1912.

Present: Middleton J. and Wood Renton J.

SILVA *v.* BASTIAN *et al.*

199—D. C. Galle, 10,555.

Crown grant—No presumption of title in favour of Crown.

A Crown grant by itself creates no presumption of the title of the Crown to the land which it conveys.

THE facts are set out in the judgment of Middleton J.

De Sampayo, K.C. (with him *J. W. de Silva*), for the seventh to twelfth defendants, appellants.

A. St. V. Jayewardene, for the thirteenth defendant, appellant.

Bawa, K.C. (with him *Gooneratna*), for the plaintiff, respondent.

Cur. adv. vult.

February 8, 1912. MIDDLETON J.—

This was a partition action in which plaintiff sought to partition a land called Eluvilla, to which first to sixth defendants claimed title through one Kumarasinghe Arachchigey Siman, to whom a grant was given on December 6, 1859. The seventh to thirteenth defendants intervened by statements of claim, in which they laid claim to the land on the ground of prescriptive possession. The plaintiff and one witness were called, when the Judge held that the issues were the following:—

(1) Does the Crown grant give a good title to plaintiff?

(2) Was the Crown the owner of the land at the time the Crown grant issued, and is it necessary for the plaintiff to prove this?

(3) Have the seventh to thirteenth defendants acquired a title to the land by prescriptive possession?

He then ruled in favour of the plaintiff that the Crown grant must be presumed to have passed a good title to the grantee on the authority of *De Silva v. Mendorisa*,[1] and called upon the intervenients to prove their title by prescription.

This being a partition case under section 4 of the Ordinance, the Judge's duty is to hear evidence in support of the title of both plaintiff and defendants, upon whom the burden is equally cast of proving their title to the satisfaction of the Court. See also *Manchihamy v. Andris*.[2]

The dictum of Burnside C.J., on which the District Judge relies, was not supported by the other two members of the Court, one of whom expressly dissented from it, and has therefore no authority as a binding decision of this Court. *Saibo v. Andris*,[3] *Rodrigo v. Livera*,[4] *Wimalasekera v. Silva*,[5] and *Suppar v. Kanapathipillai*[6] are decisions of this Court all opposed to the dictum of the learned Chief Justice, and, so far as I am aware, that dictum has not been approved of by this Court. The decision in *Gunasekera v. Tiberis*,[7] as regards a certificate of sale under the Grain Tax Ordinance of 1878, does not seem to me to apply to this case. The Crown distinctly declines to warrant and defend title, and the presumption sought to be drawn here goes further than the presumption approved of in that case, and which, indeed, Mr. Justice Wendt thought the Court was not bound to draw in every case.

The plaintiff and the first to sixth defendants may very well be entitled to the land in question by prescription, beginning possibly at the date of the Crown grant or later, but I do not think, on the evidence heard by the District Judge, that they have up to the present establishment even a *primâ facie* title. In my opinion the order of the District Judge must be set aside, and the case sent back for due proof, under section 4 of the Ordinance, of the titles of the contesting parties, when the District Judge will decide which is to prevail. The appeal will, therefore, be allowed with costs.

WOOD RENTON J.—

I agree with my brother Middleton that this case must go back for trial in the District Court, and I concur in the order that he has proposed. 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 by a series of decisions, both reported and unreported, which were binding on the District Judge, as they are binding on us, and if he had looked a little more closely into the authorities, the parties would have been spared the delay and the expense of this

[1] *(1886) 8 S. C. C. 58.*
[2] *(1890) 9 S. C. C 64.*
[3] *(1898) 3 N. L. R. 218.*
[4] *(1896) 2 N. L. R. 139.*
[5] *(1897) 3 N. L. R. 61.*
[6] *(1905) 5 Tam. 70.*
[7] *(1906) 10 N. L. R. 18.*

1912.

WOOD RENTON J.

Silva v. Bastian

appeal. The statement of Burnside C.J., in *De Silva v. Mendorisa*,[1] that a Crown grant, being a record, raises a presumption that the Crown had the right to grant, and that consequently the burden of proving that the Crown had no title in the land was thrown upon the party setting up title in opposition to the grant, was *obiter dictum* only. Clarence J. expressly declined to give any opinion on the point, and Dias J. said that the general opinion, so far as he was aware, was that no such presumption existed. The case was decided by these two Judges on the ground that the facts were sufficient to give rise to the presumption created by section 6 of Ordinance No. 12 of 1840. In *Siman v. Johanis*[2] Bonser C.J. expressed the opinion *obiter* that a Crown grant gave an indefeasible title. But two months later he concurred in the contrary judgment of Lawrie J. in *Saibo v. Andris*.[3] With the exception of the two *obiter dicta* just referred to, the current of judicial decisions in Ceylon has run strongly in the counter direction. I need only refer to the decisions of the Supreme Court in *Wimalasekera v. Silva*,[4] *Saibo v. Andris*,[3] and *Suppar v. Kanapathipillai*.[5] The same rule has, to my own knowledge, been laid down again and again in unreported cases, and repeatedly the *obiter dicta* above mentioned, when relied on in the District Court, have been abandoned here in argument at the Bar. I would venture to hope that we shall hear no more of them as authorities.

Mr. Bawa argued that the *ratio decidendi* in the case of *Gunasekera v. Teberis*[6] could be applied here. I do not think it can. In that case it was held that where a certificate of sale is given by the Government Agent under section 22 of Ordinance No. 11 of 1878, in the form prescribed by the Ordinance, in respect of property sold for non-payment of grain tax, a presumption arises under section 114 (*e*) of the Evidence Ordinance in favour of the person relying on the certificate that the sale was duly made under the Ordinance; that the tax for non-payment of which the sale purported to be held was in fact due; and that default had been made in payment of it. Section 114 (*e*) creates a presumption only in favour of the regularity of acts which an official is bound to do. There is here no question as to whether or not the Crown grant was regular in form, and the Crown was under no obligation to grant a warranty of title. It was held by the Full Court, as then constituted, in *Fernando v. Morgan*,[7] as far back as 1872, that in conveyances of land from the Crown the purchaser is not entitled to any covenant of title, and, in the absence of express warranty, must be taken to have purchased at his own risk. There can therefore, be no room here for the application of section 114 (*e*) of the Evidence Ordinance.

Appeal allowed.

[1] (1886) 8 *S. C. C.* 58.
[2] (1898) 4 *N. L. R.* 343.
[3] (1898) 3 *N. L. R.* 218.
[4] (1897) 3 *N. L. R.* 61.
[5] (1905) 5 *Tamb.* 70.
[6] (1906) 10 *N. L. R.* 18.
[7] (1872-1876) *Ram.* 57.