Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton

April 22, 1910

SILVA *v.* DINGIRI MENIKA *et al.*

D. C., Kandy, 18,314

Possessory action—Proof of possession for a year and a day before ouster not necessary—Dispossession otherwise than by process of law.

To succeed in a possessory action all that is necessary for the plaintiff to prove is that he was in possession, and that he was dispossessed otherwise than by process of law. It is not necessary to prove possession for a year and a day before ouster.

THE facts material to the report are fully set out in the judgment of Hutchinson C.J.

Seneviratne, for the appellants.—The finding of the District Judge that plaintiff had possession for a year and a day previous to ouster is unsupported by the evidence. Without proof of such possession the plaintiff cannot succeed in this action. See judgment of Lawrie J. in *Perera v. Fernando.*[1]

H. A. Jayewardene, for the respondent.—Under section 4 of Ordinance No. 22 of 1871 proof of possession for a year and a day is not necessary to maintain possessory action. See *Goonewardene v. Perera*,[2] *Menu Etana v. Gabriel Appuhamy.*[3]

April 22, 1910. HUTCHINSON C.J.—

This is a possessory action in which the plaintiff claims to be entitled to possession of certain land marked A on the plan, alleging that he was in possession for a year and a day, and that he was afterwards, in October, 1906, forcibly ousted by the defendants. The issues agreed to were: Was the plaintiff for a year and a day prior to the alleged ouster in possession of lot A; and, secondly, did the defendants take wrongful and forcible possession? The District Judge answered both the questions in the affirmative. On the first issue there was a contest in the District Court and in this Court as to whether or not the first defendant did not obtain possession of lot A in April, 1906. The Judge finds that he did not, and I think on the evidence that that was right, but I cannot find any evidence to support the finding that the plaintiff had possession for a year and a day. I think it is proved that the plaintiff was in

[1] *(1892) 1 S. C. R. 329.* [2] *(1902) 5 N. L. R. 320.* [3] *(1909) 1 Cur. L. R. 2.*

April 22, 1910

HUTCHINSON C. J.

Silva v. Dingiri Menika

possession before and up to October, 1906, and that the defendants then took possession forcibly; but there is no evidence how long the plaintiff had had possession. The question is, therefore, whether it was necessary for the plaintiff to prove possession for a year and a day. Section 4 of the Prescription Ordinance, No. 22 of 1871 enacts that "any person who has been dispossessed of land otherwise than by process of law may within one year of his dispossession, and on proof of his dispossession, obtain a decree for restoration of possession without proof of title"; but this is not to affect the other requirements of the law as respects possessory cases. Two decisions affecting this point have been quoted to us. In *Perera v. Fernando,*[1] a Full Court case, Mr. Justice Lawrie thought that the plaintiff's claim should be dismissed because he did not prove possession for a year and a day before ouster. The other Judges decided the case on a different ground. In *Goonewardene v. Pereira*[2] Chief Justice Bonser expressed the opinion that where there was an ouster by violence nothing more is required to be proved by the plaintiff than that he was in possession, and that he was violently ousted; and Mr. Justice Wendt agreed with him; and in *Menu Etana v. Gabriel Appuhamy*[3] Mr. Justice Wendt expressed a similar opinion. I think that section 4 of the Ordinance was intended to do away with the requirement of the Roman-Dutch Law as to length of possession which was required in a possessory action, and all that is necessary for the plaintiff in such a case as this to prove is that he was in possession, and that he was dispossessed otherwise than by process of law. I think, therefore, that the judgment of the District Judge was right, notwithstanding that his finding on the first issue was mistaken. The formal decree, however, requires amendment; it declares the plaintiff entitled to the land, but it should only declare him entitled to possession of the land. The decree, therefore, must be amended by adding the words " possession of " before the words "the land". I think the appellant should pay the respondent costs of this appeal.

MIDDLETON J.—I agree, and have nothing to add.

Appeal dismissed; decree amended.

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[1] *(1892) 1. S. C. R. 329.*
[2] *(1902) 5. N. L. R. 320.*
[3] *(1909) 1. Cur. L. R. 2.*