Feb. 23, 1911

Present : Hutchinson C.J. and Middleton J.

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

357—*D. C. Colombo*, 29,866.

Possessory action by members of the Dhoby community residing at Polwatta for the time being—Servitude—Right to dry clothes on another's land.

Plaintiffs, who are members of the Dhoby community, residing for the time being at Polwatta, averred that they have been for more than a year and a day before ouster using the land in dispute for drying clothes thereon, and prayed for a possessory decree.

Held, that the plaintiffs were not entitled to a decree, as the possession was not of *ut dominus*.

HUTCHINSON C.J.—I do not think that the right claimed is a possible one. If it is, the ownership of this land changes from time to time as the dhobies of Polwatta move about—a dhoby becomes one of the co-owners by coming to live there and ceases to be one by going away.

There is no such servitude as that of drying clothes on the land of another.

THE facts are fully set out by Hutchinson C.J. in his judgment as follows :—

" This is a possessory action. The plaintiffs say in their plaint that they are members of the Dhoby community residing at Polwatta, and that for more than a year and a day before the grievance complained of they had been undisturbedly and uninterruptedly using the land marked A and C on the plan Y, No. 775, filed with the plaint, for the purpose of drying clothes thereon, and had also been in possession of it ; that on June 12, 1909, the defendants forcibly and wrongfully entered on A, and, similarly, on June 22, 1909, entered on C, and have since those dates been in forcible and unlawful possession of A and C, and preventing the plaintiffs from entering on them and drying clothes thereon ; and they claimed possession and damages.

" The defendants answered : (1) That the plaint is bad for misjoinder of plaintiffs and of causes of action ; (2) that the rights claimed are in consistent in character ; (3) that no such right or servitude as that of drying clothes on land not belonging to oneself is known to the law ; (4) that A and C and the land adjacent on the north formed one land, and were owned and possessed by the defendants in common, and were on February 3, 1908, partitioned between them, and that by deed of October 6,1908, A and C were allotted to the second defendant, who is now the owner of them, and has also acquired title to them by prescription."

The issues settled were : (1) Had the plaintiffs at the dates of the alleged ouster possession of A and C ? (2) Had they at those dates a quiet and undisturbed possession of the right of drying clothes on A and C ? (3) Were they ousted on the dates alleged ? (4) Is there misjoinder of plaintiffs and causes of action ? (5) Can they claim such a servitude as that of drying clothes on the land of another ?

The learned District Judge (Allan Drieberg, Esq.) entered judgment for the plaintiffs. The defendants appealed.

Bawa, for the appellants.—The action must fail for misjoinder of parties. How can the plaintiffs sue without joining all the alleged co-owners ? A right to dry clothes is not a servitude known to the Roman-Dutch law. The plaintiffs never had possession *ut dominus* ; the mere user of the land to dry clothes is not possession *ut dominus*.

A. St. V. Jayewardene (with him *Batuwantudawe*), for the plaintiffs, respondents.—Section 17 of the Civil Procedure Code enacts that misjoinder is not to defeat an action. (Chief Justice.—Is the right which you claim known to the Roman-Dutch law ?) The question as to the nature of the right need not be ascertained. This is a possessory action, and the only question is whether the plaintiffs were in possession *ut dominus*. (Middleton J.—Is the right to dry clothes a right of dominium ?) The plaintiffs used the land for all purposes for which they required it ; they went to the land, planted poles, and dried clothes. (Middleton J.—You could not sell your right. How could you be said to be owning the right ?) I may sell my rights to a dhoby. But even if I could not sell the land, I may bring a possessory action. A fiduciary who cannot sell a land may bring a possessory action. (Middleton J.—The fiduciary has a dominium subject to contingent rights. How is the dominium vested in you ?) We have acquired the dominium by prescription and by inheritance. The land was given to the Dhoby community about seventy years ago for drying clothes. (Chief Justice.—Is it possible in law that a shifting body like the dhobies of Polwatta should be the owners of land ?) Yes. Title to property may vest in the subscribers for the time bing, either by custom or by agreement.

Counsel cited *Van Leeuwen, vol. I., bk. II., ch. I., para.* 10, *p.* 150 (45 *Madras*).

The plaintiffs may be looked upon as trustees holding the land in trust for the Dhoby community.

Bawa.—The plaintiffs, if they are to succeed in this action, must establish a possession which, if continued for ten years, must be enough to found title. If the plaintiffs are suing for trust property, they should have obtained the sanction of the Attorney-General.

Cur. adv. vult.

Feb. 23, 1911 February 23, 1911. HUTCHINSON C.J.—

Fernando v. Fernando

His Lordship set out the facts, and continued :—

The 5th issue need not be considered, because there is here no claim for a servitude—there is no dominant and no servient tenement. As the learned Judge says, the plaintiffs claim that they had possession of the land *ut domini* ; that the only purpose to which they put it was as drying ground for clothes ; that other dhobies, besides themselves, had similar possession, and used the land for the same purpose ; that, in fact, these grounds were in the common possession of all the dhobies of Polwatta, or of such of them as at any time found them convenient for the purpose.

The Judge held that they had, previous to the ouster, possession of the land for many years ; and that all those who use these grounds must be regarded as tenants in common. He held that the ouster was proved, and that it was not necessary to make the other co-owners parties to the action, since the defendants are trespassers. And he gave judgment for ejectment of the defendants from the land, and for restoration of the plaintiffs to possession.

It is possible, of course, for several persons to be the owners of land which they use for one special purpose only. But this is a claim that the plaintiffs, so long as they reside in Polwatta and use this land to dry their clothes on, are in possession of the land ; that all the other dhobies who from time to time reside in Polwatta and wish to use the land for that purpose are also in possession ; that any dhoby coming to reside in Polwatta becomes at once possessed of the land jointly with the other dhobies there, or at any rate becomes entitled to such joint possession, and that when he goes away he ceases to be so. And yet he can only use the land for the one special purpose of drying clothes ; he cannot claim the right to put it to any other use or to have it partitioned. And " possession," as we know, means not mere user or occupation of the land, it must be *ut dominus*.

I do not think that the right thus claimed is a possible one. If it is, the ownership of this land changes from time to time as the dhobies of Polwatta move about : a dhoby becomes one of the co-owners by coming to live there, and ceases to be one by going away. The ownership is transferred, not by notarial deed as the law requires, but by a change of residence amongst the co-owners. And the plaintiffs themselves will lose all their rights the moment they go to live outside Polwatta.

The learned Judge thought that the 2nd and 5th issues were framed to meet the alternative case put forward by the plaintiffs that their right could be regarded as a servitude. If that was the meaning of the 2nd issue, I agree that this is no case of a servitude. And the claim has not been put forward as a claim by " custom," such as is well recognized in England. And although the petitioners

in paragraph 6 of the petition of 1896 (P 1 in this case) appear to have set up some kind of trust, alleging that the land therein referred to was given by one of the inhabitants of Polwatta to be the common property of all the washers, that claim has not been set up here.

In my opinion the plaintiffs have failed to prove possession, and the action should be dismissed with costs in both Courts.

MIDDLETON J.—

In this action the plaintiffs obtained judgment for a possessory decree with respect to two pieces of land marked A and C in the plan in the action. Both parties were dhobies by trade, and the lots in question were claimed to have been possessed and used by the plaintiffs as common drying grounds for the purpose of their trade, and the learned Judge held that they must be regarded as tenants in common with a common possession in respect to this particular purpose, taking further the view that the defendants were absolute trespassers.

The defendants appealed and for them it was contended that the ousters relied on were fictitious ; that there was a misjoinder of parties ; that the parties, if anything were co-owners ; and that one co-owner could not maintain a possessory action against another without joining all his co-owners ; and that the possession relied on by the plaintiffs was not of such a character as to entitle the plaintiffs to a possessory decree. With regard to this last point, which appears to be the most important and vital of all, counsel for the defendants relied on the proposition that the dominium might have been vested in the plaintiffs either by inheritance or by prescription, and that it had not been shown that their possession was other than *ut domini*. The reply to this is, I think, that the plaintiffs base their claim in the plaint on usage, and that the evidence given for them is directed to the proof of user. The first plaintiff says he knew of no owner of the land, which has been used as a drying ground for generations past : that any dhoby who from any other place settled and worked in Polwatta, would be entitled to use the land in the same way as the plaintiffs. The Dhoby Muhandiram, who is called for the plaintiffs, corroborates the first plaintiff in the same sense, and says that all the dhobies in Polwatta have the right to use the lots in question, which would include the defendants, who are also Polwatta dhobies. A brother of the first defendant asserts the land belongs to nobody. The claim here seems to me to be, not of the possession of a dominium vested in the plaintiffs to hold for themselves *ut domini*, but rather the assertion of a communal right of user on land the property of no one.

No authority was quoted to us from the Roman-Dutch authors showing that a possessory action would lie under such circumstances, and I have myself endeavoured to find authority analogous or

Feb. 23, 1911

MIDDLETON J.

Fernando v. Fernando

direct, and have been unable to do so. Personally, I do not think the Court should extend the doctrines and procedure of the Roman-Dutch law beyond what has clearly been in use hitherto, and I cannot ascertain that such a right as claimed by the plaintiffs has ever before been put forward, or that there is anything in the Roman-Dutch law which would enable us to apply the law pertaining to possessory actions to the establishment of it. It seems also impossible to me that a title by prescription to the land could be obtained by adverse possession in the nature of the right claimed. Again, it is difficult to see how in a partition action the undoubted rights of co-owners of the dominium in property could be maintained or adjusted, or that any sale of the dominium by the alleged self-constituted co-owners could take place.

As regards the other points raised, it is not necessary, in my opinion, to consider them, except to repeat, as we stated on the argument, that there did not appear to be any misjoinder of parties.

In my opinion the appeal should be allowed, and the action dismissed with costs in both Courts.

Appeal allowed.