

GOONARATNA v. FERNANDO *et al.*

45—D. C. (Inty.) Kurunegala, 3,254.

*Ouster—Action by person ousted—Proof that third party has a superior title than person ousted—Proof that defendant has acquired title since date of action—Action—Loss of title by plaintiff during progress of action.*

Where a plaintiff who was in possession of a land in claim is proved to have been ousted by the defendant, neither the fact that at the time of the ouster a third person had a title superior to that of the plaintiff, nor the fact that since the commencement of the action the defendant has acquired title to the land, is relevant on the question whether the ouster was justified.

*Semble, per PEREIRA J.*—Where a plaintiff having title to land claimed at the commencement of the action loses it during its progress the defendant is entitled to be absolved.

A formal grant under the Public Seal of the Colony is necessary for the conveyance of land belonging to the Crown. The title on such a grant does not refer back to the date when the sale was actually determined upon between the grantee and the Crown.

THE facts are set out in the judgment.

*F. M. de Saram*, for the plaintiff, appellant.—The issues proposed do not arise in the case, as the case has to be decided on the rights of parties at the date of the institution of the action. See *Silva v. Fernando*.<sup>1</sup> The fact that defendants have acquired title to the land after action does not affect the decision of the case; other principles may apply to partition actions. Both parties claimed title at first from a common owner. The subsequent Crown grant cannot be pleaded in this action. Counsel also cited *Silva v. Nona Hamine*,<sup>2</sup> *Ponnamma v. Weerasuriya*.<sup>3</sup>

*F. de Zoyza*, for the defendants, respondents.—A party defendant may rely on title acquired by him after institution of action. See *Silva v. Silva*.<sup>4</sup> The plaintiff did not object to the amendment of the answer. These issues arise on the pleadings as they now stand. Defendants have to put forward all their titles to the lands; otherwise they will be barred by section 207 of the Civil Procedure Code from putting any claim forward hereafter.

*F. M. de Saram*, in reply.

*Cur. adv. vult.*

<sup>1</sup> (1912) 15 N. L. R. 499.

<sup>3</sup> 15 C. D. 67.

<sup>2</sup> (1907) 10 N. L. R. 44.

<sup>4</sup> (1913) 16 N. L. R. 89.

1913.

May 7, 1913. PEREIRA J.—

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In this action, which was instituted on September 19, 1907, the plaintiff claimed certain allotments of land, and, complaining of an ouster by the defendants on February 26, 1906, he prayed for a declaration of title, ejection of the defendants, and damages. The defendants by their answer claimed title in themselves to the allotments of land in dispute on certain old deeds. On September 30, 1912, the defendants were allowed to amend their answer by averring therein that the lands in claim " were the property of the Crown, and that the Crown advertised the same for sale in the *Government Gazette* of October 28, 1910, and the defendants purchased the same from the Crown and paid the Crown the purchase amount for the same "; and on January 31, 1913, they were allowed to amend further their answer by adding to the above the words " and have obtained Crown grants Nos. 4,785 and 4,786, both dated January 4, 1913." On these averments the District Judge framed four issues, which are classified in the proceedings as the 3rd, 4th, 5th, and 6th issues respectively, and they are as follows:—

- (3) Can the defendants set up under Crown a title acquired by them after the institution of this action?
- (4) Was the land in dispute the property of the Crown?
- (5) Did the Crown convey it to the defendants? and
- (6) Are the lands in dispute, or any of them, identical with the land conveyed by the Crown to the defendants?

The present appeal is from an order of the District Judge overruling the plaintiff's objection to these issues. Clearly these issues do not arise in this action. Before proceeding further, I should like to observe that, at the argument of the appeal, I was under the impression that the defendants, in addition to praying for a dismissal of the plaintiff's claim, had prayed for a declaration of title in themselves. If they had done so, they would, with reference to that prayer, be in no better position than the plaintiff with reference to his prayer in his plaint for a declaration of title; and as has been recently held by the Privy Council in the case of *Silva v. Fernando*,<sup>1</sup> in an action *rem vindicare*, the plaintiff cannot succeed on the strength of a title acquired after the commencement of the action, although, possibly (I may add), where a plaintiff having title at the commencement of the suit loses it during its progress the defendant is entitled to be absolved (see *Voet* 6, 1, 4). However, as observed already, the defendants contended themselves with praying for dismissal of the plaintiff's claim. There is, in fact, another prayer, namely, a prayer for compensation for improvements, which need not be noticed in connection with this appeal. Now, the defendants cannot succeed in their prayer for a dismissal of the plaintiff's claim unless they show

<sup>1</sup> (1912) 15 N. L. R. 499.

that they did not oust the plaintiff, or they are in a position to justify the ouster by proof that at the date of the ouster they had a superior title, or were acting under the authority of somebody having a superior title. The mere fact that some third person had a title superior to that of the plaintiff is no justification at all of the ouster by the defendants. So that neither the fact that, at the date of the ouster pleaded, the Crown had title to the property in claim, nor the fact that, since the commencement of the action, the defendants have acquired title, is relevant on the question whether the ouster was justified.

In the course of the argument in appeal the case of *Silva v. Silva* <sup>2</sup> was cited to us on behalf of the respondents, and the cases of *Ponnamma v. Weerasooriya* <sup>2</sup> and *Silva v. Nona Hamine* <sup>3</sup> were cited on behalf of the appellant, but the documents of which the effect has been considered in these cases are Fiscal's conveyances, which confer titles that relate back to the actual sales in execution. A formal grant under the Public Seal of the Colony, which is the only means by which the Governor is empowered to alienate land belonging to the Crown, has not that effect.

For the reasons given above I would allow the appeal with costs.

*Appeal allowed.*

LASCELLES C.J.—I agree.

1913.

PEREIRA J.

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