1950 *Present : Jayetileke C.J. and Dias S.P.J.*

ABEYKOON HAMINE, Appellant, *and* APPUHAMY, Respondent

S. C. 422—D. C. Colombo, 3,619

Crown grant—No presumption that Crown has title—Actio rei vindicatio—*Plaintiff must establish title or action fails*—Onus *placed on wrong party—Court of Appeal cannot re-write judgment of trial Court.*

In the maritime Provinces a Crown grant does not raise a presumption that the grantee is vested with *dominium*. The plaintiff in an action *rei vindicatio* cannot, therefore, rely on a Crown grant alone to discharge the initial burden of proof that rests on him to establish that he has *dominium* to the land in dispute.

Where the trial Judge has made a cardinal error *ab initio* by placing the *onus* on the wrong party, it would not be proper for the Court of Appeal to try and ascertain whether, had the trial Judge placed the *onus* on the proper party, the result might have been different. In such a case it would not be proper for the Court of Appeal to re-write the judgment of the trial Judge.

APPEAL from a judgment of the District Court, Colombo.

One Yahonis Appu, in the year 1887, obtained a Crown grant to an *owita* land. Plaintiff, asserting that Yahonis Appu's title had devolved on him, brought an action *rei vindicatio* against the defendant, who was in possession of the land. The trial Judge, holding that the Crown grant vested " paper title " in Y and his successors, placed the burden of proving title by prescription on the defendant.

H. V. Perera, K.C., with *H. A. Koattegoda* and *J. W. Subasinghe*, for defendant appellant.

N. E. Weerasooriya, K.C., with *H. W. Jayewardene* and *G. T. Samarawickreme*, for plaintiff respondent.

Cur. adv. vult.

September 4, 1950. DIAS S.P.J.—

This is an action for declaration of title to a paddy field called Kahatagaha-owita valued at Rs. 450. The plaintiff respondent says that by a Crown Grant dated 1887 one Yahonis Appu became the owner of the land. His title the plaintiff asserts has devolved on him. Except for four mortgage bonds P9, P10, P11 and P12 executed in 1894, 1896, 1897 and 1901 respectively, he has no deeds or documents for this land until March, 1944, when the present dispute had arisen. The plaintiff alleges that the defendant appellant ousted him and took forcible possession of the land in March, 1944.

The case for the appellant is that the land in dispute forms part of his fields on the west, and that he and his predecessors in title have been in exclusive possession for over 40 years.

This being an action *rei vindicatio*, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had

dominium to the land in dispute. In *de Silva v. Goonetilleke* [1] which is a decision of a Bench of four Judges, Macdonell C.J. said: " There is abundant authority that a party claiming a declaration of title must have title himself. ' To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him—*1 Nathan p. 362, s. 593* ' ..... ' This action arises from the right of *dominium*. By it we claim specific recovery of property belonging to us, but possessed by someone else '— *Pereira (1913 ed.) p. 300* quoting *Voet 6.1.2*. The authorities unite in holding that plaintiff must show title to the *corpus* in dispute, and that if he cannot, the action will not lie ".

The issues were correctly framed, but the learned trial Judge has misdirected himself with regard to the burden of proof. At the commencement of his judgment he said: " Now it is quite clear that the field in question was sold by the Crown in 1887 and that this field was not part of the field Mahakumbura (belonging to the defendant . . . . . The paper title to the field claimed by the plaintiff has come down to him. The defendant *can succeed only if she proves that she and her husband and his predecessors have prescribed to the field* ". Again the learned Judge concludes his judgment with these words—" *The burden of proving prescriptive possession is on the defendant* and I do not think that she has discharge the same . . . . . "

The learned Judge has been led into error by assuming that a Crown Grant raises a presumption that the grantee is vested with *dominium*. So far as the Maritime Provinces of the Island are concerned, there is no such presumption. In *Silva v. Bastian* [2] it was laid down that a Crown Grant by itself creates no presumption of the title of the Crown to the land which it conveys. Wood Renton J. after reviewing all the earlier authorities said: " I desire only to add a word in regard to the attempt of the learned District Judge to resuscitate the discredited doctrine that a Crown Grant by itself creates any presumption of the title of the Crown to the land which it conveys. This proposition has been negatived in a series of decisions both reported and unreported, which were binding on the District Judge as they are binding on us ". After referring to the discredited cases Wood Renton J. added: " I would venture to hope that we shall hear no more of them as authorities ". In *Mudalihamy v. Kirihamy* [3] Bertram C.J. cited *Silva v. Bastian* [2] with approval for the proposition that there is no presumption in regard to the validity of Crown Grants.

The learned District Judge, having wrongly placed the *onus* on the defendant, presumed that the plaintiff had legal title and concentrated entirely on the question whether the defendant had affirmatively proved title by prescription to the land in dispute. Mr. H. V. Perera for the defendant appellant has strenuously contended that the judgment appealed from cannot stand, because the plaintiff has failed to establish his title to the land, whatever the demerits of the case for the defence may be.

I agree with Mr. H. V. Perera, but the question arises whether there are any findings of fact in the judgment of the learned District Judge from

[1] (1931) *32 N. L. R. 217.*

[2] *(1912) 15 N. L. R. 132.*

[3] *(1922) 24 N. L. R. at p. 9.*

which a Court of Appeal, without assuming the role of a Judge of first instance, may ascertain whether there are findings to show that the plaintiff has established his title. That title can only be a title by prescriptive possession in the circumstances of this case.

It seems to me that in a case where the learned Judge *ab initio* has made a cardinal error by placing the *onus* on the wrong party, it would not be just or right for a Court of Appeal to try and ascertain whether, had the trial Judge placed the *onus* on the proper party, the result might have been different. In such a case it would not be proper for a Court of Appeal to re-write the judgment of the trial Judge. Furthermore, in the light of the order I propose to make, it is inexpedient that I should say more in regard to the facts. The pity of it is that the parties must have already spent more than what the land is worth in this litigation. They, however, have the right to demand that the case should be decided according to correct legal principles.

I would set aside the judgment and the decree appealed against and send the case back for a trial *de novo* in accordance with the principles laid down in this judgment. In the circumstance of this case I think the fairest order to make is that each party should bear the costs of this appeal. All other costs will be in the discretion of the trial Judge. It is greatly to be desired that the parties may be able to reach some reasonable settlement or compromise.

JAYETILEKE C.J.—I agree.

Sent back for fresh trial.