Present : Middleton J. and Wood Renton J.

Aug. 4, 1911

RAKI *et al.* *v.* CASIE LEBBE *et al.*

225—*D. C. Kandy*, 20,358.

Fiscal's sale—Action for declaration of title by owner against purchaser and debtor—Plaintiff has a cause of action even though his physical possession was not disturbed.

The first defendant on a writ against the second defendant caused the Fiscal to seize and sell the land in dispute as a land belonging to the second defendant, and bought it himself. The plaintiff claiming the land as his, brought the present action for declaration of title against the two defendants.

Held, that plaintiff had a cause of action against the defendants even though his physical possession was not disturbed, and though the first defendant had not obtained a Fiscal's transfer.

THE facts appear from the judgment.

Bawa, for appellants.

Allan Drieberg, for respondents.

Cur. adv. vult.

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In this case the first defendant, as judgment-creditor of the second defendant, seized and sold in execution certain lands as the property of the second defendant, which the plaintiffs now seek to vindicate in this action. The sale was not confirmed, nor the Fiscal's conveyance issued to the first defendant who was the purchaser.

The first issue settled was whether the plaint disclosed a cause of action, and upon that issue, and on the ground that the plaintiffs had no present cause of action, the District Judge dismissed the plaintiffs' action, holding on the authority of *Fernando v. Silva et al.*[1] that the plaintiffs had misconceived their action, and should have proceeded under section 247 of the Civil Procedure Code.

The plaintiffs appealed, and for them it was argued that the plaint disclosed there was a seizure and sale of their property by the first defendant, which amounted to a denial of their right, and gave them a cause of action under section 5 of the Civil Procedure Code. *Ismail Lebbe v. Omer Lebbe*[2] decided that a seizure by the Fiscal amounted in law to dispossession. Further, that the plaint showed that there was a real ground for apprehension of prospective injury by estoppel, and that the action would lie *quia timet*.

[1] *(1878) 1 S. C. C. 27.*

[2] *(1899) 3 N. L. R. 303.*

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It was urged for the respondent that there was a strong probability that the second defendant might pay his debt, when the sale would fall through ; and that the action was against the first defendant as a purchaser who had no formal dealing with the property, and could not in fact oppose his title to that of the plaintiff, as no title had passed to him. The plaint avers that the plaintiffs are and have been in possession ; but the answer traverses this averment, and alleges that the plaintiffs' predecessor in title was a servant of, and worked on the land under, the second defendant's predecessor in title.

There is no question that actions *quia timet* are maintainable in Ceylon, per Wood Renton J. in *The Ceylon Land and Produce Co. v. Malcolmson*,[1] *Soysa v. Sanmugam*.[2] I think, however, it is not necessary here to hold that this is a *quia timet* action which lies, and may be prosecuted, although I think much is to be said in favour of that proposition.

In my opinion there is a substantive cause of action disclosed in the plaint under section 5 of the Civil Procedure Code in the denial of the plaintiffs' right by the seizure of the Fiscal at the suit, and instigation of the first defendant, who is much more likely to obtain his Fiscal's transfer than not to do so, owing to the payment of his debt by the second defendant. I cannot see that the procedure contemplated under sections 241 to 247 of the Civil Procedure Code is exclusive, and prevents a suitor vindicating his rights by an ordinary action if he chooses to do so, and this, I think, has always been held by this Court. I would allow the appeal, with costs here and of the argument in the District Court on the first issue, and send the case back for trial on the other issue agreed on. All other costs to be costs in the cause.

WOOD RENTON J.—

The appellants in this action sued the respondents in the District Court of Kandy for a declaration of title to the lands described in the plaint under these circumstances. Under writ in case No. 20,124—District Court, Kandy, in which the first defendant-respondent was the plaintiff and the second was the defendant, the lands in suit were seized by the Fiscal as the property of the second defendant-respondent and bought by the first, his judgment-creditor. The sale was effected on or about December 20, 1909, but no Fiscal's transfer has yet been obtained by the first defendant-respondent, and the appellants are still in possession of the property, which they claim by gift and by inheritance from one Suppen Kankani, the husband of the first plaintiff-appellant and the father of the other plaintiffs-appellants, and by prescription. The respondents in their answer pleaded that the plaint disclosed no cause of action ; denied that Suppen Kankani was the owner of the property, and that the

[1] *(1908) 12 N. L. R. 16 ; 4 Bal. 33.* [2] *(1907) 10 N. L. R. 355.*

appellants have any right to it by gift or inheritance or prescription ; and alleged that the real owner was one Meeyapulle, father of the second defendant-respondent, to whom the lands devolved on Meeyapulle's death over thirty years ago, and who has since acquired a title thereto by prescription.

On those pleadings various issues were framed at the trial, but so far only the first of these, namely, " does the plaint disclose a cause of action against the defendants," has been decided. On this issue the respondents contend that as they have not yet taken out a Fiscal's transfer, as no title to the lands has therefore passed to them, and as the appellants have not been disturbed in their possession, the latter have no cause of action against them at present. The learned District Judge has upheld this contention, and has dismissed the appellants' action with costs, without prejudice, of course, to their right to set up their title, if any, to the lands in dispute in any future proceedings in which it may be really challenged. The grounds of his decision are, in effect, (i.) that the appellants have not availed themselves of the remedy which the Civil Procedure Code has given them namely, to prefer their claim before the Fiscal ; and if the claim was dismissed, to institute an action under section 247 to have their rights declared ; and (ii.) that in the present action the circumstances under which an action *quia timet* has been held to be maintainable, namely, actual and imminent injury to the plaintiff with prospective damage of a substantial kind, are not present. I do not think it is necessary for us to deal with this latter point. I entirely agree with the forcible remarks of the District Judge as to the need for caution on the part of courts of law, in seeing that the conditions which can alone render an action *quia timet* competent to suitors exist before such actions are entertained. Nor do I think that it is possible, or desirable to attempt, to lay down any general rules as to the classes of cases in which such actions are maintainable. Each case must be decided on its own merits and special facts. It appears to me, however, that the appellants have a "cause of action" here within the meaning of the definition of that term in section 5 of the Civil Procedure Code. It was held by the Supreme Court in the case of *Ismail Lebbe v. Omer Lebbe*[1] that the seizure of land by the Fiscal amounts to dispossession in law. It follows, therefore, that although the appellants are still in physical occupation of the land in suit, they have been legally dispossessed of it. The property has passed into the custody of the law. Irrespective altogether of the facts that the first defendant-respondent has as yet obtained no Fiscal's transfer, and that no title has passed to him under the sale, and of the possibility that he may never take out a Fiscal's transfer, or that the sale may not be confirmed, I think that the seizure of the lands by the fiscal as the property of the second defendant-respondent at the instance of the first is a denial of the

[1] *(1899) 3 N. L. R. 303.*

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legal right alleged by the appellants in their plaint, and confers upon them an immediate cause of action against both respondents. The appellants expressly pleaded that the seizure and sale of the lands took place without their knowledge. If that fact is proved, they were not in a position to exercise their right of claiming the property under section 241 of the Civil Procedure Code. Having preferred no claim to the property, they could not bring an action under section 247 of the Code. I know of no authority that obliges us to hold that, under such circumstances, they are precluded by the claim sections in the Civil Procedure Code from bringing such an action as the present, if the circumstances disclose a cause of action within the meaning of the law of the Colony. On these grounds I think that the appeal should be allowed, with the costs of the appeal and of the argument on the first issue in the District Court, and should be sent back to the District Court for trial on the other issues. All costs, except those to which I have just expressly referred, should be costs in the cause.

Appeal allowed.