SILVA *v.* SINNO APPU.

1903.
June 5 and 11.

C. R., Galle, 1,611.

Possessory action by part-owner—Civil Procedure Code, s. 12—Ordinance No. 22 of 1871, s. 2.

The owner of an undivided share of land can maintain a possessory action in respect of such share, provided he joins the other co-owners as parties either plaintiff or defendant.

D. C., Chilaw, 261 (*1 S. C. R. 329*), distinguished.

IN this possessory suit plaintiff pleaded possession for over a year and a day previous to the ouster complained of, and prayed for ejectment of the defendant. He alleged that he was entitled under a purchase in execution to an undivided half part of Higgahawatta, and that the defendants, who had no title or interest in that share or any other share of the land, forcibly opened a road on the said land, took possession of it, and deprived him of the produce thereof.

The District Judge dismissed the action on the ground that plaintiff could not maintain such an action. He held that as the second defendant claimed to be a co-owner, the plaintiff should have instituted an action *rei vindicatio*.

The plaintiff appealed. The case was argued on 5th June, 1903.

Walter Pereira, for appellant.

Dornhorst, K.C., for respondent.

Cur. adv. vult.

11th June, 1903. WENDT, J.—

The plaintiff alleged that he was entitled under a purchase in execution to an undivided half of certain land, and that he had been in the undisturbed and uninterrupted possession of that share

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for more than a year and a day prior to the ouster by defendants. He alleged that the other half share belonged to the estate of Odris de Silva. He complained that the defendants, who had no right or title to the land, about a month before action had forcibly opened a road over the land, and about four days before action forcibly taken possession of plaintiff's share. The first defendant denied plaintiff's possession, denied the ouster, and disclaimed title, but admitted Odris' ownership of one-half. The second defendant also admitted Odris' title to one-half, but denied plaintiff's possession, and setting up title in himself to the other half under conveyances dated September, 1899, and January, 1900, said that he was in possession since his purchases. He also set up a prescriptive right and denied that he had opened the road. The action was treated by the parties as a purely possessory one, and the issues agreed upon were as follows:—

(1) Can plaintiff maintain this action ?
(2) If he can, was he for a year and a day before the date of the cause of action in possession of half of the land ?
(3) Did defendants dispossess plaintiff as averred in the plaint ?

The learned Commissioner held on the first issue that, as the second defendant claimed to be a co-owner, plaintiff could not maintain the action, but should have sued in *rei vindicatio*. In view of this opinion he considered it unnecessary to pronounce any finding on the other issues. The action was dismissed, and plaintiff has appealed.

Defendants' counsel felt themselves unable to support the opinion of the learned Commissioner, but they argued that the dismissal was right on two other grounds. The first was that a possessory action was not competent in respect of an undivided share, and the case of *Perera v. Fernando* (*1 S. C. R. 329*) was relied upon. That case appears to have been decided on the Roman-Dutch Law, and although Withers, J., refers to the Ordinance No. 22 of 1871, section 4, he does not refer to section 2, which defined immovable property as including a share in such property. Section 4 must be taken in the light of this interpretation to enact that any person dispossessed of any share of immovable property might maintain a possessory action, and the reference in the latter part of section 4 to the "other requirements of the law" must, of course, be exclusive of the substantial enactment contained in the earlier part of the section. Moreover, in that case the Court's attention does not appear to have been directed to section 12 of the Civil Procedure Code, which appears to have in view not merely petitory actions, but also possessory actions (see *Arnolisa v. Dissan*, *4 N. L. R. 163*). But, whatever the reasons upon which *Perera*

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v. Fernando was decided, that decision is binding upon me, and if this case fell within the principle of it, I should be bound either to follow it or to reserve the question for the consideration of a Full Bench of the Court. I think, however, that the cases are distinguishable. Plaintiff, five months before the trial, upon the allegation that the widow and legal representative of Odris, the admitted owner of half the land, refused to join in the bringing of the action asked for, obtained leave to add her as a party-defendant. She was accordingly added, and put in an answer asserting her ownership and possession of one-half. Therefore, even assuming that plaintiff alone could not have maintained the action, I am of opinion that the bringing in of the added party under section 17 of the Code, thus bringing before the Court all the parties entitled to the possession of the land, has cured the defect.

The other point taken by the respondents was that plaintiff had not proved an ouster from the land, but a mere trespass. As, however, this involves a verdict on the evidence, upon which the Commissioner has expressed no opinion, I leave the point to be disposed of in the Court below.

I set aside the dismissal of the action and order a new trial. The respondent will pay the costs of appeal. The other costs will be costs in the case.

At the further trial in the Court below, the Commissioner found that the plaintiff had been in possession and had been ousted by the second defendant, against whom he gave judgment of ejectment. It was ordered that plaintiff be put in possession of the half share claimed.

An appeal was filed by the defendants in which it was again urged that it was necessary for a plaintiff in a possessory action to have had actual physical retention of a specific portion of land which a part-owner has not, and that the mode of possession in this case was by division of nuts, which does not amount to physical possession.

The appeal was argued on 5th June, 1903, by counsel for appellants and respondents, and the judgment was affirmed.

GRENIER, A.P.J.—

This Court has already held that the plaintiff, as the action is now constituted, can maintain a possessory action.

The evidence adduced by the plaintiff to prove that he was dispossessed by the defendants is amply sufficient. The judgment of the Court below must be affirmed.