belonged to a man called Edo and the land was therefore called Edogewatta, she did not give that name to the headman in P6.

When these facts transpired the trial had proceeded for a considerable time. The plaintiff moved to amend her plaint for the second time paying costs. Accordingly, an amended plaint was filed on November 5, 1948, where it is asserted that the ouster took place " on or about the 25th day of June, 1945 ".

This being an action for declaration of title to land, and the defendants being in possession, the burden lay on the plaintiff to prove that she had dominium to the land in dispute—see *Abeykoon Hamineу Appuhamy*[1]. Admittedly the only title upon which the plaintiff can rely in this case is title by prescriptive possession. She has no documentary title or deeds.

[1] *(1950) 52 N.L.R. 49.*

Having regard to the false and fictitious ousters pleaded, the plaintiff had a heavy onus to discharge. One would therefore have expected her to call some of her many co-owners to corroborate her story. According to plaintiff's pedigree, D. Edo was the original owner. He is supposed to have died leaving a widow Thengohamy and three children, Siyadoris, Sanchohamy and Kachohamy. It is stated that Thengohamy " sold her half share " to her son Siyadoris—but the deed is not forthcoming. The failure to produce that deed is unexplained. Plaintiff who is a comparatively young woman cannot have any personal knowledge of these facts and many other facts which she was made to state in evidence. Siyadoris is said to have died leaving four children—Podiappu, Eramanis Appu, Adanhamy and Saranappu, who is the father of the plaintiff. On this pedigree there must be many co-owners of the land in dispute. Plaintiff mentions two of them—Simon Appu, the son of her paternal uncle Podiappu, and Jadinhamy, the child of her paternal uncle Eramanis Appu. Neither of these two persons has been called. If plaintiff's story is true, they also are each entitled to an undivided $\frac{1}{6}$th of the land. They have not joined the plaintiff in this action, and have not appeared to give evidence. It is significant that plaintiff's husband who helped to plant the land, and whose name is on the list of witnesses, has not been called to corroborate his wife.

Plaintiff's explanation as to why she waited for one year until June 25, 1946, to complain to the headman of an ouster committed twelve months previously carries no conviction. She says " I delayed so long because I tried to get all the co-owners including Baronsingho to join me in this action, but as the co-owners were not willing to do so, I made this complaint to the Vidane Arachi one year later ". It is incredible that even the most ignorant village woman who has been forcibly ousted from her land would wait for one year to go to the headman. Far more probable is it that when the plaintiff realized that in the absence of documentary title, her case was extremely weak, she tried to create some sort of evidence by going to the headman and complaining of an ouster a year previously.

In my opinion the documents P1, P3 and P4 which were admitted in this case are inadmissible. P1 is a bond dated 1879 between strangers to this action where the northern boundary of one of the lands hypothecated is given as " the land planted by D. Siyadoris ". It is sought to identify Siyadoris as the son of Edo. The name of the land is not given, and as there may be many persons bearing the name of Siyadoris in this locality, the value of this deed as evidence, even if it is admissible, appears to be almost nil. It has been held by the Full Bench of Patna in *Soney Lall v. Darbdeo* [1] that statements of boundaries in title deeds between third parties are not admissible under Section 32 of the Evidence Ordinance. There is also the deed P2 executed between strangers where the northern boundary is stated to be Edogewatta. For the reasons already given, the evidentiary value of such a statement in P2 is nil. The exhibits P3, P4 and P5 relating to a Court of Requests case about the felling of a jak tree is in my opinion inadmissible in this case, as the

[1] *(1935) A. I. R. Patna 167.*

defendants had nothing to do with that case. Plaintiff's witness Baronsingho, far from corroborating the plaintiff, contradicts her on many points.

I am mindful of the fact that we are asked in this case to reverse a finding of fact by the trial Judge who saw and heard the witnesses give evidence. The authorities on this point will be found collected in *Marikkar v. Lebbe* [1]. In *Alles v. Alles* [2] the Privy Council said :

" To reverse this finding (of fact) on appeal would be a strong step, only justified if the trial Judge had demonstrably misjudged the position ". In my opinion, this is such a case. The plaintiff's case is teeming with inaccuracies and improbabilities. The learned trial Judge has made no attempt to grapple with these difficulties. He has overlooked the fact that whatever may be the demerits of the defendants' case, the onus was on the plaintiff to prove that she had title to $\frac{1}{8}$th of the land. He has given the go-by to this aspect of the case and concentrated on the weaknesses of the defendants' case. Even assuming that the whole of the defendants' case is demonstrably false, the fact remains that they being in possession are presumed to have title, and it was for the plaintiff to rebut that presumption by proving her own title. This she has failed to do.

In my opinion the judgment appealed against cannot stand. I allow the appeal and dismiss plaintiff's action with costs, both here and below.

GRATIAEN J.—I agree.

Appeal allowed.