

FERNANDO v. MARSHALL.

D. C., Kandy, 9,077.

1896.

December 31

Title to land—Prescription—Absence in plaint of averment of prescriptive possession—Issues as to possession—Judgment on proof of possession by plaintiff.

In an action to be declared entitled to a parcel of land and to recover possession of the same, plaintiff did not expressly claim the benefit of Ordinance No. 22 of 1871. He, however, averred in his plaint possession for upwards of ten years of the parcel on the part of himself and his predecessors in title, and some of the issues stated, and agreed to at the trial, were as to such possession.

Held, that defendant was not prejudiced by plaintiff's omission to pray for a decree under the Prescription Ordinance, and as it appeared that plaintiff had discharged the burden on him on the issues as to possession, judgment was entered in his favour for the parcel of land claimed.

THE facts of the case appear in the judgment of BONSER, C.J.

Wendt, for appellant.

Dornhorst, for respondent.

3rd December, 1896. BONSER, C.J.—

In this case the plaintiff sues to recover an undivided one-third share of a piece of land in the Mátalé District, which appears to have been originally a coffee estate. In 1879 this estate was owned as to two-thirds by one Mr. Brown, and the remaining one-third belonged to Mr. G. R. Bray. Mr. Bray mortgaged his one-third share to his Ceylon agents, Skrine & Co., to secure advances for the purpose of working the estate. The mortgagees put their mortgage in suit and recovered judgment thereon on the 27th May, 1881. This judgment they assigned to the present plaintiff in September, 1881. In 1883 the plaintiff procured himself to be substituted in the record (of Skrine & Co.'s hypothecary action) in the place of the plaintiff's mortgagees, and on the 15th June of that year caused the property to be put up for sale in execution of that judgment. At that sale he became the purchaser, and it is proved that he entered into possession of this one-third share which he had purchased. He did not however get a Fiscal's conveyance till nearly ten years after, namely, on the 5th June, 1893. The conveyance was registered on the 8th of the same month. In the meantime much had happened; for on the 30th of June, 1884, he was adjudged insolvent. His assignee put up for sale this one-third share, and it was purchased by a man called Salgado, who obtained a conveyance from the assignee. In the interval also Mr. George Bray, who had left the Island, and was then resident in the Colony of

1896. *December 3.* New South Wales sent a power of attorney to this Island, and his attorney sold his one-third share to a gentleman then residing in Mátalé, the Rev. Henry Bray. The conveyance was dated 30th August, 1892. The defendants claim under that conveyance, having in the following year purchased this one-third share from the Rev. Henry Bray. The defendants had also, in some way not explained, become the owners of the other two-third shares, so that they thus claim to be the owners of the entirety. On the 20th August, 1894, Salgado conveyed the one-third share which he had purchased from the assignee to the plaintiff. The plaintiff alleges that in February, 1895, he being in possession by his agent of his one-third share, was forcibly turned out of possession by the defendant's agent, and there is no dispute as to this. The plaintiff claims that he is entitled to this land, and asks for a declaration to that effect, and also to be restored to possession. At the trial a number of issues were framed—seventeen in all. Of these, the seventh issue was whether the plaintiff possessed the land, that is, after the Fiscal's sale. The twelfth issue was whether Salgado possessed the land, that is, after the purchase from the assignee. The thirteenth issue was whether Salgado put the plaintiff into possession of this land, that is, after he sold it to the plaintiff.

The plaintiff adduced evidence, which satisfied the District Judge, and which satisfies me, that he did get possession of the land after his purchase from the Fiscal; that Salgado did get possession after he purchased from the assignee; and that the plaintiff was put into possession by Salgado when he purchased from him; and it was not disputed that he was turned out of possession in February, 1895.

Various questions were argued before the District Judge, and have been discussed before us, which, in my opinion, it is not necessary in this case to decide. For instance, what was the effect before the passing of the Civil Procedure Code of a sale by the Fiscal? Did the sale divest the property out of the execution-debtor and vest it in the purchaser when confirmed by the Court? And was the Fiscal's conveyance merely evidence of the fact of the sale, like a charter of feoffment under the old law of England? On the other hand, was a conveyance necessary to divest the title out of the execution-debtor and vest it in the purchaser? as is the law laid down by section 289 of the Civil Procedure Code. There is also the further question, whether a power authorizing a person to convey land in this Island, in the name and stead of another, must be conferred by a notarially executed instrument, or whether a verbal authority is sufficient?

In the circumstances it is unnecessary to decide these questions.

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BONNER, C.J.

The decree is right, and should be affirmed. The plaintiff has satisfactorily proved that he and Salgado have since the Fiscal's sale in 1883 down to the time of the ouster in 1885 held uninterruptedly his share. I have some doubts as to whether we ought to do more than give plaintiff a merely possessory decree without dealing with the question of title. But my brothers are of opinion that we ought to put an end to this litigation by making a declaratory decree now, and I yield to their opinion.

It is true that the plaintiff did not expressly claim the benefit of the Ordinance No. 22 of 1871, but the parties must have had this present in their minds at the trial. For these issues, which I have mentioned, were stated and agreed to by the parties themselves. That being so I think that they must have been stated with a view to the determination of this question. Under these circumstances the defendants cannot justly complain that they are taken by surprise, and that they did not come into Court prepared to discuss the question of possession.

The judgment is affirmed, but the costs will be taxed as of an action under class V.

LAWRIE, J.—

I agree to affirm the judgment. There is I think sufficient evidence that the plaintiff and his predecessors in title have been in possession of one-third of the land ever since the Fiscal's sale in 1883. The evidence of possession is not only uncontradicted, but it is good in quality and sufficient in quantity.

WITHERS, J.—

I am also of opinion that the decree in plaintiff's favour should be affirmed.

It is quite true that this plaint does not contain any prayer of a decree of title under our Prescription Ordinance, but the 7th, 8th, and 9th paragraphs of the plaint allege the plaintiff's entry into possession of the one-third share under his judicial purchase, Salgado's entry into possession under his assignment from the plaintiff trustee in bankruptcy, and plaintiff's re-entry under his conveyance from Salgado.

Entry into possession imports tenure, and the plaint alleges tenure for a long time.

Possession for ten years and upwards by an adverse title to one-third of the premises was proved to the satisfaction of the Judge. I think his verdict on that point right. Upon that verdict plaintiff was entitled to judgment.