1941 *Present :* **Nihill J.**

HETHUHAMY *v.* BOTEJU.

128—C. R. Ratnapura, 281.

Land Settlement Ordinance (Cap. 319), s. 8—Effect of settlement order—Vesting of title in claimant free from all unspecified interests—Right of bona fide *possessor to compensation.*

Under section 8 of the Land Settlement Ordinance the effect of a settlement order is to declare the Crown or any person to be entitled to a land or such share or interest in the land free from all encumbrances and to the exclusion of all unspecified interests.

The words "unspecified interests" refer to unspecified interests in the title and they do not deprive the right of a *bona fide* possessor of the land to compensation for improvements.

[1] *33 N. L. R. 169.* [2] *L. R. 9, C. P. 446.*

APPEAL from a judgment of the Commissioner of Requests, Ratnapura.

G. P. J. Kurukulasuriya (with him *U. A. Jayasundere*), for plaintiff, appellant.

N. Nadarajah (with him *E. B. Wikremanayake*), for defendant, respondent.

Cur. adv. vult.

November 4, 1941. NIHILL J.—

This is an appeal and a cross-appeal from the Court of Requests, Ratnapura. There is no contest on the facts, which are as follows:— By Settlement Order 25 (Ratnapura), which was published in the *Ceylon Government Gazette* No. 7,498 of October 14, 1932, " (P 1) land known as lot No. 77c was settled upon the plaintiff-appellant without any encumbrances. The total extent of this lot is about 5 acres and 13 perches. Of this lot the defendant-respondent had been in possession of a strip, 1 rood and 13 perches in extent, on the east which abutted the western boundary of land purchased by him in 1926 from the villagers. He had enclosed this strip with his other land and had planted rubber. That was the position when the plaintiff entered into an agreement with the Crown in 1928 under the provisions of section 4 of the Waste Lands Ordinance (Ordinance No. 1 of 1897). The defendant remained in possession of this strip and this action was brought for ejectment and damages. The defence to the action was that the defendant had acquired a title to the strip by prescription and that in any event he was entitled to compensation for improvements. The learned Commissioner decided against the defendant on the issue of prescription on the ground that the strip in question was regarded as the property of the Crown until the date of the Settlement Order in 1932, and that prescription against the plaintiff could only run from that date. He found also that the Settlement Order was conclusive as regards title in the plaintiff's favour and he awarded him damages for being kept out of possession for the two years prior to the institution of the action. He found that the defendant's possession had been *bona fide* and awarded him Rs. 56 as compensation for " his planting trouble ". The plaintiff-appellant has now appealed against that part of the order of the Commissioner which relates to the payment of compensation and the defendant-respondent in his cross-appeal has challenged the correctness of the order on the issue of prescription and asserts that he is entitled to a recovery of the land inasmuch as there was wilful suppression by the plaintiff-appellant at the settlement inquiry of the fact that the defendant-respondent was in possession and alone had improved that portion of the land. He claims also that the amount of compensation awarded to him was inadequate and that he should at least have been allowed a *jus retentionis* over the land until payment of compensation.

The first point for consideration is the legal effect of the Settlement Order. Does it or does it not confer an unencumbered title on the plaintiff-appellant? To examine this it will be necessary to study the inter-relationship between Ordinance No. 1 of 1897 and the Land Settlement Ordinance (Cap. 319), which came into force on October 23, 1931.

This Ordinance repealed Ordinance No. 1 of 1897, *i.e.*, the Waste Lands Ordinance ; but section 2 of Ordinance No. 22 of 1932 (now incorporated in section 3 (3) of Cap. 319) preserved proceedings begun, but not completed under the repealed Ordinance; it was this provision coupled with section 32 of Cap. 319 which allowed the proceedings in the present instance to continue and to terminate in the Settlement Order of October 14, 1932. That order purported to be made under section 32 (1) of Cap. 319 and sub-section (2) of that section gave the order the same force as an order made in consequence of proceedings taken under the Land Settlement Ordinance. Thus in determining the effect of the Settlement Order of October 14, 1932, one must look not at the provisions of the Waste Lands Ordinance but to those of the Land Settlement Ordinance. Now section 8 of this Ordinance lays down that every Settlement Order published in the *Ceylon Government Gazette* shall be judicially noticed and shall be conclusive proof, so far as the Crown or any person is thereby declared to be entitled to any land or to any share of or interest in any land, that the Crown or such person is entitled to such land or to such share of or interest in any land free of all encumbrances whatsoever other than those specified in such order . . . . and that subject to any encumbrances so specified such land share or interest vests absolutely in the Crown or in such person to the exclusion of all unspecified interests of whatsoever nature—two provisions are added to the section, the first preserves the right of any person prejudiced by fraud or the wilful suppression of facts of any claimant to proceed against such person either for the recovery of damages or for the recovery of the land awarded to such claimant, the second preserves the rights of *fidei commissarii.*

It will be necessary to consider the first of these provisos later. Now, the intention of this section seems to be clear; it excludes the unspecified interest and seeks to achieve finality. It only does so, however, so far as the Crown or any person is *thereby* declared to be entitled to any land or to any share of or interest in any land ", that is to say, " declared " by the terms of the Settlement Order. The word " thereby " must mean that. Mr. Nadarajah for the defendant-respondent has sought to make the point that the Settlement Order of October 14, 1932, is not a declaratory order, that nowhere in the body of the order do words appear which " declared title " on the persons mentioned in the Schedule to the order.

This is literally true but the acceptance of his submission that accordingly the Settlement Order is outside the provisions of section 8 and settles nothing would reduce the proceedings taken under the two Ordinances to absurdity. Furthermore, the Settlement Order of October 14, 1932, was in terms of Form 2 as set out in the First Schedule to the Land Settlement Ordinance, varied only as was necessary on account of the proceedings having been started under the Waste Lands Ordinance. The Settlement Officer thus complied with section 32 (1) which sanctions the use of this Form subject to such amendments as may be necessary and states that an order so made shall be valid and effectual for all purposes. It is true also that in a case where there has been no claimant to land the subject of a Settlement Notice Form 1 in the First Schedule is framed in a specific declaratory sense. It might be thought that the

draftsman would have been more happily inspired had something similar been introduced into the wording of Form 2 as well. But that a Settlement Order drawn up according to Form 2 is meant to be and can be implied to be a declaration. I have no doubt, as I think a study of the wording used in section 5 of the Ordinance will show. This section, *inter alia*, provides that a Settlement Officer may enter into an agreement with a claimant whereby a claimant or any other person shall be *declared* by Settlement Order under sub-section (5) of the section to be entitled either wholly or in part to any land specified in the Settlement Notice (sub-section (4) (c)) and sub-section (5) says that the Settlement Officer shall embody any such settlement in a Settlement Order which shall be substantially as set out in Form No. 2 in the First Schedule. That seems to me to make it reasonably certain that the Legislature meant Form No. 2 to be declaratory for proceedings initiated under the Land Settlement Ordinance. If that be so, then, under sub-section (2) of section 32 a Settlement Order made under the terms of sub-section (1) of this section appllied to proceedings begun under the provisions of the Waste Lands Ordinance but not completed before its repeal must have similar effect.

The next point taken by Counsel for the defendant-respondent is that the alleged agreement between the plaintiff-appellant and the Settlement Officer in 1928 was not in fact an agreement but an admission of a claim and that herefore the principle of the decision in *Gunasekera v. Silva and another* [1] should apply. The text of the agreement was not filed as a document in the case, but the plaintiff in evidence which was unchallenged stated that he paid Government Rs. 16 per acre for the land which the Settlement Officer agreed to settle on him. That indicates that the Settlement Officer was dealing with the land as Crown land and not as land to which the plaintiff had made out a clear title of ownership. In fact on that evidence I regard this case as even stronger than the one dealt with in *Kiri Menika v. Appuhamy* [2].

In that case a Court of two Judges held that an order published in the *Ceylon Government Gazette* under the Waste Lands Ordinance following an agreement was conclusive against a co-owner who had not claimed before the settlement. In this case the plaintiff-appellant did not claim as one with an undivided share but as sole owner. The wording of section 8 of the new Ordinance with its greater details has if anything strengthened the position which the Judges in the *Kiri Menika Case* (*supra*) found strong enough when interpreting the wording of the old Ordinance.

If then, as I hold it to be, the effect of the Settlement Order published on October 14, 1932, was to give the plaintiff-appellant an unencumbered title on that date it must follow that the defendant-respondent fails on the issue of prescription. It has been urged upon me that in any event prescription should run from the date of the agreement, viz., 1928, but that would only be if it was the agreement and not the published order that passed the title.

Under section 8 it is the Settlement Order "so published", that is in the *Ceylon Government Gazette*, that shall be judicially noted as conclusive

[1] *4 C. W. R. 226.* [2] *19 N. L. R. 298.*

proof of title. Can it be said that title passes from the Crown at the date of the agreement although it is the published Settlement Order which ultimately provides the title holder with conclusive proof of his title?

I do not think that the wording of sub-section (4) (c) of section 5 of the Land Settlement Ordinance supports such a view. The essence of the agreement is the undertaking by the Crown to settle land subsequently on the claimant by the procedure provided for by sub-section (5). In the case before me there was a wide gap between the agreement made in 1928 and the publication of the Settlement Order in 1932. This, however, should have been of advantage to the defendant-respondent for had he been alive to his interests instead of sleeping over them he would have had ample time to pursue the remedies open to him by other provisions of the Ordinance.

After the publication of the Settlement Order he had a year under section 24 to put forward his interest in this land. Even now when the eleventh hour has passed section 26 with its apparently timeless right of approaching the Executive Committee of Agriculture and Lands with a request for compensation means that the door if shut, is not finally bolted against him.

There remains to be considered the first proviso to section 8 of the Land Settlement Ordinance. This runs as follows :—

> " Provided that nothing in this section contained shall affect the right of any person prejudiced by fraud or the wilful suppression of facts of any claimant under the notice from proceeding against such claimant either for the recovery of damages or for the recovery of the land awarded to such claimant by the order.

It is now contended before me that the evidence of the plaintiff in the lower Court discloses that he knew that the defendant-respondent was in possession of the strip at the time he made his claim before the Settlement Officer and that he had enclosed it and planted rubber trees thereon. It was not asserted in the lower Court that the plaintiff had suppressed some material fact in his negotiations with the Settlement Officer. The proviso to section 8 does not seem to have been in anyone's mind when the issues were framed. There is thus no evidence before me on which I can judge whether there was fraud or a wilful suppression of fact by the plaintiff before the Settlement Officer.

Mr. Nadarajah has contended that even if everything be held against him there should be a new trial at least on this issue. I cannot subscribe to that view. The defendant-respondent has all along been negligent of his interest and it would not be fair to allow him another opportunity to fight the plaintiff on ground which he might well have selected for himself at the trial of this action, if he had evidence in support.

It did, however, emerge clearly from the plaintiff's evidence that he was content in the years 1926 to 1928 to regard the defendant as being in lawful possession of the strip since when some of the defendant's trees accidentally burnt down in a chena fire started by the plaintiff he planted the present trees for the defendant as compensation. On this evidence the learned Commissioner found that the defendant was, to the plaintiff's

knowledge, a *bona fide* possessor of the land at the time of his first planting and that it was apparently because of this that he awarded the defendant compensation for his planting trouble.

The plaintiff-appellant has submitted in his appeal that the words "to the exclusion of all unspecified interests of whatsoever nature" are so all-embracing as to take away from the defendant-respondent any right to compensation which he might otherwise as a *bona fide* possessor have had. In my view, however, those words relate only to unspecified interests in the title and cannot take away a right to compensation, where it exists in the possessor on ouster by the true owner.

I hold, therefore, that the learned Commissioner was right on his finding of fact, which the evidence supported, to award the defendant-respondent compensation for his trees. The plaintiff's appeal on this point, therefore, fails. There remains, however, still one further matter for consideration. If the defendant-respondent is entitled to compensation for his improvements to this chena land has the learned Commissioner applied a correct assessment in awarding a sum of Rs. 2 per tree? Mr. Nadarajah has maintained that in view of the fact that his client was in undisturbed possession of this strip for over five years the true measures of compensation is that set out in section 9 of the Definition of Boundaries Ordinance (Cap. 315). The defendant bought his land to the east of the land in dispute in October, 1926, and he fenced what he thought to be the correct western boundary. It is admitted that he did plant and improve what subsequently turned out to be an encroachment and he remained in possession of the encroached strip for over five years.

I think, therefore, there is substance in Mr. Nadaraja's submission and that with regard to this matter of compensation there must be further inquiry.

The result, therefore, of my judgment is that both this appeal and cross-appeal are dismissed except on the point taken by the defendant-respondent as to the adequacy of the compensation. In all other respects I uphold the judgment of the learned Commissioner. On the issue of compensation I remit the case back to the Commissioner for evidence to be taken to enable him to fix compensation on the basis set out in the first paragraph of section 9 of the Definition of Boundaries Ordinance (Cap. 315).

As regards the costs of this appeal and cross-appeal, although the plaintiff has failed in his appeal he has succeeded in defeating the respondent's cross-appeal on the main issue with regard to title.

I think, therefore, that the fairest order I can make is to direct that the defendant-respondent should pay two-thirds of the costs and the plaintiff-appellant the remaining one-third; costs of the action in the lower Court to remain as ordered by the Commissioner.

Varied.