Present : Lascelles C.J. and Wood Renton J. 1912.

SILVA *v.* APPUHAMY.

87—D. C. Kurunegala, 4,288.

Possessory action—Proof of possession for a year and a day essential—Plaintiff may take advantage of predecessor's possession—Action for declaration of title—Court may ex mero motu *grant possessory decree.*

In a possessory action a plaintiff might take advantage of his predecessor's possession; it is not necessary that he should himself have had a year and a day's possession.

In an action for declaration of title there is nothing to prevent the Court from granting a possessory decree *ex mero motu* when all the necessary evidence is before it.

Obiter,—Section 4 of Ordinance No. 22 of 1871 has not dispensed with the requirement of the common law that to maintain a possessory action proof of possession for a year and a day prior to ouster is essential except in cases of ouster by violence.

THE facts are set out in the following judgment of the District Judge (Bertram Hill, Esq.):—

Plaintiff in this case leased Ambagahawatta from one Punchappuhamy in March, 1910. He complains that the defendant, who has no right to the land, ousted him in about January or February, 1911.

[1] *(1904) 7 N. L. R. 280.* [2] *(1891) 9 S. C. C. 203.*

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The defendant admits plaintiff's right to one-half the land, but claims the other half by virtue of a deed dated February 28, 1911. *i.e.*, nearly one year subsequent to plaintiff's lease.

The evidence, in my opinion, establishes the following facts. Plaintiff's lessor in 1900 purchased the entirety of the land from one Kiri Etana and began to plant it. Later on his son, the defendant, came and lived with him and helped him to look after it, and perhaps plant. The defendant must have been aware that his father, Punchappuhamy Wadurala, had a deed for the whole land and claimed the entirety of it, and any assistance he may have rendered his father must be presumed to have been rendered for his father's benefit.

Later, in 1910, defendant's father leased the land to the plaintiff. The defendant acquiesced in this, and plaintiff was in possession. The defendant then got dissatisfied with his prospects as his father's heir and purchased the rights of another Punchappuhamy, who claimed to be entitled to half the land. There appears to be evidence that this Punchappuhamy is entitled to a share of the land on the pedigree, but he admittedly had nothing to do with the planting, and I do not believe the evidence that defendant planted under him. At any rate, he cannot dispossess the plaintiff until he has paid plaintiff's lessor compensation.

I treat this as a possessory action. I find that plaintiff was in lawful possession of the entirety of the land at the date of the ouster, and that he was dispossessed by the defendant without due process of law.

I give judgment for plaintiff for possession, for damages at Rs. 75 a year from March, 1910, until restored to possession, and costs.

H. A. Jayewardene, for the defendant, appellant.—The plaintiff, who is a lessee, prayed in this action for declaration of title (as a lessee). The District Judge was wrong in giving a possessory decree when the plaintiff did not ask for it.

The plaintiff was in possession for only ten months. That possession is not sufficient to entitle the plaintiff for a possessory decree. There has been a series of decisions, in which it has been held that in a possessory action the plaintiff must have possession for a year and a day. The only case that can be cited against that is *Silva v. Dingiri Menika.*[1]

Gooneratne (with him *A. St. V. Jayewardene*), for the respondent.—*Silva v. Dingiri Menika*[1] is the latest case on the subject, and is a direct authority for the proposition that possession for a year and a day is not necessary for maintaining a possessory action. [Wood Renton J.—What are "the other requirements of the law" which section 4 of Ordinance No. 22 of 1871 expressly conserves?] The possession should be *ut dominus*.

In any case the plaintiff in this case can take advantage of the possession of his lessor (*Umma v. Ismail Lebbe* [2]).

Cur. adv. vult.

[1] (1910) 13 *N. L. R.* 179.

[2] (1881) 4 *S. C. C.* 75.

June 20, 1912. LASCELLES C.J.

The plaintiff claims the right to occupy the whole of a land known as Ambegahawatta under a lease for eight years granted to him by one Punchiappuhamy, who had purchased the land in 1900 from one Kiri Etana.

The defendant avers that Punchiappuhamy was entitled to a half share only in the land, and claims that he, the defendant, has acquired the other half by purchase from one Punchappu Vedarala.

The learned District Judge treated the claim as a possessory action, and gave judgment for the plaintiff for possession with damages.

On appeal two grounds of objection were argued, namely, (1) that the learned District Judge was wrong in treating the action as a possessory action; and (2) that the plaintiff, inasmuch as he had not been in possession for a year and a day, was not entitled to a possessory decree.

I am unable to see any substance in the first ground of objection. The prayer in the plaint is not inconsistent with a possessory action. The plaintiff prayed (1) for a declaration that the plaintiff was entitled to possess the land under his lease; (2) for damages; (3) for ejectment of the defendant; and (4) for costs. An action so framed might properly be treated as a possessory action, and assuming the existence of the conditions which are necessary in order to bring a possessory action, an action of that nature was the plaintiff's proper remedy.

With regard to the second ground of objection, it was proved that the plaintiff was in possession under the lease for only ten months. The question thus arises whether a lessee who has been in possession for less than the period of a year and a day can bring a possessory action.

On this question there has been some difference of authority. There is sufficient authority for the proposition that where there is a violent ouster nothing more is required to be proved by the plaintiff than that he was in possession and was violently ousted (*Goonewardene v. Pereira*[1]), and in the same case, which was one in which the plaintiff was in possession under a lease, Wendt J. stated that it had been ruled that in a possessory action a plaintiff might take advantage of his predecessor's possession, and that it is not necessary that he should himself have had a year and a day's possession. The authority there quoted was *Umma v. Ismail Lebbe.*[2]

This last ruling would dispose of the objection of insufficiency of possession in the present case. It was contended that the decision in *Silva v. Dingiri Menika*[3] laid down the rule once and for all that the requirements of the Roman-Dutch law as regards the length of possession which must be proved in a possessory action are no-

[1] (*1902*) *5 N. L. R. 320.*

[2] (*1881*) *4 S. C. C. 75.*

[3] (*1910*) *13 N. L. R. 179.*

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longer part of our law. I am not quite clear whether the observations of Hutchinson C.J., which were not necessary for the decision of the case, were intended to go beyond the facts of that case, which was one where there was proof of violent ouster.

The rule that possession for a year and a day is necessary has been repeatedly acknowledged by the decisions of this Court, and it is at any rate unlikely that it was intended in *Silva v. Dingiri Menika*[1] to over-rule all these decisions. I prefer to decide the point in this case on the ground that the lessee is entitled to the benefit of the lessor's possession.

In my opinion the appeal fails, and should be dismissed with costs.

WOOD RENTON J.—

The plaintiff-respondent brought this action as one for declaration of title. He is a lessee of the land in dispute from one Arachchige Punchiappuhamy on a lease for eight years and two months from March 18, 1910, and he alleges that the defendant-appellant forcibly and unlawfully ousted him from the possession of the land under that lease in or about January or February, 1911. The appellant admits the respondent's right to one-half of the land, but claims the other half by virtue of a deed from another Punchi Appuhamy. The case went to trial as one of declaration of title alone. The learned District Judge did not decide the question of title as between the appellant and the respondent, but gave the respondent a possessory decree with damages at Rs. 75 a year from March 1, 1910, till he was restored to possession. The present appeal is brought against that judgment. The respondent stated in his evidence that he had possessed the land only for ten months. It was argued in appeal that this admission was fatal to the possessory decree which the District Judge has given him, and that no such decree could be made in favour of a person who had not been in possession of the land for a year and a day before dispossession. If it had been necessary to decide this point, it would have constituted, in my opinion, a serious objection to the decree under appeal. I do not think that section 4 of Ordinance No. 22 of 1871 has dispensed with the requirement of the common law that, except in cases of ouster by violence, proof of possession for a year and a day prior to ouster is essential. Section 4 seems to me to modify the common law in two respects only. It gives a right to bring a possessory action on dispossession "otherwise than by process of law," and it provides that such action must be brought within a year after the dispossession. The proviso to the section enacts that the other requirements of the common law in regard to possessory actions are not affected, and the old condition as to possession for a year and a day before ouster is, therefore, still in

[1] *(1910) 13 N. L. R. 179.*

force. That view of the law has been recognized in a long series of cases (see *Namasivayam v. Ukkuwa*,[1] *Miguel Perera v. Sobana*,[2] *Avaturry Ayer v. Navaratnasingham*,[3] *MacCrogher v. Baker*,[4] *Perera v. Fernando*,[5] *Goonewardene v. Pereira*,[6]), and impliedly by the judgment of the Privy Council in *Azeez v. Rahiman*.[7] The only authority to the contrary is a passage in the judgment of Sir Joseph Hutchinson C.J., concurred in by Sir John Middleton J., in *Silva v. Dingiri Menika*:—[8]

> "I think that section 4 of the Ordinance was intended to do away with the requirements 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 is to prove first that he was in possession, and that he was dispossessed otherwise than by process of law."

If this passage is limited to the facts of the particular case it is no doubt right, as there was proof of ouster by violence. If it was intended to go further, it is contrary to the series of authorities cited above, and could not, I think, be supported.

But the present appeal fails upon another ground. It was held by Clarence J. in *Umma v. Ismail Lebbe*[9] that in a possessory action the plaintiff might take advantage of the possession of his predecessor in title, and that it is unnecessary that he himself should have had a year and a day's possession where that is one of the requirements for bringing a possessory action. That decision was approved by Bonser C.J. in D.C. Negombo, No. 2,795,[10] and by Wendt J. in *Goonewardene v. Pereira*.[6] I think that we ought to follow it. There is ample evidence in the present case of possession by the respondent's predecessor in title, which when taken together with that of the respondent, is sufficient to satisfy the requirement in question.

Mr. Hector Jayewardene argued that there had been no claim for or issue as to a possessory remedy, and that the District Judge ought not to have given that relief to the respondent in an action where only a declaration of title had been claimed. I do not think, however, that the appellant has any reason to complain of the decree on this ground. It has been the practice for the Courts to grant such decrees in actions for declaration of title, and although this has usually been done on the application of the plaintiff at the trial, there is nothing to prevent the Court from granting such a decree *ex mero motu* when all the necessary evidence is before it.

I would dismiss the appeal with costs.

Appeal dismissed.

[1] *(1880) 3 S. C. C. 151.*
[2] *(1884) 6 S. C. C. 61.*
[3] *(1885) 7 S. C. C. 27.*
[4] *(1883) Wendt 253.*
[5] *(1892) 1 S. C. R. 329.*
[6] *(1902) 5 N. L. R. 320.*
[7] *(1911) 14 N. L. R. 318.*
[8] *(1910) 13 N. L. R. 179.*
[9] *(1887) 4 S. C. C. 75.*
[10] *S. C. Mins., August 30, 1898.*