

Present : Schneider A.J.

1921.

SOOTIHAMY v. CHARLES et al.

C. R. Kalutara, 3,686.

Restitutio in integrum—Procedure governed by chapter XXIV. of the Civil Procedure Code—Respondent to begin.

Where on an application for *restitutio in integrum* notice was issued to the respondent, and he appears he has the right to begin.

The application for *restitutio in integrum* is by way of summary procedure, and is governed by the provisions of chapter XXIV. of the Civil Procedure Code. Upon such an application section 377 prescribes the order which should be made. It should be either an order *nisi* or an interlocutory order. Section 379 indicates the form of the order and the mode of service.

THE facts appear from the judgment.

*De Zoysa*, in support.

*H. V. Perera*, contra.

February 14, 1921. SCHNEIDER A.J.—

In this matter the procedure to be followed in an application for *restitutio in integrum* arose incidentally by my requiring the respondent to begin. The defendants had made an application for *restitutio*, and my brother De Sampayo had ordered notice to issue to the plaintiff. When the matter came up before me to-day, I thought the plaintiff-respondent, who was represented, should begin. The notice which had issued from this Court had for its caption the names of the parties and the number and name of the lower Court, and required the plaintiff-respondent to show cause why the application should not be allowed. The procedure to be followed in an application for *restitutio in integrum* was indicated by Wood Renton J. in the case of *Abeyesekere v. Harmanis Appu*.<sup>1</sup> He pointed out that the application should be by petition and affidavit and upon materials necessary for making out a *primâ facie* case for relief, and should be, in the first instance, *ex parte*. If the Court is satisfied that a *primâ facie* case is made out, notice should issue. If, after hearing both sides, the Supreme Court is satisfied that *restitutio* should be granted, the case should be remitted for further inquiry and adjudication in the Court of first instance.

It seems to me that the language used by Wood Renton J., as also the reason of the thing, shows that the application for *restitutio in integrum* is by way of summary procedure, and governed by the

<sup>1</sup> (1911) 14 N. L. R. 353.

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provisions of chapter XXIV. of the Civil Procedure Code (*vide* sections 373-376). Upon such an application section 377 prescribes the order which should be made. It should be either an order *nisi* or an interlocutory order. Section 379 indicates the form of the order and the mode of service. The caption, I think, should be: "In the matter of chapter XXIV. of the Civil Procedure Code, 1889, and, in the matter of the application of . . . for *restitutio in integrum*." It should contain the names of the petitioner and the respondent and the number and name of the Court of first instance. It should also contain the particulars set out in section 379. The procedure thereafter should be as laid down in sections 382-388.

I regarded the notice issued in this case as an interlocutory order, and requested the respondent's counsel to begin.

In regard to the application itself, I do not think that there is a case to be remitted for further inquiry and adjudication in the Court of first instance. The land in dispute is a small allotment of land, having on its west land admittedly belonging to the petitioners, and on its east land admittedly belonging to the respondent. Both parties claimed it by prescriptive possession. The issue was framed, the trial proceeded, and the judgment was based upon the footing that either party's claim was by right of possession. The present application is made on the ground that the respondent (plaintiff) had title to the land on the west under a Crown grant, and that if that grant had been produced, that fact would have been proved, and that, therefore, the Commissioner would not have believed the evidence of the plaintiff's possession. I do not think so. The Commissioner has decided the issue upon the weight of the oral evidence.

I therefore dismiss the application, with costs.

*Application refused.*

