

1937 Present : Abrahams C.J. and Fernando J.

RAYMOND *v.* WIJEYWARDENE.

20—D. C. Kurunegala, 18,365.

Possessory action—Possession for a year and a day—Predecessor's possession—Dispossession by predecessor—Prescription Ordinance, No. 22 of 1871, s. 4.

In a possessory action the plaintiff is entitled, in calculating the essential period of a year and a day to take advantage of the possession of his predecessor in title, even though the person dispossessing him happens to be his predecessor in title.

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

H. V. Perera, K.C. (with him *F. A. Tisseverasingam*), for plaintiff, appellant.

F. A. Hayley, K.C. (with him *Barr Kumarakulasingham*), for defendants, respondents.

Cur. adv. vult.

November 24, 1937. ABRAHAMS C.J.—

The plaintiff-appellant instituted this action for the recovery of possession of a coconut estate of about a hundred acres in extent which was mortgaged to him by the defendants-respondents who all joined in the mortgage bond. What their various titles and interests were in the said estate did not emerge during the action, since the case was fought out entirely upon documents, but that point does not appear to be material. The plaintiff eventually obtained a mortgage decree in 1934; and three of the defendants made an application to set aside the mortgage decree but

this was unsuccessful. An arrangement was come to on August 20, 1934, which was recorded by the learned District Judge, to the effect that if the defendants paid the full amount of the claim and costs within one year the sale under the decree should be set aside and in the meantime the plaintiff should remain in possession of the property purchased by him under the decree and take the rents and profits arising, keeping proper books of account in order to credit the defendants as against the decretal amount. It was further agreed that if at the end of the year the defendants did not pay to the plaintiff the amount remaining and due to him the sale was to be confirmed.

Later there appeared to be a dispute between the plaintiff and one or more of the defendants as to the identity of the land covered by the mortgage decree, and it was agreed that the sale should be confirmed and that the plaintiff should take such action as he might be advised to take in order to obtain possession of the property sold. This confirmation was effected on March 1, 1935, and seven days later the plaintiff obtained a Fiscal's conveyance.

On December 2, 1935, the Fiscal purported to put the plaintiff into possession of the whole of the land, and when this operation was performed it was found that some of the defendants were actually in possession of a portion of the land described in these proceedings as lot B, and he told them to quit and they quitted. On the following day, however, these defendants with others returned and took possession of the whole of the land in the absence of the plaintiff. It was to regain possession of the whole of the land that the plaintiff then brought an action.

The learned District Judge held that by the agreement of August 20, 1934, the plaintiff was placed in charge of the property and was to collect the rents and profits on behalf of the defendants. He held that his possession from August, 1934, till December 2, 1935 (the date that the Fiscal put him into possession) was not of such a nature as to be taken into consideration in calculating the period of a year and a day during which, according to the law of Ceylon, the plaintiff in a possessory action must prove that he was in possession in order to recover the land from his dispossessor. It would appear from this judgment that the learned District Judge regarded the plaintiff as being disqualified from calculating the period from August 20, 1934, to March 1, 1935, the date on which he obtained confirmation of the sale. He dismissed the plaintiff's action with costs.

This appeal is not pressed in respect of the claim to lot B, but as regards the remainder of the estate it is submitted that the judgment is wrong. The ground of appeal stated in the petition of appeal was that the plaintiff had conclusively established that his possession of the estate from August 20, 1934, up to December 3, 1935, the date of dispossession, was *ut dominus* and not held on behalf of any other person.

During the argument a point was raised for the appellant which did not figure in the petition of appeal, namely, that the learned District Judge had not taken into consideration the fact that according to the law of Ceylon the plaintiff in a possessory action was permitted, in calculating the essential period of a year and a day, to count in making up that period any time during which his predecessor in title has been in possession.

The limitation upon the right of a person to bring a possessory action is contained in section 4 of the Prescription Ordinance, No. 22 of 1871, and reads as follows:—

“It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title. Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases”.

It was held in *Silva v. Appuhamy*¹, by a Court consisting of Lascelles C.J. and Wood Renton J. that the common law of Ceylon required proof of possession for a year and a day prior to ouster, and that that requirement was not effected by the proviso to the section, and the same Court also held that in a possessory action a plaintiff might take advantage of the possession of his predecessor in title and that it is unnecessary that he himself should have had a year and a day's possession.

It is not disputed on behalf of the respondents that a plaintiff may avail himself of his predecessor's possession. It is however contended that this point was not taken in the lower Court. It is perfectly true that the learned District Judge does not mention it in his judgment, and it does not seem probable that so important a matter would have been completely ignored. On the other hand, the record of the case shows that *Silva v. Appuhamy* (*supra*) was cited by the plaintiff's Counsel. I do not think, however, that we can hold that the appellant is precluded from making this submission now, since it does not involve the consideration of facts which were not before the Court. There is a further argument for the respondents which is, however, of a more formidable nature. Mr. Hayley contends that the plaintiff cannot take advantage of the prior possession of anybody when he himself had dispossessed, presumably by the Fiscal's conveyance. It does, at the first glance, certainly seem peculiar that the plaintiff should be able to pray in aid the period of possession of somebody whom he first dispossesses and who then dispossesses him. Put in another way, the defendants say to the plaintiff, “we have turned you out, it is true, but you were not in possession for a year and a day as the law requires”. The plaintiff retorts, “It is true that I was in possession for nine months only, but you yourselves were in possession immediately prior to my possession for more than the required period”. But despite the novelty of the situation, I see no warrant for excluding from the ordinary meaning of the term “predecessor” the dispossessor himself. It could certainly create hardship for which no foundation in law or reason can be found to place the dispossessed person in a worse situation in respect of one kind of dispossessor than another, because that dispossessor was his predecessor instead of being someone else. Mr. Perera for the plaintiff-appellant reinforces his logic with a telling illustration. He says that if the respondents' submission on this point were to prevail a man

¹ 15 N. L. R. 297.

might sell a plot of land to someone else and then might after the purchaser had been in possession for a few days, dispossess him and contend that the unfortunate purchaser had no right to bring a possessory action but must bring an action for declaration of title which he, the vendor, might then frustrate by claiming that there was no valid title that could be transferred.

It was admitted by the appellant that he was not in possession *ut dominus* until the Fiscal's conveyance on March 8, 1935. But it was contended that he was in possession on behalf of the defendants according to the arrangement of August 20, 1934, until that date when his occupation was replaced automatically by possession *ut dominus*, and that therefore it was uninterrupted possession of which he could have availed himself, namely, the possession of the defendants through him their agent from August 20, 1934, to March 8, 1935, and possession on his own account from that date to December 3, 1935, making up the required period. I am of the opinion that this contention must prevail.

It was also argued for the respondents that when the sale was confirmed what the appellant retained was not the estate of the defendants but the right, title, and interest, which was not the same thing as it does not amount to a transfer of the land itself. In my opinion a Fiscal's conveyance to a purchaser after confirmation of the sale by the Court is a conveyance of the property which is the subject of the decree. A perusal of the terms of the conveyance in this case shows as much. The operative part of the conveyance states that the Fiscal had sold and assigned the said property and premises to the said G. H. Raymond, his heirs, &c., to have and to hold the same to him the said G. H. Raymond, his heirs, &c., for ever.

I am of the opinion that this appeal must be allowed in respect to the property claimed, excluding lot B, and that the appellant is entitled also to the agreed damages, viz., Rs. 1,000 a year to the date when possession was given up. The appellant will have the costs of the trial in the Court below, and of this appeal.

FERNANDO J.—I agree.

Appeal allowed.

