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BANDA *et al. v.* BANDA.

D. C., Kandy, 11,992.

Ordinance No. 22 of 1871, s. 3—"Possession for ten years previous to the bringing of the action"—Proof of appointment of assignee in insolvency.

Per MONCREIFF, J.—The natural meaning of section 3 of Ordinance No. 22 of 1871 is not, in my opinion, that the ten years' possession must endure until the bringing of the action. The words—"the bringing of the action"—were introduced simply to prevent any dispute as to the stage in the action before which the ten years' possession must be complete. Those words do not confine the ten years to the period next before the bringing of the action.

Per BROWNE, A.J.—I agree with my brother's views, and feel bound by the decision in *Nakar v. Sinnatty* (*Ram. 1860, p. 75*).

Silva v. Siman (*4 N. L. R. 144*), disapproved.

The method of proving the appointment of an assignee in insolvency explained.

ACTION for ejectment, and that plaintiffs should be placed in possession of the lands unlawfully held by defendant.

Plaintiff alleged title to an undivided half share in several lands by right of purchase from one Kumarihamy upon deed dated 19th July, 1897. The action was instituted on the 7th December, 1897.

Defendant alleged that Kumarihamy was adjudged an insolvent in 1878, and that defendant's right was by inheritance under Bandara Mahatmaya and his wife, who died, the former in 1878 and the latter in 1895.

The District Judge found that Kumarihamy was declared insolvent and an assignee appointed to her estate on 6th December, 1878, and that therefore the insolvent's immovable property vested in him from that date.

A further issue framed by the District Judge was whether the plaintiff and his predecessor in title had acquired a prescriptive right by adverse possession for ten years previous to action. The District Judge found against the plaintiff upon this issue and dismissed the action with costs.

Plaintiff appealed.

The case came on for argument in appeal on 26th September, 1900, before MONCREIFF, J., and BROWNE, A.J

Wendt, Acting A.-G., for appellant.

Pieris, for respondent.

Cur. adv. vult.

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22nd October, 1900. The judgment of MONCREIFF, J., was delivered as follows by Browne, A.J.:—

By deed dated the 19th July, 1897, the plaintiffs bought from one Kumarihamy one-half of a piece of land situated at Pattipola in Tumpane. Kumarihamy had possessed the land by virtue of a deed executed in her favour by her father on the 7th October, 1867.

Finding the defendant in possession, the plaintiffs brought this action for vindication of the land and damages.

The defendant did not think it necessary to go into the whole of his case, but said that the plaintiffs had no title to sue upon, because their vendor Kumarihamy had become insolvent in 1878, and, upon the appointment of Mr. J. H. Wijenaike as assignee on the 6th December, 1878, the whole of Kumarihamy's property vested in the assignee. The plaintiffs do not admit this, and they say that, even if it were true, Kumarihamy was left in undisturbed possession of the land from 1878 to 1895, and acquired a prescriptive title to it.

The case having arrived at this point, the defendant protested that the plaintiffs should not be allowed to prove a title acquired by prescription, because they were out of possession; that by the terms of section 3 of the Prescriptive Ordinance (No. 22 of 1871) they were debarred from setting up a title founded upon undisturbed and uninterrupted possession for ten years, unless they were still in possession at the date of the bringing of this action. We are asked to say whether the defendant has correctly interpreted the section.

The effect of the section—in so far as it relates to this question—is as follows:—

When any plaintiff shall bring his action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of undisturbed and uninterrupted possession by him or by those under whom he claims, by a title adverse to or independent of that of the defendant, *for ten years previous to the bringing of such action*, shall entitle the plaintiff to a decree in his favour with costs.

What is the meaning of "for ten years previous to?" If the expression had been "for *the* ten years," or "for ten years preceding," there could have been no doubt. But the mere words "ten years previous to" do not necessarily mean the ten years next preceding the point of time indicated.

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But the further question must be answered. Why did the words of the section not run " previous to the action?" Why was the Legislature particular enough to say " previous to *the bringing of* the action?" Certainly to give precision to something. But the natural meaning of the mere words does not confine the ten years to the period next before the bringing of the action. I believe that the words " the bringing of " the action were introduced simply to prevent any dispute as to the stage in the action before which the ten years' possession must be complete.

Now it is urged, on the one hand, that a plaintiff under this section must have completed his ten years' possession, and have been actually in possession at and down to the moment at which he brings his action. That appears to have been the view of the Chief Justice in *Silva v. Siman* (4 *N. L. R. 144*). The provision is supposed to be prompted by a desire that persons, ousted from property, should not lie by for a longer period than a year. To prevent any injustice resulting to ousted persons, section 4 was introduced by which they are enabled to return to possession upon simple proof of dispossession. I do not altogether understand why persons ousted from possession should be more deserving than other litigants of being restricted in the proof of their claims, why they are debarred from proving a title to land, unless they take certain steps within a year. I find no special reason for such a provision in the fact that the title to be set up is one of prescriptive possession.

It is to be noted that section 3 deals with three classes of plaintiffs:—

(1) Those who wish to be quieted in possession;
(2) Those who wish to prevent usurpation and encroachment;
(3) Those who wish to establish their claims in any other manner.

The first two classes are in possession; if they have been ousted, they have come back into possession under section 4. But the third class is, I should imagine, composed of persons who are not in possession. And what is the position of those persons if they cannot prove prescriptive possession without showing that their ten years' possession extended to the bringing of the action? Are they introduced simply to be excluded from the advantage of the section?

I am disposed to think that section 4 was introduced to prevent dispossession by violence, and attempts to regain possession by violence. And I do not see why the fact that section 4 gives a summary method of regaining possession indicates an intention

that ousted parties who have not availed themselves of the section should not be permitted to prove prescriptive possession.

The natural meaning of the words of the section is not, in my opinion, that the ten years' possession must endure until the bringing of the action, and I do not find sufficient reason in the circumstances for imposing that meaning upon the words.

As to the other point, the validity of the assignee's title, I think that the appointment of the assignee has not been proved. It should have been proved according to the ordinary rules of evidence. The mere production of the proceedings under the petition for adjudication is not enough, unless provision to that effect is made in the Ordinance (*Muskett v. Drummond, 10 B. & C. 153*). Section 143 of the Insolvent Estates Ordinance provides that in actions by assignees the *Gazette* shall be sufficient proof, if the insolvent does not dispute his insolvency. And section 144 dispenses with proof in certain other cases, but it does not touch this matter. Moreover, there were other deficiencies in the proof. The District Judge found that the appointment of the assignee was proved. I do not agree with him.

Even if this view be mistaken, it is clear that Kumarihamy was in unmolested possession for many years before 1895, and therefore in the view I take of the law she acquired a title which was good as against her assignee (if there really was an assignee), and which entitles her transferee, the plaintiff, to maintain this action. I think that the decision of the District Judge should be set aside and judgment entered for the plaintiff.

BROWNE, A.J.—

The trial of this action was rather abruptly terminated at its very close. The father of the vendor to plaintiffs had undoubtedly been originally entitled to the land in claims. His children were plaintiffs' vendor and defendant. He donated half to the former, leaving defendant entitled by inheritance to half. But defendant seeks not only to claim title to that donated half by his own adverse possession of it, but also to destroy plaintiffs' title to it by alleging (1) that the vendor married in *diga*, (2) that the vendor became insolvent and her title passed to her assignee, and (3) that her assignee sold the lands to others.

The one issue which would embrace the latter two defences was but roughly framed. In argument before us Mr. Attorney desired to expand it into yet another direction, whether there had ever been a valid adjudication of insolvency made when it was of three persons who were not partners. We are, indeed, now concerned

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only with one issue, on which, *per se*, has been given a decision fatal to plaintiffs' claim: whether, being without possession for three years prior to the bringing of this action, they can declare and recover upon a title in their vendor by her adverse possession for over ten years at any time prior to such loss of possession, so long as the defendant or any other during her absence from possession did not acquire title in that wise or in any other way. If in reversing that decision we had been obliged to remit the action for further hearing, it might perhaps have been found possible, and indeed fundamentally necessary to any questions arising out of the alleged insolvency, to ascertain whether there ever had been a valid adjudication.

On the question of title by prescriptive possession and the construction of the words " previous to bringing of the action," I venture still to consiler myself bound by the decision pronounced in 41, C. R., Point Pedro (*Ram, 1860, p. 79*), in presence of, if not by, all the members of the Collective Court, which decision was overlooked in the argument in both Courts, of 87,427, D. C., Colombo (*8 S. C. C. 31*). The discovery of that omission, however, caused this Court in 934, D. C., Colombo (*9 S. C. C. 48*), and 6,371, D .C., Kegalla (*2 C. L. R. 43*), to indicate that the decision in 87,427, D. C., Colombo, was not necessarily conclusive; and though I believe that WITHERS, J., was (*e.g.*, 447, D. C., Kurunegala, S. C. M. *3rd November, 1895*, though he may possibly have had only section 4 then in view) of the same opinion as that which my Lord the Chief Justice has expressed in 5,625, C. R., Colombo (*4 N. L. R. 144*), I, with all due deference, say I feel myself bound by that earliest pronouncement both as a binding precedent and because I agree in my brother's views thereon. To his remarks I would add, that if only a possessory action was ever open to a plaintiff out of possession, I cannot see why the enactment in section 3 respecting plaintiffs who wished " to establish their claims in any other manner " should have been made. For a person dispossessed of possession to bring his possessory action under section 4 it is not necessary that he should have had more than, say, a day's possession before dispossessed. The remedy that section 3 gave to a plaintiff who had held over ten years' possession was one of a larger purpose than to be merely reinstated in possession. In my judgment it was the power to vindicate the title which (as till the doubts expressed in or arising out of the decisions in *8 S. C. C.* and *4 N. L. R.*), I, for nearly thirty years, have always understood could be acquired by such undisturbed possession. Even if that view as to title were wrong, I would still feel concluded by it

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for the reason so expatiated upon in another judgment by Creasy, C.J. (28,256, D. C., Galle, *Vand. 276*), lest " to reverse it " suddenly would be to shake the titles to many properties and to " cause great and general inconvenience."

I would therefore hold it was open to plaintiffs to plead and prove, as they did, that their vendor had at any time previous to her sale to them and to the institution of this action adverse, &c., possession as under section 3, and that having proved the same the title is in them like title adverse to that vendor, or title deduced *aliter* from her not having been proved by defendant, nor that any title she so acquired accrued to the benefit of any creditors of her insolvent estate under section 71 of Ordinance No. 7 of 1853, and that judgment be entered for plaintiffs accordingly with costs.