*Present:* Fisher C.J. and Drieberg A.J.

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PUNCHI BANDA *v.* IBRAHIM *et al.*

*24—D. C. Kandy, 33,915.*

*Police Ordinance—Protection given to acts of Police Officer—Scope of authority—Reasonable and* bona fide *belief—Ordinance No. 16 of 1865.*

Section 79 of the Police Ordinance extends protection to any act which a Police Officer does in the reasonable and *bona fide* belief that he is acting within the scope of his authority and which is not actuated by any malice or ulterior motive.

APPEAL from a judgment of the District Judge of Kandy. The facts are fully stated in the judgment of Drieberg A.J.

*H. V. Perera* (with *Rajapakse*), for first defendant, appellant.

*R. L. Pereira*, for second defendant, appellant.

*Keuneman*, for plaintiff, respondent.

September 16, 1927. FISHER C.J.—

As regards the first defendant, in my opinion the plea under section 79 of the Police Ordinance must prevail. The learned Judge has decided that he was not entitled to the protection of the section because he finds that he did not act in good faith. He says:—

> " The protection afforded by provisions like section 79 of the Police Ordinance are only intended to apply in cases where the public officer has acted *bona fide* and not in cases where he has acted out of the scope of his duties."

By " the scope of his duties " I take it that the learned Judge means the extent to which he is expressly or impliedly authorized to act. I do not think that on the true construction of this section its operation is limited as the learned Judge has found. I think that by the words " intended to be done " it extends protection to any act which a police officer does in the reasonable and *bona fide* belief that he is acting within the scope of his authority, that is to say, that when he did the act under consideration he intended to do what he conceived and reasonably and honestly thought to be his duty and was not actuated by any malice or ulterior motive. Whether the writing of the word " police " on the petition really constitutes an express direction to do what he did in this case, if he thought the occasion demanded it, is a question which I do not think it is necessary to go into.

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In my opinion the learned Judge's finding that the first defendant was not acting *bona fide* cannot be upheld. He was a police sergeant of fourteen years' service. No suggestion was made that his record was tranished. He was not cross-examined as to his credit nor as to his " having been in touch with the second defendant's party even before the petition was brought to him," of which there was no evidence but which the learned Judge says that his " prompt action " indicates to his mind. There is no evidence of any motive why he should give false evidence. According to his uncontradicted evidence the transfer to the widow was produced to him by her, and there must have been in all probability indications of hostility between the brothers, as two of them were actually there to support their mother's claim. Under these circumstances the first defendant ordered the elephant to be given to the person who seemed to him by reason of the document to have the legal right to it, pending resort to Court to have the question of legal rights determined. The effect of his evidence is that he prevailed upon the plaintiff to take that view and made a note of the circumstances which, had he had it in his mind to be a thorough partisan in favour of second defendant and to fabricate a note accordingly, would not, in my opinion, have taken the form that it did. As it is, it seems to me to be a note which is natural and consistent with the surrounding circumstances and to bear on the face of it the impress of truth. Moreover, the plaintiff, a man of twelve years' experience in such matters, admitted that the first defendant questioned him and wrote down what he said and took his signature to what he had written. He does not suggest what his version is of what he really said, but merely denies that the statement truly sets out what he said. I think the proper deduction to be drawn from it is that it is not a false record of what took place.

This is a case in which the Judge has seen and heard the witnessess, and the position of the Court who hears an appeal in such a case is described by Lindley M. R. in *Coghlan v. Cumberland.*[1] He says:—

> " It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

[1] *(1898) 1 Ch. D. at p. 705.*

I think those observations are in point here. Under all the circumstances I think that there was no proper foundation for the finding of the learned Judge as regards the want of *bona fides* of the first defendant, and I therefore think that he is entitled to the protection of section 79.

With regard to the case against the second defendant, I have had the advantage of reading the judgment of my brother Drieberg, with which I agree.

The appeals are allowed and the judgment appealed from must be set aside, and judgment must be entered dismissing the action. The respondent must pay the costs of appeal and in the District Court.

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The plaintiff-respondent filed action alleging that he was the owner of an elephant worth Rs. 1,500 and that he had possession of it for the last eleven years. He alleged forcible removal of it under these circumstances: He said that the second defendant-appellant complained falsely to the Police Magistrate of Kandy that the elephant had been wrongfully and forcibly removed by him from the second defendant's possession; that the petition was referred to the Katugastota Police and that on January 27, 1926, the police sergeant, the first defendant-appellant, wrongfully removed the elephant from the custody and possession of the plaintiff and gave it over to the second defendant. He alleged that this gave him a cause of action to sue for the recovery of the elephant, or in the alternative for its value and damages.

This elephant had been sold to the second defendant's husband, Mudalihamy Vedarala, by a deed of October 6, 1915, for the sum of Rs. 1,265. Mudalihamy died intestate on March 30, 1925, having transferred to his children all his immovable property. The plaintiff says that he contributed Rs. 865 of the price of the elephant, and he suggests that by arrangement with his father the elephant was his from the time of its purchase, and that his father adjusted matters by giving him less property than the other children when he distributed his property among his children. This, however, was not done until some days before the death of Mudalihamy.

The second defendant says that Mudalihamy gifted to his children all his property except the elephant, and that as it was acquired property she had the widow's life interest in it or right of maintenance from it.

While the plaint undoubtedly has the averments necessary for a possessory action, it is also one *rei vindicatio*, for though the plaintiff does not ask for a decree declaratory of right it contains an averment of ownership and an alternative claim for Rs. 1,500, the value of the elephant.

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Counsel for second defendant suggested the issue whether the plaintiff was the owner of the elephant or whether it was the property of the deceased Mudalihamy. On objection by the plaintiff the learned District Judge refused to allow this issue, but not, however, on the ground that the action was a purely possessory action or that he would permit it to be converted or treated as a possessory suit; he upheld the objection on some other grounds which I am unable to understand fully.

Judgment was entered for the plaintiff against both defendants as prayed for and they have appealed.

As I am of opinion that the plaintiff has entirely failed to prove any possession *ut dominus* at all, it is unnecessary to deal with the question debated at some lenght at the trial whether a possessory action is available in Ceylon in such a case as this. The most recent authority which has been cited to us on the point is against this proposition (*Ponnampalam v. Sinnatamby*[1]).

Regarded as a possessory action, and if, as it was assumed, the period of possession needed to support it is a year and a day, the action must fail for this reason; the issue accepted by the plaintiff for this purpose was this, " Was the plaintiff in possession of the elephant since his father's death, or was the second defendant in possession as widow? "

The forcible removal complained of was on January 27, 1926, and Mudalihamy died on March 30, 1925; the period between these dates is less than a year and a day. I am reluctant to base my judgment on this ground alone, for there is ample material in this case to decide the issue of possession and the question of title as well in favour of the second defendant.

It is unfortunate that the learned District Judge did not admit the issue of title and finally determine the dispute about this elephant. It is not desirable where both parties derive their title from the same source, and we have merely doubtful inferences from uncertain facts that an action *rei vindicatio* should be converted into a possessory action and the possessory remedy granted; such a course has been condemned in the case of *Philippu v. Pedris*.[2]

At the time of the purchase of the elephant the plaintiff was living with his father, Mudalihamy. He was then a Peace Officer; he had been appointed to the office in 1911, and held office till 1923, when he was dismissed. He had no salary, and he must necessarily have been dependent on his father, who was a man of means. He offers no explanation of how he obtained the sum of Rs. 865. After some time he moved to a land belonging to his father, which was about 200 yards away, and he says that he kept the elephant there. This is the land which was gifted to him by his father shortly before his death. He built a house on it with his own money, as he

[1] *(1911) 15 N. L. R. 11.*

[2] *(1913) 5 Bal. Notes of Cases 39.*

suggests but as the second defendant suggests, with money given him by his father. He seeks to support his suggestion that the payment made by Mudalihamy was reckoned by the latter when he distributed his properties before his death by the fact, so he alleges, that in the gift to him the land was valued at Rs. 800, whereas properties valued at Rs. 1,500 Rs. 1,400, and Rs. 1,000 were given to the other chidren.

This is based on the statement P 1, which contains some particulars of the deeds by which these properties were transferred. It would appear that these are not deeds of gift, in which case the value of the subject of the gift would be entered on the deed, but they are drawn in the form of transfers for consideration. I am aware that deeds of gift are frequently drawn in this form, but the amount stated as the consideration cannot be taken as a reliable index of the value. I prefer to accept the official valuations for probate given in D 3, and from this it will appear that there was a considerable inequality in the value of the properties gifted.

In any case material such as this is entirely inadequate to support the conclusion that by this distribution of property the plaintiff, so to speak, repaid out of his inheritance the Rs. 400 paid by Mudalihamy.

The plaintiff's case, except for his own evidence, finds very little support. It is admitted by the second defendant that he was for a considerable period in charge of the elephant, but it has not been proved that he was so as owner. He relies upon the fact that in the testamentary proceedings his proctor stated that he claimed the elephant, and on the fact that in a certain Police Court case he refers to Siyatu as the keeper of his elephant. This is of little value. He also relies on the fact that Medagoda Korala had given him a report, P. 2 of January 19, 1925, that he had an income of Rs. 200 "from the elephant." The learned District Judge seems to have been influenced by this circumstance, because the Korala said that on that occasion the plaintiff was accompanied by his father. The Korala, however, recognized the rights of the second defendant, for in December, 1925, when he wanted the elephant for a perahera, he wrote to the second defendant for it (letter D 2). Against this entirely inconclusive evidence of the plaintiff there is in addition to the document D 2 the letter D 5 of May, 1921, by which Ratnayake applied to Mudalihamy for the use of the elephant for transporting timber and inquired what the hire would be; also a similar letter, D 4 of June 19, 1924, by which a Moorman made a similar application to Mudalihamy.

The surest guide to the truth is to be found in the incidents of January 27, 1926, on which point I think the learned District Judge has come to a wrong conclusion on the facts. There is no reason for doubting the good faith of the first defendant and the

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genuineness of the record D 1, which he wrote in the presence of the plaintiff. The settlement there arrived at fully supports the case of the second defendant. When the first defendant had to take some action on the report referred to him, the second defendant produced Mudalihamy's deed for the elephant, and the plaintiff said that he had a share in the elephant, and justified his retention on the ground that the keeper, Siyatu, was unsatisfactory. The second defendant and two of her sons said they wished Siyatu to continue looking after the elephant, and Siyatu said that he had had charge of it for eight years and that there had been no complaints. The paintiff signed the record of his statement made by the first defendant. I am unable to believe that a man like the plaintiff, who has been a headman, would have signed the Police record without acquainting himself of its contents. If his case is true, there was most improper action by the first defendant, and when he found the elephant given over to the second defendant by him as a result of an application to Court, to which he was not a party, I think he would have made very prompt complaint to the Police Magistrate and to the superior Police Officers. Instead of which, he did nothing in the matter until he filed his action on April 28, 1926, after giving notice to the first defendant under section 461 of the Civil Procedure Code.

I agree with my Lord the Chief Justice that the first defendant is entitled to the protection of section 79 of the Police Ordinance. He would not be entitled to it only if he acted maliciously and not in the *bona fide* exercise of his official duties. *Van Hoff v. Keegal.*[1]

The appeals are allowed and the judgment appealed from must be set aside, and judgment entered dismissing the action. The respondent must pay the costs of the proceedings in the District Court and of this appeal.

*Appeal allowed.*

[1] *(1917) 4 C. W. R. 258.*