

Mar. 14, 1910 Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

FERNANDO *et al.* v. FERNANDO *et al.*

D. C., Negombo, 7,418.

*Invalid lease of an undivided share—Possessory action by lessee—Co-owners—Possession ut dominus.*

An owner of an undivided share of land can maintain a possessory action in respect of such share, if he joins the other co-owners as parties.

A lessee who has entered into possession *bona fide* under a lease is entitled to a possessory remedy, even though the lease may be technically defective; he has to prove possession *ut dominus*, i.e. he must have possession not *alieno nomine*, but with the intention of holding and dealing with the property as his own for the full term of the lease.

THE facts are fully set out in the judgment of Wood Renton J.

*A. St. V. Jayewardene* (with him *Soertsz*), for the appellants.—It has been held in *Silva v. Sinno Appu*<sup>1</sup> that the owner of an undivided share of land can maintain a possessory action. The possession of the plaintiffs was clearly *ut dominus*.

*Sansoni*, for the respondents.—The possession of the plaintiffs was not *ut dominus*.

March 14, 1910. WOOD RENTON J.—

This is a possessory action in which the plaintiffs-appellants claim to be restored to the possession of certain undivided shares of the lands described in the plaint, which were leased to them by the first and second defendants-respondents, and from which they alleged that the defendants-respondents, among whom other persons besides the actual lessors are included, have ousted them. The lease is dated February 28, 1903, for a period of eighteen years, and the first plaintiff-appellant, who is the husband of the second, and who on November 22, 1906, assigned a one-third share of his interest in the lease to the second plaintiff-appellant, alleges that he paid the whole rental in advance when he entered into possession, and remained in possession of the demised lease for more than three years, and that he was forcibly ousted by the defendants-respondents on January 8, 1908. The plaint is dated October 12, 1908. At the trial issues were raised whether the action for damages could be maintained, in view of the fact that the husband of the second defendant, who was actually the lessor, had not given his consent to the lease, and that consequently section 9 of Ordinance No. 15 of

<sup>1</sup> (1903) 7 N. L. R. 5.

1876, to the provisions of which the parties are subject, prohibited the wife from dealing with it at all. The husband was subsequently made a party to the action, and the remaining issues raised the question of ouster and damages. The learned District Judge held that a possessory action cannot be maintained in respect of undivided shares of land; that even if, as averred in the plaint, the shares in question were possessed separately, it was doubtful if a possessory action was open to a lessee against his lessor, and that, in any event, this plaintiff could not sue on the lease, which in view of the provisions of section 9 of Ordinance No. 15 of 1876 not having been complied with, was invalid in law. He accordingly dismissed the plaintiff's action with costs. It was held by Mr. Justice Wendt in the case of *Silva v. Sinno Appu* <sup>1</sup> that the owner of an undivided share of land can maintain a possessory action in respect of such share, provided that he joins the other co-owners as parties, either plaintiffs or defendants; and it is clear, I think, that in a possessory action a person who has entered into possession *bona fide* under a lease, even although that lease may be technically defective, has his remedy where he can prove the fact of ouster by the defendant. For the purposes of such an action as section 4 of Ordinance No. 22 of 1871 contemplates, it is not necessary that the plaintiff should set out a title sufficient to support an action *rei vindicatio*. He has to prove possession *ut dominus*, that is to say, as the term has been defined by a Bench of three Judges in the recent case of *Abdul Aseez v. Abdul Rahiman* <sup>2</sup>, he must have possessed not *alieno nomine*, but with the intention of holding and dealing with the property as his own, where, as here, he is a lessee for the full term of the lease. If the plaintiff should succeed in satisfying the District Judge that he did possess the property in question in that sense, and that he was ousted therefrom by the defendants, he would be entitled to a possessory decree with such damages as the Court should think reasonable on the evidence. In the present case, although there is evidence at least on the question of ouster, and perhaps also on the question of damages, there is no finding by the learned District Judge in regard to either of these issues. Under these circumstances, I do not think that we can finally dispose of the case as it stands. I would set aside the decree of the District Court dismissing the plaintiff's action, and send the case back for the trial of the issues of possession *ut dominus*, within the meaning of the law as we have endeavoured to define it in this judgment, and also of ouster and of damages. I would give the plaintiffs-appellants the costs of this appeal and of the proceedings at the hearing of the case in the District Court, but I think that the costs of the subsequent proceedings should abide the event.

GRENIER J.—I agree.

Sent back.

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<sup>1</sup> (1903) 7 N. L. R. 5.

<sup>2</sup> (1909) Cur. L. R. 271.