

1937

Present : Abrahams C.J. and Maartensz J.

## WIMALASEKERE v. DINGIRIMAHATMAYA et al.

317—D. C. Ratnapura, 6,011.

Res judicata—Action for declaration of title—No order for possession—Subsequent action for ejectment—Interruption of possession—Claim for compensation for improvement—Jus retentionis.

A successful action for declaration of title to land is an interruption of defendants' adverse possession of the land.

Where the plaintiff in an action *rei vindicatio* obtained a declaration of title but no decree for possession was entered in his favour,—

Held, that he was not debarred from obtaining a decree for possession in a subsequent action for ejectment.

Held further, that the defendant was not precluded by the decree in the former action from claiming compensation for improvements and a *jus retentionis* in the action for ejectment.

*Appuhamy v. Banda* (16 N. L. R. 203) followed.

THIS was an action for declaration of title to certain blocks of land, for a decree of possession, and for ejectment. The plaintiff-appellant had instituted another action, earlier, against the same defendants, and had been declared entitled to the block in dispute, but he had omitted to pray for a decree of possession. A subsequent application for an order of possession having been refused, he instituted the present action.

The learned District Judge dismissed plaintiff's action, on the ground that the defendants had acquired title by prescription, and also that the decree in the previous action operated as *res judicata*. With regard to the alternative claim of the defendants for compensation for improvements, he held that the first defendant was entitled to compensation and the *jus retentionis*.

*H. V. Perera* (with him *S. W. Jayasuriya*), for plaintiff, appellant.—At the time the previous action was instituted, defendants had not been in possession for ten years. That action interrupted the running of prescription, so the period between that action and the institution of the present action cannot be taken into account for the purpose of proving title by prescription. A successful action for declaration of title interrupts prescription (*Emanis v. Sadappu*<sup>1</sup>). On the question of *res judicata*, the cause of action is entirely a new one, which accrued to the plaintiff subsequently. Defendant's possession is a continuing cause of action, and plaintiff is entitled to institute a separate action in respect of each day's possession.

*N. E. Weerasooria* (with him *A. E. R. Corea*) for defendant, respondents.—When the present action was instituted, the defendants had been in possession for over ten years. The previous action did not interrupt the running of prescription. On the contrary it strengthened the defendant's position, inasmuch as they remained in adverse

<sup>1</sup> 2 N. L. R. 261.

possession in spite of the decree against them. Further, the plaintiff omitted to sue for possession in the previous action. He cannot bring a second action in respect of a claim which he should have made in the previous action, but omitted to make, whether purposely or by an oversight. (Sections 34 and 207 of the Civil Procedure Code.) The plaintiff has not proved an ouster by the defendants subsequent to the previous action, and therefore no cause of action has arisen to the plaintiff since then. In any event, the defendants have effected improvements on the land, and are entitled to compensation and the *jus retentionis*. The defendants should be given the opportunity of proving their claim to compensation. Counsel cited *Siman Appu v. Christian Appu*<sup>1</sup>, *Bandulahamy v. Don Charles*<sup>2</sup>.

*H. V. Perera*, in reply.—The claim for compensation could have been made in reconvention in the previous action, but that was not done. Defendants are barred from making such claim now.

*Cur. adv. vult.*

June 14, 1937. MAARTENSZ J.—

The plaintiff-appellant in this action sued the defendants for declaration of title to two parcels of land described in the plan filed of record as lot 6 and the western portion of lot 5. The plaintiff's title to lot 5 was not disputed and this appeal affects only lot 6. It appears from the proceedings that the plaintiff had brought a previous action No. 4,222 of the District Court of Ratnapura against the same defendants in which on January 25, 1928, he was declared entitled to lot 6. The plaintiff had not prayed for a decree of possession and his application for an order of possession was refused on the authority of the ruling in *Vengadasalem v. Chettiyar*<sup>3</sup>. The plaintiff in this action claims a decree for possession and ejectment.

The defendants pleaded (a) that they had acquired a title by prescription, (b) that the plaintiff was precluded from setting up a claim for possession as he had not claimed it in the previous action. In the alternative the first defendant claimed compensation for improvements and a *jus retentionis* until that claim was satisfied.

The defendants had been in possession of lot 6 for eight years when action No. 4,222 was filed in 1925. The present action was filed in 1934. The ouster in November, 1933, alleged by the plaintiff was not proved. The defendants had therefore been in possession for over ten years when this action was filed. The learned District Judge accordingly held that the defendants had acquired a title by prescription and dismissed plaintiff's action with costs.

The first question for decision is whether the defendants' possession had been interrupted by the result of the action No. 4,222.

The District Judge relied on the case of *Siman Appu v. Christian Appu*<sup>1</sup>: Certain dicta in that case support the view taken by him. Withers J. said that "possession is disturbed by an action intended to remove the possessor". Lawrie A.C.J. said "If the actual physical possession has never been interrupted, it matters not that the possessor

<sup>1</sup> 1 N. L. R. 288.

<sup>2</sup> 2 Matara Cases 87.

<sup>3</sup> (1928) 29 N. L. R. 446.

<sup>1</sup> (1896) 1 N. L. R. 288.

has been troubled by law suits . . . . Until they succeed in getting the decree of a competent court on which they evict him, his possession is good as against his opponents”.

These dicta were *obiter* to the question in issue and I am not bound by them.

On the other hand the current of authority up to the case of *Unambuwe v. Junohamy*<sup>1</sup> was that the institution of an action even if successful was an interruption of possession. In the case referred to it was held that it did not, and this view was affirmed by Lawrie and Withers JJ. (Bonser C.J. dissenting) in the case of *Emanis v. Sadappu*<sup>2</sup>. Bonser C.J. was of opinion that the Court was bound by the previous decisions. He did not however express an opinion on the point.

The converse of the proposition that a successful action does interrupt possession must be inferred from the decisions in the cases reported in 2 *Cey. Law Rep.* 103 and 2 *N. L. R.* 261 (*supra*). Pereira J, held in the case of *Bandulahamy v. Don Charles*<sup>3</sup> that possession is not to be taken as disturbed by mere action; but an action in which a person is condemned to pay for his possession is an interruption of possession. The judgment is a very short one and not very helpful.

I am of opinion, apart from authority, that a successful action for declaration of title is an interruption of possession. The decree forces upon the person against whom it is entered an acknowledgment of title, and if that person continues in possession the possession can only be calculated for the purposes of prescription, from the date of the decree. To hold otherwise would mean that a person who has had adverse possession for say seven years may claim a title by prescriptive possession if he continues in adverse possession for three years after the decree. A proposition which stands self condemned.

The respondents however sought to support the judgment on the ground that plaintiff is precluded by sections 34 and 207 of the Civil Procedure Code from praying for a decree in ejectment as he omitted to claim it in the earlier action. The cases of *Casiechetty v. Cowell*<sup>4</sup> and *Ram Menika v. Dingiri Amma*<sup>5</sup> were cited in support of this proposition. In the former case the plaintiff having failed in an action for declaration of title against him was held to be precluded from bringing an action for a right of way over the same land. In the latter case the purchaser of property sued her vendor and a third person for possession; the third person established a right to compensation for improvements. The plaintiff paid the compensation and brought an action to recover the amount from the vendor; it was held that he should have made his claim in the earlier action. I confess I cannot see the relevancy of either decision to the question we have to decide in this appeal.

There can be no doubt that the plaintiff could have prayed for ejectment in the first action and did not do so. In this action he prays for declaration of title and a decree for ejectment alleging a fresh ouster in November, 1933. If there was such an ouster as averred in the plaint the plaintiff would have been entitled to a decree for ejectment

<sup>1</sup> (1892) 2 *C. L. Rep.* 103.

<sup>2</sup> (1896) 2 *N. L. R.* 261.

<sup>3</sup> 2 *Matara Cases* 87.

<sup>4</sup> (1916) 2 *C. W. R.* 255.

<sup>5</sup> (1909) 1 *Cur. Law. Rep.* 66.

as the cause of action was a new one. But no evidence was led of such an ouster and the trial appears to have proceeded on the footing that the defendants had continued in possession after the decree.

There was no physical interruption of defendants' possession and if a successful action for declaration of title did not constitute in law an interruption of the possession which is the view the District Judge took, the plaintiff could not in this action claim a remedy which he could have claimed in the previous action as there was no fresh ouster. But I have already held that the previous action brought by the plaintiff was, as it was successful, an interruption of defendants' possession. The possession after the decree therefore amounted to a fresh ouster. I am accordingly of opinion that the previous action does not preclude the plaintiff from making a claim for ejectment in this action.

As regards a claim for compensation for improvements Mr. Perera for the appellant contended that first defendant could not claim it in this action as he had not claimed it in the previous action.

This objection so far as the claim to compensation is concerned is met by authority.

It was held in the case of *Appuhamy v. Banda*<sup>1</sup> that the defendant in a District Court action who had not in reconvention set up a claim for improvements is not barred from bringing a separate action to enforce the claim.

The *ratio decidendi* is I think equally applicable to the claim in reconvention for compensation made by the first defendant in this case.

In the case cited the plaintiff did not set up a claim to a *jus retentionis*. Such a claim would I have no doubt have been rejected for a decree in ejectment had been entered against him in the previous action and he had been removed from possession.

In the present case the first defendant claims a *jus retentionis*. I do not see why he should not do so as the plaintiff in his first action had not prayed to be placed in possession and it was not necessary to set up a *jus retentionis*.

The appellant next contended that the first defendant had not proved that he was a *bona fide* possessor.

On the day of trial the following issues were framed:—

- (1) Is plaintiff entitled to an order for ejectment and possession under the decree obtained by him in D. C. 4,222, Ratnapura?
- (1A) If so, what damages is he entitled to? (Damages agreed upon at Rs. 100.)
- (2) Is first defendant entitled to compensation for the improvements made to the land (lot 6)?
- (2A) What is the value of the compensation? (Agreed Rs. 125 an acre.)
- (3) If so, is he entitled to the *jus retentionis* until he receives payment of compensation?
- (4) Are the decree and proceedings in D. C. Ratnapura, 4,222, *res judicata* on the plaintiff's claim to be placed in possession of lot 6 and to have the first defendant ejected therefrom?

<sup>1</sup> (1912) 16 N. L. R. 203.

- (5) Has the first defendant established a right by prescription to possess lot 6 referred to?

Mr. Peeris also suggests the issue—

- (4A) Are the decree and proceedings in D. C. Ratnapura, 4,222, *res judicata* in respect of the defendant's present claim for compensation?

No evidence was called. The Proctors for plaintiff and defendants addressed the Court on the law and judgment was reserved.

The District Judge held that the first defendant had acquired a title by prescription and went on to hold that first defendant's "failure to claim compensation in the old case further is no bar to his making such a claim in this case". He further said, "I hold that the first defendant is not only entitled to claim compensation and the *jus retentionis* but that he has acquired title to lot 6 in plan A by prescription".

Apparently the only questions discussed at the trial were: (1) whether the first defendant had acquired a title by prescription? (2) whether the decree and proceedings in D. C. Ratnapura, 4,222, precluded the first defendant from setting up a claim to compensation?

I do not think either side addressed themselves to the question of *bona fides* or *mala fides*. The plaintiff admitted that first defendant had planted the land with rubber prior to the institution of action No. 4,222, and that the rubber was seven or eight years old at the time the plan No. 100 was made (plan No. 100 is marked P1A). The survey according to the surveyor's notes was made in September, 1925—the plan was made for the purposes of the first action 4,222. The plaintiff would appear to have allowed the first defendant to possess the land for a number of years and make the plantation for which compensation is claimed.

In these circumstances I think the first defendant should be given an opportunity of establishing his right to compensation and to a *jus retentionis* until the compensation is paid.

The part of the decree dismissing plaintiff's action to lot 6 is set aside and the case remitted to the District Court for determination of the question whether the first defendant is entitled to the compensation and *jus retentionis* claimed by him until he is paid the compensation. After this question is determined a decree will be entered declaring plaintiff entitled to lot 6 as described in paragraph 1 of the schedule of the plaint and that the defendants be ejected therefrom and the plaintiff placed in possession subject if the Court so decides to the *jus retentionis* of the first defendant.

The plaintiff will be declared entitled to the sum of Rs. 100 as damages.

As regards costs the order of the District Court ordering the plaintiff to pay the defendant half the costs of this action is set aside and the plaintiff is declared entitled to the costs of the action. I think the plaintiff is entitled to those of appeal. The costs of the inquiry regarding the claim to compensation is left to the discretion of the District Judge.

ABRAHAMS C.J.—I agree.

*Set aside.*