

1938

Present : Maartensz J.

DE MEL *et al.* v. AMARASINGHE.

37—C. R. Panadure, 6,485.

*Use and occupation—Agreement to purchase land—Purchaser placed in possession—No liability for use and occupation.*

An action for use and occupation does not lie against a person who was given possession of land in pursuance of an agreement to purchase the land which was not completed through no default on his part.

**A** PPEAL from a judgment of the Commissioner of Requests, Panadure.

G. P. J. Kurukulasuriya (with him Gilbert Perera), for plaintiff, appellants.

D. W. Fernando, for defendant, respondent.

*Cur. adv. vult.*

July 29, 1938. MAARTENSZ J.—

This is an appeal from a decree dismissing the plaintiff's action for the recovery of a sum of Rs. 375 alleged to be due from the defendant for use and occupation of the premises bearing assessment No. 208, Horana.

It appears that the father of the plaintiffs acting on their behalf verbally agreed to sell the property in question to the defendant, the purchase was to be completed in two months, and the defendant was placed in occupation of the premises pending completion of the sale. The defendant denied liability to pay rent while admitting the circumstances in which he was placed in possession and further stated that he was ready and willing to complete the sale.

The learned Commissioner in dismissing the case relied on the case of *Isla Maricar v. Andris Appu*<sup>1</sup>. In that case it was held that an action for use and occupation will not lie unless there has been a contract, expressed or implied between the parties. There the plaintiff sued for rent on a parol lease. The Commissioner held that the parol lease had not been proved, but gave the plaintiff judgment in a certain sum as compensation for use and occupation. That decision was clearly wrong because the defendant had denied the plaintiffs' title and the plaintiff was not entitled to recover except on the footing that the defendant had agreed to pay rent. In this case, however, the defendant admits the title of the plaintiffs and he would be liable to pay compensation for use and occupation unless he was placed in possession in circumstances from which it would be inferred that he was to be in possession free of rent.

In the case of *Winterbottom and others v. Ingham*<sup>2</sup> it was held that where the vendee of an estate sold by auction had been allowed to enter upon and hold the premises while the title was under investigation, and where the contract had afterwards been determined for want of title that the vendor cannot on these grounds only, recover for use and occupation, although a jury found that the occupation had been beneficial.

<sup>1</sup> (1907) 10 N. L. R. 178.

<sup>2</sup> (1845) 7 Q. B. R. 611.

In a South African case, *Wepner v. Schrader*<sup>1</sup>, the report of which is not available, it was held that a person who was allowed use and occupation on the understanding of a future purchase, will not be liable for use and occupation on an action brought by the person, who put him in possession, as the facts did not constitute an implied contract to pay rent, but that the plaintiff was entitled to eject the defendant on refunding to him the sum of money paid in advance.

I think these decisions are applicable to the facts of the present case. It is clear from the evidence of the plaintiffs' father that the defendant was willing to purchase the property till January, 1937. He also stated that he was still prepared to sell the premises even now to the defendant if his wife will agree. The defendant says that he is still ready and willing to purchase the premises.

The plaintiffs are therefore not entitled to succeed in this appeal. They have received a certain amount of compensation because the defendant has not claimed the sum of Rs. 200 which he had paid as an advance, and I understand he has given up possession of the premises.

The appeal is dismissed with costs.

*Appeal dismissed.*

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<sup>1</sup> (1903) T. S. 629.