[FULL BENCH.] *Feb. 7, 1911*

Present : Hutchinson C.J., Middleton and Grenier JJ.

ELIASHAMY *v.* PUNCHI BANDA *et al.*

151 *to* 153—*D. C. Ratnapura*, 1,738.

Action for declaration of title, ejectment, and damages—Sale of land by plaintiff pending action—Plaintiff entitled to recover damages in spite of sale.

Where during the pendency of an action for declaration of title, ejectment, and damages consequent on the trespass and the wrongful removal of plumbago from the land in dispute, the plaintiff sold the land in dispute to a third party,—

Held (*per* HUTCHINSON C.J. and MIDDLETON J., *dissentiente* GRENIER J.), (1) that the vendees need not be added as plaintiffs ; (2) that plaintiff was not precluded from maintaining his claim for damages, though he could not get a decree for declaration of title and ejectment.

Ossen Lebbe v. Cader Lebbe [1] over-ruled.

IN this action plaintiff sued for declaration of title to 19-24ths of a certain land, and to recover possession, and damages, and for an injunction. He alleged that the first three defendants and certain other persons are the *nindagama* proprietors, and that he and his predecessors in title duly performed *rajakariya*, and that he was on December 17, 1909, in the enjoyment of all the rights and privileges incidental to the said *rajakariya*, and that on the last-mentioned date

[1] *(1899) 2 A. C. R. 175.*

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the first three defendants, in collusion with the last three, entered the land and took forcible possession of it from him and sank pits and mined for plumbago and removed a large quantity of plumbago from it, causing him damage to the amount of Rs. 2,500, and he claims the said Rs. 2,500 and further damages. The first three defendants filed a joint answer denying the plaintiff's title to any share in the land, or that he or his predecessors ever performed *rajakariya* in respect of the land, or that they themselves took forcible possession ; they also alleged that the land is *bandara*, and is the exclusive property of themselves and certain others, but that even if it is *paraveni* land, and if the plaintiff is entitled to 19-24ths of a tenant's share in it, the minerals belong to the defendants and their co-owners ; and that, lastly, that the plaintiff has since the institution of this action conveyed all his interest in the land to E. L. F. de Soysa and T. Cooray, and is therefore not entitled to maintain this action. The fourth and sixth defendants filed a joint answer to the same effect as that of the first three defendants. The fifth defendant in his answer did not admit any of the allegations made in the plaint, but disclaimed title for himself.

The learned District Judge framed, *inter alia*, the following issues :—

(1) Is the plaintiff not entitled to maintain this action by reason of conveyance No. 3,952 of March 12, 1910, to Mr. E. L. F. de Soysa and to Themis Cooray ?

(2) Was plaintiff on December 17, 1909, in possession of 19–24ths of the land described in the plaint, and if so, entitled to be presumed *paraveni nilakaraya* owner thereof ?

(8) The plaintiff having vindicated his title to the said shares of the land against the defendants in D. C. Ratnapura 1,507, for the fifth and seventh defendants, of whom the fourth defendant herein was the proctor, is the fourth defendant herein entitled to set up a title derived from the first, second, and third defendants herein, obtained after decree, to defeat the same ?

On the first issue the learned District Judge held (August 20, 1910) that the action was not maintainable, but ordered that Soysa and Cooray be added as plaintiffs within a specified time. They were accordingly added on August 31, 1910.

There were three appeals by the defendants, and there was a cross objection filed by the plaintiff under section 776 of the Civil Procedure Code.

The appeal in No. 151 was by the fourth, fifth, and sixth defendants against an order dated August 31, 1910, directing two persons, vendees of the plaintiff, to be made added plaintiffs to the action. The appeal No. 152 was by the first, second, and third defendants,

and was against an order refusing to vacate the order of August 31, 1910. The appeal No. 153 was by the first, fourth, and sixth defendants, and was against an order allowing issues (2) and (8), and further sought that the order adding plaintiffs should be set aside.

The case was reserved for a Full Bench.

H. A. Jayewardene (with him *Jayatileke*), for the appellants.—The main prayer of the plaint is one for declaration of title ; the right to recover damages depends on the right to get a declaration of title. Since plaintiff has sold his interest after the filing of the action, he cannot get a declaration of title, nor can he get damages since he is not owner now. *Ossen Lebbe v. Cader Lebbe*[1], *Norton v. Freckar.*[2] *Voet* 6, 1, 4 (*Casie Chitty's Translation, p.* 14) lays down the same principle. Counsel also referred to 2 *W. R.* 169.

The eighth issue does not arise on the pleadings. The plaintiffs have not followed the proper procedure for the adding of parties.

Bawa, for the respondent.—*Ossen Lebbe v. Cader Lebbe* proceeds upon the assumption that we have various kinds of action by name as under the old law. Under the Code actions are not labelled by names. We have only to state facts and ask for relief. Even if under the Roman-Dutch Law we cannot maintain this action, the action is maintainable under the Civil Procedure Code. The plaintiff alleges that the defendants had removed his plumbago ; the fact that he had sold his land does not deprive him of the right to recover the value of the plumbago. Chapter XXV. of the Civil Procedure Code specifies all the cases in which an order of abatement may be made ; it nowhere says that alienation, *pendente lite*, causes the action to abate. The Court should not have ordered the vendees to be joined as plaintiffs. They have no right to recover damages. Counsel referred to *Pless Pol v. Soysa*,[3] *Veeravagu v. Fernando.*[4]

H. A. Jayewardene, in reply.

Cur. adv. vult.

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His Lordship stated the facts, and continued :—

The second and eighth issues raised questions of law proper to be tried by the District Court, and I see no reason why they should not be tried. The main question in these appeals is whether the order adding plaintiffs should stand, and if not, whether the action should be dismissed. The action was commenced in January, 1910. By deed dated March 12, 1910, the plaintiff conveyed to the added plaintiffs 15–18th shares in the land. It seems clear

[1] *(1899) 2 A. C. R. 175.*
[2] *(1737) 1 Atkyns 523.*
[3] *(1907) 10 N. L. R. 252 ; 3 Bal. 146.*
[4] *(1893) 2 C. L. R. 207.*

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that under that conveyance the added plaintiffs are not entitled to the damages which the plaintiff claims for the plumbago removed by the defendants before the date of the conveyance ; the right (if he had any) to those damages is still vested in the original plaintiff ; if he cannot recover them the defendants will keep the value of that plumbago, even though it is decided that they were trespassers and wrongdoers. That claim of the plaintiff must therefore be decided in this action. The plaintiff contended before the District Court that he should maintain his claim for damages in this action without adding the purchasers as plaintiffs ; the Judge expressed his opinion that the action must be dismissed, unless the purchasers were added ; and the plaintiff accordingly asked that they should be added, and the Judge allowed his request. The appellants' contention, if I have rightly understood it, is that the order adding plaintiffs was irregularly made and should be set aside, and that when that is done, the plaintiff's action must be dismissed, because there is a rule that a man cannot recover what are called " mesne profits " from a trespasser on his land, unless he gets at the same time a decree declaring him to be still entitled to the land ; that this plaintiff admittedly cannot now get such a decree, and that the damages which he claims are " mesne profits," or at any rate should be dealt with in the same way as if they were " mesne profits ". The case of *Ossen Lebbe v. Cader Lebbe*[1] was cited in proof of the alleged rule. If there is such a rule the original plaintiff's claim must fail, whether the purchasers are added or not, because he is not now entitled to the land, and the added plaintiffs are not entitled to damages for the plumbago removed before their purchase. From any point of view, therefore, it was not necessary to add the purchasers as plaintiffs. For if there is such a rule, the plaintiff's claim must fail whether the purchasers are added or not.

In *Ossen Lebbe v. Cader Lebbe*[1] the plaintiff sued for declaration of his title to land and to eject the defendant, and for damages, and for mesne profits. He had never had possession, but claimed to have been entitled to it up to the time of the commencement of the action ; and his interest in the land had, during the pendency of the action, been sold under a writ of execution against him. The District Judge dismissed the claim for ejectment, but gave the plaintiff mesne profits for the period before the sale. The Supreme Court (Lawrie and Withers JJ.) dismissed the action. Lawrie J. said : " It seems to work injustice in this case, but I think that certainly the law is that to maintain an action for mesne profits founded on wrongful possession of the land the plaintiff must have at the date of the decree for mesne profits a present possessory title ". That opinion seems to me to be right in so far as it " works injustice," but in other respects I cannot assent to it. He refers to *Norton v. Freckar*[2] and another case, the report of which I have

[1] *(1899) 2 A. C. R. 175.*

[2] *(1737) 1 Atkyns 523.*

not been able to find. Withers J. agreed with him, and quoted a passage from *Voet* 6, 1, 4. In *Norton v. Freckar*[1] R had been for many years in possession of land, claiming it as his own, and after his death the plaintiff filed a bill in Chancery against R's administrator for an account of the rents and profits ; the plaintiff had never had possession, and had not brought any action at law to prove his title and recover possession, and his bill was therefore dismissed. Voet in the passage quoted was speaking only of an action *rei vindicatio*. I think that these authorities only deal with the form of action or (in the case of *Norton v. Freckar*[1]) with the Court in which the action should be brought. They do not say, and I cannot believe they meant that, if a man has a right to recover damage for trespass on his land, he loses it, and no one else acquires it, when he sells the land. And if he still has the right, he must have a remedy ; the form of the action is no longer material.

In 151 and 153 the order of August 31 adding plaintiffs, and in 152 the order of September 15 refusing to vacate the order of August 31, should be set aside ; and so much of the appeal in 153 as asks that the order of August 17 be set aside and that the action be dismissed ought to be dismissed. The case must go back for trial on the issues settled by the District Court other than the first. The plaintiff has substantially succeeded on all the appeals, and I think that he should have his costs of the appeals.

MIDDLETON J.—

There were three appeals by the defendants, and there was a cross objection filed by the plaintiff under section 776 of the Civil Procedure Code. The appeal in No. 151 was by the fourth, fifth, and sixth defendants against an order dated August 31, 1910, directing two persons, vendees of the plaintiff, to be made added plaintiffs to the action. The appeal in No. 152 was by the first, second, and third defendants, and was against an order refusing to vacate the order of August 31, 1910. The appeal No. 153 was by the first, fourth, and sixth defendants, and was against an order allowing issues (2) and (8), and further sought that the order adding plaintiff should be set aside. The action was brought on January 4, 1910, in the form of an action *rei vindicatio* for a declaration of title to a land, ejectment therefrom, damages for removing plumbago thereon, and an injunction to prevent further interference.

On March 12, 1910, the plaintiff sold his interest in the land to two other persons, now made added plaintiffs by the District Judge. The object of the action was to obtain damages for certain plumbago alleged by the plaintiff to have been dug and removed by the defendants from the land while in the possession of the plaintiff. The sale by the plaintiff unquestionably terminated his claim to be

[1] (*1737*) *1 Atkyns 523.*

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declared owner of the land or to have ejectment or an injunction, but what he sold was his right in the land, not his right to recover damages for injury inflicted when he was owner of the land. If, therefore, he had a right to claim such damages, I cannot see that he is precluded by the form of his action from proceeding in conformity with it for their recovery. As a condition precedent to their recovery he will be bound to prove that at the time the plumbago was wrongfully removed—if it was wrongfully removed—he had a legal right to the share of the land he claims in his action. The fact that his action is supposed to be in the form of an action *rei vindicatio* does not prevent him from abandoning that part of his claim seeking a declaration of title and ejectment and reducing his claim to one of damages only. There are no set forms of action under our present procedure, but for the sake of brevity and distinction it is customary to use the old names of actions under the Roman-Dutch procedure. The District Judge has ordered the vendees of the plaintiff to be added as plaintiffs, on the grounds apparently that an action for mesne profits cannot be maintained unless the plaintiff has at the date of the decree a possessory title (*Ossen Lebbe v. Cader Lebbe* [1]). This is a judgment purporting to be founded on *Norton v. Freckar* [2] an old case decided when the distinction between law and equity in the English Courts was marked and determined, and when procedure was governed by restricted forms. Under the old procedure it was necessary by an action at law to recover possession of land by ejectment before in equity you could recover mesne profits, and *Norton v. Freckar* [2] is authority for it. In law also apparently no action would lie in trespass for mesne profits till possession was recovered. This would not, however, have prevented an action on the case for damages to the *corpus* while in the lawful possession of the plaintiff. It must be remembered also that under the English Law mesne profits has a signification limited to the yearly value of the premises to a person wrongfully kept out of them, while under our Procedure Code (section 196) it means profits actually received or which with ordinary diligence might have been received. If in *Ossen Lebbe v. Cader Lebbe* the plaintiff had a claim for damages to the *corpus* while he was in lawful possession of it, or if his claim was for rent or profits wrongfully taken by the defendants while the plaintiff was entitled to the possession, I think, with all respect, that the learned Judges were wrong in dismissing the action. Again, I think that *Voet* 6, 1, 4, at page 14 of *Casie Chitty's Translation*, does not apply here. It no doubt applies to a simple claim for declaration of title, but here there is a claim for damages in addition, and the foundation of the action still exists, although the interest of the plaintiff in the *corpus* may have ceased to exist. As regards the second issue, it appears clearly to arise in the case; and the fourth issue raises a question of law, which must be decided

[1] *(1899) 2 A. C. R. 175.*

[2] *(1737) 1 Atkyns 523.*

by the District Judge in the first instance. I think that both appeals Nos. 151 and 152 should be allowed. As regards appeal No. 153, in my opinion it should be allowed as regards the addition of the added plaintiffs and dismissed as regards the issue objected to, and the case sent back for trial upon the question whether the plaintiff was entitled to a share in the land at the time of the alleged abstraction of the plumbago, which would give him a right to be reimbursed for it by the defendants, and to what amount. I agree with my Lord in the order he makes as to costs.

GRENIER J.—

This is an action *rei vindicatio* instituted on January 4, 1910, against six persons in respect of a land called Damunuketayahena, of which the plaintiff claimed 19–24ths. We are not concerned at present with the title which he has set out in the plaint, or with the merits of the case. In addition to his claim for a declaration of title, the plaintiff claimed the sum of Rs. 2,500 as damages, and further damages at the rate of Rs. 300 a day from the date of institution of action, alleging that all the defendants had entered on the land on December 17, 1909, and had mined for plumbago and appropriated the same.

The defendants severed in their defence. The fifth defendant filed answer disclaiming title ; the first, second, and third defendants denied the plaintiff's title, and raised several questions which are not material on this appeal ; and the answer of the fourth and sixth defendants followed practically on the lines of that of the first, second, and third defendants. Both these sets of defendants raised the objection that as the plaintiff had by his conveyance No. 3,952, dated March 12, 1910, transferred the land in question to E. L. F. de Soysa and Themis Cooray, the plaintiff was not entitled to maintain this action. When the case came on for trial on August 17, 1910, several issues were suggested by plaintiff's counsel, and to some of these the defendants' counsel objected, and suggested other issues. The Court thereupon framed eight issues, the first of which was : " Is the plaintiff not entitled to maintain this action by reason of the conveyance No. 3,952 of March 12, 1910, to E. L. F. de Soysa and to Themis Cooray ? " This issue, which went to the very root of plaintiff's action, if decided against him, was first argued, and the District Judge held that the judgment of Lawrie and Withers JJ., reported in *Appeal Court Reports, vol. II., pp.* 175–178, was on all fours with the present case, Mr. Justice Withers having said in his judgment : " I do not see how you can disassociate the *res* from the *fructus*, and when the dominium goes, the foundation of the action goes with it ". The District Judge, however, instead of dismissing the plaintiff's action, appears to have given way to a suggestion from plaintiff's counsel that the purchasers, De Soysa and Cooray, should be added as plaintiffs. The District Judge thought this was—

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I am quoting his words—" the fairest course to pursue in a case of this nature, where such large interests are involved, and so as to avoid further litigation ; the law requires that justice not injustice be done". He accordingly made order as follows : " If the plaintiff within fourteen days, with notice to the defendants in writing, as required by section 403 of the Code, moves this Court to add the purchasers from the plaintiff as added plaintiffs in this case, this Court will, subject to the hearing of any objection raised by defendants' counsel, allow the motion, in default the plaintiff's action will be dismissed. The plaintiff must pay the defendants the costs of this contention."

This order is dated August 20, 1910. On August 29, 1910, the plaintiff's proctor moved in conformity with the order of Court dated August 20, 1910, that E. L. F. de Soysa and Themis Cooray be added as plaintiffs in this action, mentioning in his motion paper that these two persons had consented to be added as parties. Notice of this motion was served on the proctors for the fourth and sixth defendants and fifth defendant, but it was not served on Mr. Dharmaratne, who was the proctor for the first, second, and third defendants. The District Judge allowed the motion of the plaintiff's proctor to add the purchasers on August 31, 1910. On September 12 Mr. Dharmaratne gave notice to the plaintiff that he would on the next day move the Court to vacate the order made by the District Judge on August 31, 1910. His motion was supported by an affidavit, in which he stated the circumstances under which he was unable to be present in Court on August 31. His first objection was to the procedure adopted by the plaintiff, which he said was wrong, as the application to add parties should have been made by petition by way of summary procedure, and the defendants should have been made respondents on the face of the application. His second objection was that the application to add parties should not have been considered pending the decision of the appeal preferred against the order of the Court dated August 20, 1910. His third objection was that it was not competent for a party who had, *pendente lite*, acquired an interest in the subject of an action *rei vindicatio* to continue the action in his name. The matter came up for discussion before the District Judge, and on September 15, 1910, he made order declining to vacate the order allowing the plaintiff's motion of August 29, 1910, made in conformity with his order of the 20th of that month. We have therefore now three separate petitions of appeal : the first by the fourth, fifth, and sixth defendants, who are appealing from the order of the District Judge dated August 31, 1910 ; the second by the first, second, and third defendants, who are appealing from the order dated September 15, 1910 ; and the third by the first, fourth, and sixth defendants, who are appealing from an order dated August 17, 1910, allowing the second and fourth issues suggested by the plaintiff's counsel, and from the order made

on the first issue, allowing the purchasers to be added, of the same date. The main appeal, however, is from the order allowing the purchasers to be added as parties plaintiffs at the present stage of the action. If that appeal succeeds, I think it will be unnecessary to consider the other appeals, as they are entirely dependent upon the result of our decision on the main appeal. The judgment of Lawrie and Withers JJ., to which I have already referred, is in point ; and in the absence of any authority to the contrary I feel bound by it. The plaintiff is in this position, now that he has parted with the *dominium* to a third party, that he cannot obtain a declaration of title under any circumstances. I do not think that either section 18 or section 404 is helpful to the plaintiff in the position in which he has placed himself by conveying the property in question to third parties, for no declaration of title can be made in this action in favour of the purchasers so long as the plaintiff is on the record. It may be that the defendants have grounds of defence against the purchasers which cannot be raised in the present action, and it would not, I think be either convenient or proper, or indeed right in law, to allow the plaintiff, after he has once parted with the *dominium*, to go on and maintain his action for a declaration of title for a land of which admittedly he is no longer the owner. He cannot claim mesne profits because he has alienated the *res*, and the *fructus* cannot be allowed to be claimed by him.

Voet, in *Liber* 6, *title* 1, section 5, appears to be quite clear on the point. This passage runs as follows, as translated by Casie Chitty : " But, again, if he who brought this action was the *dominus* at the time of the institution of the suit but *lite pendente* has lost the *dominium*, reason dictates that the defendant should be absolved (*Arg. Dig.* 13, 1, 14, 12), both because the suit has then fallen into that case from which an action could not have a beginning, and in which it could not continue (*Inst.* 4, 8, 6), and because the interest of the plaintiff in the subject of suit has ceased to exist (*Arg. Dig.* 10, 4, 7, 7), and, in short, because that (right of *dominium*) has been removed and become extinct, which was the only foundation of this real action."

I would set aside the order appealed from, and dismiss the plaintiff's action, with costs in both Courts.

Order varied.