1958 *Present :* **Weerasooriya, J., and Sansoni, J.**

A. M. KARUNADASA, Appellant, *and* ABDUL HAMEED, Respondent

S. C. 810—D. C. Matale, 519/L

Rei vindicatio *action—Plea of prescription—Court should examine documentary title first.*

Land Settlement Ordinance (Cap. 319)—Settlement order obtained thereunder—Effect on plea of exceptio rei venditae et traditae—*Section 8.*

In a *rei vindicatio* action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties.

The plea of *exceptio rei venditae et traditae* is not available to a purchaser as against a vendor who obtains a settlement order under the Land Settlement Ordinance after the date of the purchase.

[1] *(1918) 20 N. L. R. 385 at page 396.* [2] *(1921) 22 N. L. R. 236.*
[3] *(1955) 57 N. L. R. 469.*

APPEAL from a judgment of the District Court, Matale.

S. B. Yatawara, for the plaintiff-appellant.

T. B. Dissanayake, for the 1st defendant-respondent.

Cur. adv. vult.

February 10, 1958. SANSONI, J.—

The land in dispute in this action is 2 roods in extent. It was the subject of a settlement order dated 11th November, 1939, made under the Land Settlement Ordinance (Cap. 319). That order was published in the *Government Gazette* of 19th July 1940, and by virtue of section 8 of the Ordinance it became conclusive proof of the title of the persons in whose favour it was made.

By the order four persons named Ausadanaide, Tikirihamy, Ukkuamma and Dingiriamma, were declared entitled to the land in the proportion of 1/3, 1/6, 1/6 and 1/3 respectively. Ausadanaide transferred his ⅓ share to the plaintiff in 1954, and the other three persons transferred their shares also to the plaintiff in 1953. The plaintiff brought this action in September 1954 for declaration of title, ejectment and damages, pleading that the defendants were in unlawful possession of the land.

The case for the defendants was that Ausadanaide had transferred this land to one Udupihilla in 1938, and Udupihilla in 1949 had transferred it to the 2nd and 3rd defendants, who in turn transferred it to the 1st defendant and Hussain Kandu. In the answer of the 1st defendant it was pointed out that Hussain Kandu had transferred his ½ share to the 1st defendant's children and that they were necessary parties to the action: they have not, however, been noticed or added as parties to this action.

The issues framed at the trial raised questions regarding the effect of the settlement order, due registration of the deeds, and prescription. After trial, the learned District Judge held that the 1st defendant had acquired prescriptive title to the land. He also held that the settlement order in favour of Ausadanaide to the extent of ⅓ share enured to the benefit of the 1st defendant. On the evidence, the question of due registration of the deeds relied on by the plaintiff does not arise for consideration.

With great respect to the learned Judge I think his approach to the matters in dispute between the parties was erroneous. It has been said before, and I think it will bear repetition, that in a *rei vindicatio* action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties[1]. Yet in this case the learned Judge has paid no heed to the conclusive effect of the settlement order, and has instead considered only the question of possession. If he had directed himself correctly he would have seen that on 19th July 1940 all rights which any other persons had in this land were wiped out by the settlement order, including any rights which Udupihilla may have had upon his purchase from Ausadanaide. And

[1] *(1935) 17 C. L. Rec. 83.*

since the rights of the 4 persons in whose favour the settlement order had been made were purchased by the plaintiff before September 1954, when this action was brought, the burden lay upon the defendants to prove that they had acquired prescriptive title to this land. It was not necessary for the plaintiff to rely on possession because his title, apart from prescription, was unimpeachable.

If the learned Judge had approached the case in this way, I think he would have scrutinized more closely the evidence of possession which was led on behalf of the defendants. One fact which stands out quite clearly on that evidence is that the soil of this land is very infertile, and it is also water-logged. Possession of such a land would therefore not be easy, and the evidence led by the defendants to show that efforts were made to grow paddy, coconuts and plantains on it, also shows that those efforts were not successful.

Now according to the first defendant, the purchase by Udupihilla in 1938 was really on behalf of one Unambuwa, who planted the land with plantains and possessed it in that way. Since Udupihilla did not part with the land till 1949 it was essential to examine whether there was any truth in the suggestion that during those eleven years plantains were grown on the land. The second defendant who bought the land from Udupihilla claimed to speak to Udupihilla's possession, but in cross-examination he admitted that he had never been to the land until he went there shortly before his purchase. He was forced to admit that when he said that Udupihilla possessed the land he was only going by the deeds and by what he had heard. Another witness called by the defendants was the Village Headman who first said that Udupihilla possessed the land but immediately afterwards added that when Udupihilla owned it no work was done on it. He left no doubt as to what he meant, when he added that no one made any attempts to plant plantains on this land, and he therefore contradicted the first defendant. In this state of the evidence it is apparent that there was no possession by Udupihilla, and the learned Judge was in error when he held the contrary.

Even as regards the second defendant's possession, which the learned Judge has also found as a fact, there is some doubt, because while the second defendant said that he planted plantains and coconuts, the Village Headman's evidence contradicted that, and the first defendant has also said that no coconuts were planted on this land. All that the second defendant seems to have done was to grow paddy on one occasion. But whether the second defendant possessed the land or not does not really affect the case, because even if he did (and that is a matter which has been far from proved) his possession could only have begun in 1949.

I am unable to agree with the learned Judge when he says that the benefit of the settlement order in favour of Ausadanaide to the extent of ½ can be claimed by the first defendant, for it has been held that the plea of *exceptio rei venditae et traditae* is not available to a purchaser as against a vendor who obtained a settlement order after the purchase was made—see *Pericaruppan Chettiar v. Messrs. Proprietors and Agents Ltd.*[1]. The first defendant therefore has no title whatever to the land in dispute.

[1] *(1946) 47 N. L. R. 121.*

For these reasons I would set aside the judgment appealed against and enter judgment for the plaintiff as prayed for with costs in both Courts, save that damages will be as agreed upon at the trial.

WEERASOORIYA, J.—I agree.

Appeal allowed.