1975 *Present :* **Samerawickrame, Acting C. J., Vythialingam, J., and Walpita, J.**

P. EDIRISURIYA, Appellant, *and* M. EDIRISURIYA, Respondent

S. C. 283/70 (F)—D. C. Hambantota 255/L

Possessory action—Meaning of Ouster—Possession ut dominus—Scope of remedy.

(1) The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force nor fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.

(2) To succeed in a possessory action the plaintiff must prove that he was in possession "*ut dominus*". This does not mean possession with the honest belief that the plaintiff was entitled to ownership. It is sufficient if the plaintiff possessed with the intention of holding and dealing with the property as his own.

APPEAL from a judgment of the District Court, Hambantota.

I. M. R. Wijetunga, with *N. Seneviratne* for the Defendant-Appellant.

N. R. M. Daluwatte with *M. S. A. Hassan* for the Plaintiff-Respondent.

Cur. adv. vult.

October 9, 1975. VYTHIALINGAM, J.—

The plaintiff-respondent brought this possessory action for the ejectment of the defendant, his servants, agents, workmen and others and to be restored to quiet possession of the land and house of which he claimed to have been in possession for over a year and a day. Admittedly the land originally belonged to one Porolis Edirisuriya, the father of both the plaintiff and the defendant, on the Crown Grant P11 dated 2.9.1943 (also marked D1). Porolis Edirisuriya died in March 1950.

It is plaintiff's claim that he lived with his father and assisted him in cultivating the land during his lifetime and after his death he was in sole possession of it till 7th April, 1968 when he was dispossessed by the defendant. He had obtained a permit under the Land Development Ordinance P1 dated 11.12.1950. The defendant on the other hand maintained that he was the nominated successor of his father and produced in support of it the document D4 dated 29.9.1945 the nomination under section 56 of the Land Development Ordinance. This nomination was was registered in the Register of Grants D5.

He admitted however that after his father's death in 1950 he went to live in Hathala, six miles away and allowed the plaintiff to possess the land. He also said that upto February, 1968 the plaintiff gave him his paraveni share and that there was no dispute at all. In February he came to know that the plaintiff was claiming the land on a permit and that thereafter he and his family occupied the house and that he was working the field from 7.4.1968. After trial the learned District Judge held that the plaintiff had been in possession of the premises in suit for over a year and a day prior to the date of the ouster and entered judgment for him as prayed for with costs.

The defendant has appealed against the judgment and decree. On the facts there is ample evidence in the case to support the findings of the learned District Judge and I see no reason to interfere with it. Mr. Wijetunge who appeared for the defendant-appellant submitted that the plaintiff should establish that he was in possession 'ut dominus' and dispossession or ouster in order to succeed. He argued that the plaintiff had not established either of these matters.

In regard to the second matter Mr. Wijetunge submitted that the acts of the defendant only amounted to tresspass and did not amount to a dispossession or ouster of the plaintiff from possession. In support of this contention he relied strongly on the case of *Pathirigey Carlina Hamy vs. Mugegodagey Charles de Silva* (1883) 5 *S. C. C.* 140 where Burnside, C. J. said "It is clear that the dispossession referred to in section 4 consists of an amover or deprivation of possession, or in another word well known to the law, 'an ouster'. Acts which merely amount to a trespass without ouster do not amount to dispossession." In that case the defendant, in the absence of the plaintiff, entered his land and erected a fence separating the portion on which he lived from the rest and plucked the nuts of the portion so separated. The plaintiff thereafter did not receive the fruits of the separated portion. On these facts it was held that the acts of the defendant did not amount to dispossession of the plaintiff.

It is doubtful whether the law has been correctly applied to the facts in that case. It is undoubtedly true that a mere act of trespass, as for instance, where one enters another's land and commits theft of coconuts, would not amount to dispossession or ouster. But where as in that case the defendant separated the portion on which he lived and fenced it off and plucked the nuts from the portion so separated and thus deprived the plaintiff of the free possession of that portion he has effectively dispossessed or ousted the plaintiff within the meaning of that section, from that portion.

In Perera Vs. Wijesuriya (59 *N. L. R.* 529) Basnayake, C. J. and Pulle, J. refused to follow Carlina Hamy's case, Basnayake, C. J. remarking "with great respect I find myself unable to agree with that decision." In that case on 13th June, 1951, the defendants cut the barbed wire and trees of the fence that separated their land from the plaintiff's land and on 22.6.1951 the 2nd defendant along with several others entered the land in the night at about 9.30 p. m. and began constructing a hut which they could not complete because of the intervention of the Police. However on 23.6.1951 the plaintiff constructed two huts and remained in possession. It was held that although the plaintiff was in possession of the land on the date of the institution of the action, the acts of the defendant on the 13th and 22nd June, 1951 amounted to dispossession of the plaintiff within the meaning of section 4 of the Prescription Ordinance.

In the instant case the defendant apparently started disputing the plaintiff's possession in February 1968. The plaintiff made a complaint to the Police on 1.3.1968 (P3) in which he complained that the defendant was threatening to take forcible possession

of the paddy field and requested the Police to look into it and grant him relief. Thereafter the defendant himself wrote the letter dated 3.3.68, D12 to the Government Agent stating that he was the nominated successor of his father but that the plaintiff was claiming to be entitled to it on a permit and requesting the Government Agent to inquire into the matter and cancel the plaintiff's permit.

Then on 7.4.1968 when the plaintiff went to the field in the morning at about 6 or 6.30 a.m. to clear the threshing floor he found the defendant, his sons and several others standing in the compound and the verandah of the house which at that time was unoccupied and which was being used to keep the tools. He then went and made the complaint P2 to the Police on the same day at 11 a.m. He also filed a private plaint P5 charging the defendant and the others in the Magistrate's Court of Hambantota. The Magistrate however discharged the accused and referred the plaintiff to his civil remedy as he was of the view that this was purely a civil matter. This order was made on 6.11.68, but in the meantime the plaintiff had filed this action on 31.10.1968.

The defendant's evidence is that after sending the letter D12 he came with his wife and children and stayed in the house as he had the key with him. He also admitted that till 1968 the plaintiff worked the field though he said that without any trouble the plaintiff gave him his share. There was no other evidence than the defendant's mere ipse dixit in support of this. It was not even put to the plaintiff. The defendant frankly admitted that from 7.4.1968 he was working the field. Although no force was used there has been here a clear dispossession and ouster which distinguishes the facts of this case from the facts in Carlina Hamy's case, even if that is good law.

Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses whether it is done by sowing, or by ploughing or by building or repairing something or by doing anything at all by which they do not leave the free possession to the person who was dispossessed. The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force nor fraud is necessary. The fact that through fear of superior force the plaintiff did not try to assert his rights by going into the field cannot be held against him. His complaints to the Police and his filing actions show that he was relying on his legal remedies. In *Wijesuriya's* case (supra Basnayake, C. J. said at page 532 " Any act which deprives a person from exercising his rights of possession would be a deprivation of his possession or an ouster of him. " I hold therefore that the plaintiff has establish-

ed that he has been dispossessed in the sense in which that term is used in section 4 of the Prescription Ordinance.

In regard to the first submission mentioned earlier Mr. Wijetunge submitted that the plaintiff had to establish possession "ut dominus" to succeed in the action. His contention was that this involved two elements a physical element that is actual possession and a mental element of possession as an owner with an honest belief that he was the owner. He argued that the plaintiff did not and could not have an honest belief in his ownership because he knew, and the learned District Judge has so found, that the defendant was the duly nominated successor of his father.

No authority has been cited to us in support of the proposition that possession "*ut dominus*" means possession with the honest belief that the plaintiff was entitled to ownership. Nor have I been able to find any. It is correct to say that to succeed in a possessory action the plaintiff must prove that he was in possession "*ut dominus*". But all that this means is, in the words of Wood Renton, J. (later C. J.) "he must have possessed not *alieno nomine*, but with the intention of holding and dealing with the property as his own ....." *Fernando et al vs. Fernando et al* (13 N.L.R. 164 at 165). In that case it was held that a lessee who has entered into possession bona fide under a lease is entitled to the possessory remedy even though the lease may be technically defective, as he had possession "*ut dominus*".

Quoting this passage with approval Gratiaen, J. said at page 101 in *Perera Vs. Perera* (39 C. L. W. 100) "The test to be applied with regard to proof *ut dominus* is a subjective test". In the instant case the plaintiff had been in possession of the land for over eighteen long years asserting that he was the sole owner and refusing to recognise as valid any claim of the defendant. He is registered as the owner cultivator of this field. He has paid acreage taxes and other dues in respect of the permit given to him by the Government and obtained loans from the Multi-purpose Co-operative Society for the purpose of cultivating this field and has even brought a tractor.

The defendant said that he allowed the plaintiff to possess the field and obtained from him his paraveni share. But as I have pointed out there was nothing to support his version. In fact his own conduct disproves his statement. According to him there was no trouble from 1950 to February 1968 when the plaintiff suddenly decided not to pay his share and told him that he had a permit in respect of this field. There was no explanation as to why the plaintiff acted in this strange manner in 1968

although he had obtained the permit on 11.12.1950. It was only after he entered into possession that the defendant sought to get his name registered in the Paddy Lands Register and to become a member of the Multi-Purpose Co-operative Society.

Besides I do not think that the learned trial judge correctly appreciated the oral and documentary evidence when he said that " Having regard to the documents P15 and P16 it is correct to say that the plaintiff was aware of the defendant's nomination at least sometime after 11.12.1950 ". The documents P15 and P16 are payments for water rates in respect of the field and the land, made on 13.8.1952 by the plaintiff on behalf of P. Edirisuriya. Apparently the trial judge has misunderstood these documents to mean that the plaintiff made these payments on behalf of the defendant. He has, however, overlooked the fact that the payments although made in 1952 were for dues in respect of the year 1947 when the grantee the father of Porolis Edirisuriya was alive and therefore the payment could have been on his behalf and not on behalf of the defendant Piyadasa Edirisuriya. The plaintiff's evidence was that he came to know that the defendant was the nominated successor only after 1.3.1968. So that the trial judge was not justified in holding that the plaintiff was aware that the defendant was the nominated successor of his father prior to 11.12.1950. I am satisfied that the plaintiff's possession was possession " *ut dominus* " as required by the law.

Mr. Wijetunge submitted further that a decree in favour of the plaintiff would be futile as the defendant as the duly nominated successor of the grantee Porolis Edirisuriya was entitled to the land. The trial Judge has also held that the nomination D1 prevails over the permit P1 in favour of the plaintiff. This is a moot point. However, the question as to who is the owner of the land is quite irrelevant. As Gratiaen, J. pointed out in Perera's case (supra) " .....in possessory actions it is not appropriate to investigate title for the purpose of deciding whether or not a party's claim to possession of land is justified in law. The purpose of a possessory suit is not to adjudicate upon questions relating to title but to give speedy relief to a person who, claiming to be owner of property in his own right has been dispossessed otherwise than by process of law." To refuse to give plaintiff relief in these circumstances is to defeat this purpose and to encourage people who take the law into their own hands to assert title by taking forcible possession of property.

Here again Mr. Wijetunge relied on *Carolina Hamy's* case (supra) where Burnside, C.J. said " The plaintiffs before this suit, had it is admittedly by a regular sale and conveyance, parted with all interest whatever which might have. or have

had, in the lands, they can therefore have no locus standi to claim to be put in possession of lands or interests in lands, which even assuming they were ever entitled to, they have elected to transfer to someone else." It is sufficient for the purpose of distinguishing that case to say that the plaintiff in the instant case has not parted with any rights he may have had.

As pointed out by Bonser, C.J. in the case of *Changarapillai Vs. Chelliah* (5 N.L.R. 270) the possessory action is a most beneficial one whose operation the court should seek to enlarge rather than to narrow. The trial judge was therefore correct in relying on the words of Buchanan, A.C.J. in *Wilsnack Vs. Van der Westhizen and Haak* (1907 S. C. 600) in which a licensee under a local authority of a house was evicted by the respondents who purported to have obtained a title deed in their favour, and quoted by Pulle, J. in *Sameen Vs. Dep,* 55 N.L.R. 523 at 527 " The whole foundation of the rule for the restoration of property taken possession of in this way is that a spoliator is not entitled to take the law into his own hands and a person who takes the law into his own hands must restore the property and establish his right thereto in a peaceable manner or in a court of law.' The words apply to the facts of the instant case.

The appeal fails and is dismissed with costs.

SAMERAWICKRAME, J.—I agree.

WALPITA, J.—I agree.

Appeal dismissed.