1908.
July 14.

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

PEDRO COSTA *v.* FERNANDO *et al.*

C. R., Negombo, 9,090.

Action under s. 247, Civil Procedure Code—Prescriptive title of judgment-debtor—Adding judgment-debtor as a party.

The execution-creditor may, in an action under section 247 of the Civil Procedure Code, prove the prescriptive right of the execution-debtor to the property; and for that purpose the execution-debtor may be added as a party plaintiff or party defendant, as the case may be.

APPEAL from a judgment of the Commissioner of Requests. The facts and arguments appear in the judgment.

C. M. Fernando, C.C., for the plaintiff, appellant.

A. Drieberg, for the defendants, respondents.

Cur. adv. vult.

July 14, 1908. HUTCHINSON C.J.—

The appellant, plaintiff in this action, obtained judgment against the first defendant, and under a writ of execution caused certain land to be seized. The second and third defendants put in a claim to it, and their claim was upheld, they being in possession. The plaintiff then brought this action against the debtor, and the claimants, alleging that the debtor is the owner and had a prescriptive title to it, and that the claimants had no right or title to it, and praying for a declaration that the debtor is entitled to it, and that it is executable in satisfaction of the plaintiff's judgment.

The action was at first dismissed on the ground that the plaintiff had consented to the allowance of the claim of the claimants. That was obviously wrong, and on appeal the judgment was set aside and the case sent for trial.

At the trial the following issue was agreed upon: Was the first defendant (the debtor) or the other defendants owner of the land at the time of the seizure ?

After taking evidence the Commissioner said: " I do not find that the first defendant, Christogu, was owner of the land." But his reason for so finding was that, even supposing that Christogu had been in possession for ten years, such a possession did not give him a title to the land; it did not vest the ownership in him. And he thought that the decision in *Terunnanse v. Menika* [1] was against the plaintiff. The evidence of the plaintiff was directed to showing that Christgou had had ten years' possession; and the evidence for

[1] *1 N. L. R. 200.*

the respondents to showing that they had had possession for several years immediately before the issue of the plaintiff's writ of execution. The Commissioner expressed no opinion on the result of the evidence.

On the appeal, reference was also made to *De Silva v. Gunesekere* [1] and *Harmanis v. H.*[2] I can see no reason why the judgment-debtor should not join as plaintiff in an action under section 247; no reason why we should insist on two actions, one by the judgment-debtor against the person in possession, and then, after he has obtained a decree under section 3 of Ordinance No. 22 of 1871, another action by the plaintiff under section 247. And if he can be joined as plaintiff I do not see why he cannot be joined as defendant. And if he is thus a party to the action, an action " claiming to have the property declared liable to be sold in execution of the decree," then proof of such possession as is mentioned in section 3 of Ordinance No. 22 of 1871 by the plaintiff or by the debtor under whom he claims will entitle the plaintiff to a decree in his favour. That is my opinion. But it would perhaps be well to have the point settled by the Full Court.

In the present case, having read through the evidence carefully, I do not think that it proves such possession, as the Ordinance requires, by Christogu. Santiago deposed that he had taken a ten years' lease of the land from Christogu in 1879, and a six years' extension of it in 1890, and that he gave up possession to Christogu; that there was no house on the land when he had it; that a house was built on it five years ago, and that for the last five years the third defendant's daughter has lived on the land. S. P. Jayawardana deposed that Christogu was in possession before 1901, not saying how long before; that the third defendant and her sister, the second defendant, possessed five or six years ago; and that Usavi Perera has been for eight or nine years in possession. The seizure under the plaintiff's writ was in 1901; the second and third defendants were then in possession. The third defendant deposed that she and her husband had lived on the land for the last thirty years, and that he had planted it; and two witnesses corroborated this. S. P. Jayawardana produced a lease of the land dated May 29, 1900, from the second and third defendants to him for 8½ years, and said that the lessors were in possession, that he was in possession when the land was seized, and that the third defendant and her husband lived on the land for fifteen or twenty years to his knowledge, that her husband planted it, and that he died there.

I do not think it worth while to send the case back for the Commissioner to give his opinion on the evidence. I think it was insufficient to prove a prescriptive title in Christogu.

I dismiss the appeal with costs.

Appeal dismissed.

[1] *3 App. C. R. 29.*

[2] *10 N. L. R. 332.*