

1931

Present : Macdonell C.J. and Garvin,
Dalton, and Akbar J.J.

DE SILVA *et al.* v. GOONETILLEKE *et al.*

151—D. C. Colombo, 22,132.

Action rei vindicatio—Title to property vested in Municipal Council—Council added as party—Right of plaintiff to maintain action.

Where an action *rei vindicatio* had been instituted in respect of property which had vested for non-payment of taxes in the Municipal Council, by virtue of a vesting certificate issued in terms of section 146 of Ordinance No. 6 of 1910,—

Held, that the plaintiff could not maintain the action, even though the Municipal Council, on being added as party, expressed its willingness to transfer the property to the party declared entitled thereto by Court.

CASE referred by Macdonell C.J. and Akbar J. to a Full Court.

This was an action for partition.

Plaintiff claimed the land under a *fidei commissum* created by a last will in 1822. In 1922 the property was sold for non-payment of taxes and bought by the Municipal Council, Colombo, and a vesting certificate issued under section 146 of the Municipal Councils Ordinance, No. 6 of 1910. The Municipal Council intervened and the action was converted into one *rei vindicatio*. The position of the Municipal Council was that it was "ready and willing to postpone and withhold any reconveyance until the determination of this action and to transfer the property in question to the party declared entitled thereto by the Court, upon condition that the Municipal Council be paid the rates and taxes due or accruing due to it, with its expenses and costs of suit". An issue (No. 5) was raised as follows :—"In view of the fact that the title to these premises has vested in the Municipal Council under Ordinance No. 6 of 1910, can the plaintiff maintain this action?" In view of the position

taken up by the Council the District Judge considered it unnecessary to decide the question and determined the case on other grounds, and declared plaintiff entitled to the property on payment of the sum due for taxes.

Croos Da Brera (with him *B. F. de Silva*), for the second added defendant, appellant.—We have been in possession for over 40 years.

One who seeks to dispossess another in possession must show a paramount title. This the plaintiff cannot do as the title is in the Municipal Council. Plaintiff must recover on the strength of his own title (1 *Lorenz* 124). In order to sue by way of *rei vindicatio* plaintiff must have the right of ownership vested in him (*Nathan's Common Law of South Africa*, vol. I., p. 362, s. 593). On the pleadings and on the evidence plaintiff has disclosed no title in himself. So he has no cause of action and therefore cannot maintain this action.

In 214, D. C. (Final) Colombo, 13,091 (*S. C. Minutes*, Nov. 1, 1927) the same question arose and by consent the matter was referred to the lower Court. The order in that case being a consent order is really not in conflict with 188, D. C. (Final), Colombo, 18,034 (*S. C. Minutes*, Feb. 12, 1930), where it was held that such an action is not maintainable.

H. V. Perera (with him *Weerasooria* and *Nadarajah*), for the plaintiffs, respondents.—This action is not really one *rei vindicatio*. The Municipal Council having expressed itself willing to convey to the party found by the Court to be entitled, the question submitted to Court is, who was owner at the time of the vesting order? It is somewhat in the nature of a case stated.

[Macdonell C.J.—Can you argue a trust?

Choksy, for the Municipal Council.—We deny a trust.]

It is sufficient for me to base my case on an agreement by the Municipal Council, even though it falls short of a trust.

It is submitted that under section 699 of the Civil Procedure Code the Council can come in and invite the Court to decide the question of fact as to who was entitled to the property at the time of the vesting order.

[GARVIN S.P.J.—You are seeking to make this a sort of interpleader action. But, even, then, the Council's position is that it is the owner.]

But by declaring itself willing to transfer the property the Council renders itself a stakeholder.

Under section 408 of the Civil Procedure Code if a party agrees to do a certain thing and the Court enters a decree there is no appeal. This Court will only rectify errors. Whatever infirmities there were in the original action are cured by the Council not appealing against the decree, to which it consented.

On the question of the subsistence of the *fidei commissum* after the vesting order (see *Sivacolandu v. Noormaliya*¹ and *Nafia Umma v. Abdul Aziz*²); the question whether section 146 of the Ordinance No. 6 of 1910 confers absolute title or only present title and the question whether the rights of a *fidei commissary* are wiped out (*cf.* the analogous case of a partition decree) might have arisen if the point regarding the maintainability of the action had been taken earlier—there is still a residuum of rights left in the co-owners. A co-owner paying the whole sum due for taxes and getting a transfer would be a trustee for the other co-owners.

This action may be looked upon as being of the same nature as a *quia timet* action and must be so regarded as against the contesting defendants. Such an action can be brought before a cause of action actually accrues.

A. F. Goonesekera, for the fourth and sixth added defendants, respondents.

Choksy, for the third added defendant, respondent.

Croos Da Brera, in reply.

¹ 22 N. L. R. 427.

² 27 N. L. R. 150.

January 15, 1931. MACDONELL C.J.—

This action was originally one for partition, subsequently changed into one for declaration of title. In the Court below and when first brought to the Supreme Court, argument was directed as to the effect of a certain partition by agreement in the year 1841 of the land in dispute, but it will be unnecessary to consider these arguments or the judgment below founded thereon. It was stated in the amended plaint that the premises in dispute had become vested for non-payment of taxes in the Colombo Municipal Council and this fact was admitted by all parties. The Municipal Council was then brought into the action as third added defendant and stated in its plea that the premises in question had become vested in itself by virtue of a vesting certificate of November 14, 1922, under section 146 of Ordinance No. 6 of 1910, and further that it was "ready and willing to postpone and withhold any reconveyance of the premises until the determination of this action and to transfer the property in question to the party declared entitled thereto by Court, upon condition that the Municipal Council be paid the rates and taxes due or accruing due to it, together with its expenses and costs of suit". It was common cause that title to the premises had become vested in the Colombo Municipal Council, exactly as asserted by it.

Issues were framed of which No. 5 is as follows:—"In view of the fact that the title to these premises has vested in the Municipal Council under Ordinance No. 6 of 1910, can the plaintiff maintain this action?" but as to this issue the learned District Judge said as follows:—"In view of the position taken by the Municipal Council", namely, that it was willing to transfer the property to the party declared entitled thereto by Court "I do not think it necessary to go into the question of law raised in the 5th issue", and he determined the case on other grounds.

The case came on appeal before my brother Akbar and myself and was at first argued on the points dealt with in the judgment below. Attention was then directed to issue No. 5 quoted above, and it was argued that this action, being one for declaration of title, could not be maintained as between the parties thereto (other than the Municipal Council) since the title was not in any one of them. Two conflicting decisions, neither reported, were cited to us of actions for declaration of title where the title itself was elsewhere. In one of them the decision was, in effect, that such an action was maintainable, in the other, that it was not. It seemed necessary, therefore, to get an authoritative ruling on this point and we referred it to a Full Bench Court of four Judges, at the same time directing that the Municipality, the third added defendant below, should be added as a party to this appeal. This was done, and the Municipality was represented at the hearing of the point by the Full Bench.

That point is as follows :—The title to the premises has been vested in the Colombo Municipal Council, the third added defendant and respondent in this appeal, by certificate under section 146 of Ordinance No. 6 of 1910, which is conclusive evidence of the title of the Council to the property specified in such certificate, *Nafia Umma v. Abdul Aziz*¹. Then the title to the premises is not in either of the plaintiffs in this action, respondents on appeal. They claim a declaration of title, but admit that the title is in the Municipality, and admit further that the Municipality cannot be regarded as in any manner a trustee for them. They claim that they had the best right to the property in dispute but admit they have not the title to it now since that is in the Municipality. Then their action for a declaration of title must fail *ex definitione*. How can the Court declare that to be in them which is in another holding adversely to them?

There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him". (1 *Nathan* p. 362, s. 593.) "The right to possess may be taken to include the *ius vindicandi* which Grotius (2, 3, 1) puts in the forefront of his definition of ownership. Eigendom is de toe—behoorte tot een Zaeck, waer door iemand, schoon het bezit niet hebbende, 't zelve vermag rechtelick te bekomen" (*Lee's Introduction to Roman-Dutch Law*, p. 111 note, ed. 1915). "This action arises from the right of *dominium*. By it we claim specific recovery of property belonging to us but possessed by someone else" (*Pereira*, p. 300, ed. 1913, quoting *Voet* 6, 1, 3). The authorities unite in holding that plaintiff must show title to the *corpus* in dispute and that if he cannot, the action will not lie.

If it be argued that the Municipality, by declaring in its plea that it is willing to transfer the property to the party declared entitled thereto by the Court, has somehow admitted a right in the parties to the action, in either the plaintiffs or the defendants, the answer is furnished by *Silva v. Fernando*¹, a Privy Council decision, which decides that the commencement of the action is the time at which the rights of parties are to be ascertained, and that no retrospective effect can be given to this admission, if so it can be called, of the Municipality. But suppose this difficulty away, it is a statement of willingness to transfer to a party "declared entitled thereto by the Court", confessedly no one of the parties is entitled, how then can the Court make such a declaration?

It was argued to us that there was a "residuum of right in the parties", but for myself I could not collect of what nature that "residuum of right" could be. Not a legal one, that was apparent from the pleadings. Nor an equitable one of a fiduciary character, that was

¹ 27 N. L. R. 150.¹ 15 N. L. R. 499.

conceded in argument. And against whom did this residuum of right exist? At this point my brother Akbar drew counsel's attention to section 43 of the Civil Procedure Code—"The plaintiff must show that the defendant . . . is liable to be called upon to answer the plaintiff's demand". But the plaintiff having no right in himself could not have any against the defendant, and since there would then be nothing for defendant to answer, the plaintiff would not lie.

It was argued further that the action was of the nature of a *quia timet*. But that action is always founded on some right enforceable in a court of justice, *Ceylon Land and Produce Co. v. Malcolmson*¹, and see the English authorities on that action, *passim*.

It seems to me, then, that the plaintiff's action fails, and on the point stated for the Full Bench I am of opinion that the answer to issue 5 should have been that in view of the fact that the title to these premises has vested in the Municipal Council under Ordinance No. 6 of 1910, the plaintiff cannot maintain this action. That being so, the appeal should be allowed and the action dismissed with costs here and below.

GARVIN J.—I agree.

DALTON J.—I agree.

AKBAR J.—I agree.

Appeal allowed.
