1936 *Present :* **Akbar and Koch JJ.**

SADIRISA *v.* ATTADASI THERO

115—D. C. Avissawella, 1,660.

Possessory action—Brought by one co-owner against another—Nature of possession required—Possessio civilis—*Roman-Dutch law.*

A co-owner of a land may maintain a possessory action against another provided the other co-owners are parties to the action, whether as plaintiffs or defendants.

In such an action the plaintiff must establish that his possession was *possessio civilis.*

Silva v. Sinno Appu (7 *N. L. R.* 5) followed.

APPEAL from a judgment of the District Judge of Avissawella.

N. E. Weerasooria (with him *T. S. Fernando*), for defendants, appellants.

Rajapakse (with him *D. W. Fernando*), for plaintiff, respondent.

Cur. adv. vult.

July 15, 1936. AKBAR J.—

The plaintiff brought this action originally claiming title to a certain land, and alternatively, on a second cause of action, claiming a possessory

decree in respect of this land. On the plaint, as regards the first cause of action, he became entitled only to a 1/10th undivided share of the land claimed from the owner of the land on a deed of *gift* (P 1) dated April 12, 1914, executed by the then owner of the land. The plaintiff also admitted that the persons under whom the defendants claimed were also co-owners of this land which is the subject-matter of the action, under another deed, P 2, dated August 31, 1915. At the trial, the plaintiff abandoned his claim for title and confined his action to one of possession only. I cannot accede to the argument of Counsel for the appellants that the plaintiff had not this right ; the learned Judge was right in allowing the trial to proceed on the footing of a possessory action.

The law relating to possessory actions, so far as it affects the rights of one co-owner against another, seems to be in some confusion owing to the apparently conflicting decisions of this Court. It is therefore necessary to state briefly what the effect of these judgments appears to be.

The remedy of possessory action is given by statute—Ord. No. 22 of 1871 (section 4). It will be seen from that section that it is provided that the law that should govern such actions was to be the Roman-Dutch law. In other respects, that section only provides the time within which the action is to be brought, reckoning it from the date of ouster.

The earliest case we have been referred to by the Supreme Court on this question of a possessory action is the case of *Changarapillai v. Chelliah*[1], wherein Bonser C.J. indicated what the nature of the possession should be, which would entitle a plaintiff to ask for a possessory decree. This case was quoted with approval by the Privy Council in the case of *Abdul Azeez v. Abdul Rahiman*[2].

Referring to the case of *Changarapillai v. Chelliah* (*supra*), their Lordships stated that in their view, " that decision was sound in principle and is applicable to the circumstances of the present case ". What the plaintiff in a possessory action had to prove was *possessio civilis,* or, in other words, possession " *animo domini* " (see Walter Pereira's *Laws of Ceylon* (*2nd ed.*) *pp. 354 and 544*). So that all that the Roman-Dutch law requires is such possession as the evidence would indicate that the plaintiff regarded himself as the sole owner of the land he was so possessing. If we look at this question from this point of view it seems to me that one co-owner cannot, strictly speaking, be said to have such possession in a possessory action brought by him against his other co-owners in which he claims to be restored to the possession of his undivided share. As Bertram C.J. stated in the case of *Tillekeratne v. Bastian*[3], every co-owner, has a right to possess and enjoy the whole property and every part of it, and the possession of one co-owner in that capacity is in law the possession of all. It will be observed, however, in this case, that the plaintiff claimed not the possession of his undivided share but the possession of the whole land and he claimed to be restored to possession in an action which he brought against the two defendants, who were claiming to be entitled to remain in possession under two other co-owners.

[1] *5 N. L. R. 270.* [2] 14 *N. L. R. 317.*

As regards the cases relating to a possessory action by one co-owner against another co-owner the first case to which we were referred was the Full Bench case of *Perera v. Fernando* [1] in which case, so far as we have been able to ascertain, the Supreme Court came to the conclusion that the possession of a co-owner was not such an exclusive possession as entitled him to a possessory action in the event of his being dispossessed.

It is not clear from the judgment whether the Supreme Court was referring to disturbance of the possession by another co-owner, or by a total stranger. In any event, when this judgment came up for interpretation before the Supreme Court in the case of *Silva v. Sinno Appu* [2] it was accepted in the sense that it dealt with a possessory action by one co-owner against another co-owner. In the case of *Silva v. Sinno Appu* (*supra*) it was a possessory action brought by one co-owner against other co-owners, and Mr. Justice Wendt stated that whatever the reasons upon which the case of *Perera v. Fernando* was decided, that decision was binding upon him, and that if the case before him fell within the principle of it he would be bound either to follow it or to reserve the question for the consideration of a Full Bench of the Court. In the case before him, however, he held that all the parties being before the Court, the action could proceed and, for this reason, the case was sent back and a new trial was ordered.

It will thus be seen that Mr. Justice Wendt interpreted the Full Court decision to mean that one co-owner could bring a possessory action against another co-owner so long as the other co-owners were parties to the action, whether defendants or plaintiffs. This was the sense in which the Supreme Court, in yet another decision interpreted the case of *Perera v. Fernando,* the decision to which I refer being the case of *Fernando v. Ferando* [3].

Interpreting the decision in *Silva v. Sinno Appu* (*supra*), Wood Renton J. stated as follows :—

> " It was held by Mr. Justice Wendt in the case of *Silva v. Sinno Appu* that the owner of an undivided share of land can maintain a possessory action in respect of such share, provided that he joins the other co-owners as parties, either plaintiffs or defendants . . . ."

He also approved of the legal principle that the possession which the plaintiff had to prove in a possessory action was *possessio ut dominus.* The case was sent back for further trial with an expression of opinion of the Supreme Court that that case was to be decided on the principle set forth in that case. It will thus be seen that the effect of the Full Bench case of *Perera v. Fernando* (*supra*) was interpreted in this sense in the two later cases I have quoted.

There is yet another case to which I have to refer before I apply the law to the circumstances of the case now before us, and that is the judgment of Lascelles C.J., in the case of *Abeyratne v. Seneveratne* [4]. He there referred to the cases I have already cited and added that the Full Court decision of *Perera v. Fernando* had not been followed.

[1] *1 Supreme Court Reports, Vol. I p. 329.*
[2] *7 N. L. R. 5.*
[3] *13 N. L. R. 164.*
[4] *3 Balasingham's Notes of Cases 22.*

I cannot understand why he came to this conclusion unless he meant that the later cases of *Silva v. Sinno Appu* (*supra*) and *Fernando v. Fernando* (*supra*) to which also he referred, had interpreted the decision of the Full Bench in a certain sense. In that case Lascelles C.J. came to the conclusion that if there was *possessio ut dominus* for more than a year and a day, a person could maintain a possessory action in the circumstances of that particular case. The circumstances were as follows: The plaintiffs were the assignees of a lease granted by one Alexander, one of several co-owners; and that possession being disturbed by the other co-owners, a possessory action was brought. From the short judgment of Lascelles C.J. it appears that the plaintiffs had a lease from Alexander for the entire land and that they had been in possession of the entire land; when a lessee takes a lease for the whole land without being aware of the fact that his lessor was really entitled only to an undivided share and when he gets into possession of the whole land and holds it for a number of years, these facts are entirely corroborative of the fact that possession by the plaintiff was *ut dominus*, in other words, that he possessed it fully believing that the lessor was the owner of the whole land and that he was entitled to keep the possession of the whole land against anybody but his lessor. So that, it will be seen that the Roman-Dutch Law principle which I mentioned at the beginning of this judgment has been always observed by the Supreme Court in the series of cases quoted above—that possession had to be *possessio civilis*.

The case now before us can at once be distinguished from the case I referred to last—*Abeyratne v. Seneveratne*—because here the plaintiff is asking for a possessory decree, not with regard to an undivided share, but with respect to the whole land, and he is asking for a decree against two other co-owners without making the other co-owners parties to the action as required by the decision of the Full Bench according to the interpretation placed on it later by the Supreme Court.

Therefore it becomes very material to find out whether the possession alleged by the plaintiff was *possessio ut dominus* or whether it was possession by him with the full knowledge that he was a co-owner, and with the knowledge that the law presumes in such circumstances, namely, that his possession must enure to the benefit of his other co-owners also.

The learned District Judge had a simple point to decide, namely, the nature of the possession which was alleged by the plaintiff which would entitle him to a possessory decree. In his evidence, the plaintiff stated that the original donor of the land, Priest Gunatissa, died in 1917, and that after his death all his pupils, meaning thereby the co-owners under the two deeds of donation, met in a "pinkama" ceremony in memory of the death of their donor in 1919 and they came to an understanding that the plaintiff should possess this field and a high land adjoining it in lieu of his shares in the other lands mentioned in the deed. In the face on this evidence, I cannot see how the learned District Judge came to the conclusion that the possession which the plaintiff had when he entered upon the land was *possessio ut dominus* or *animo domini*. The period from the year 1918 till the year in which the action was brought, namely, the year 1934, was too short a period if we reckon this period from the

point of view of one co-owner being able to prescribe against another co-owner. The plaintiff knew when he entered upon his possession that the possession was really on behalf of himself and his other co-owners. He nowhere states in his evidence that as a result of his entering solely in possesion of this field, he gave up his rights to the shares in the other lands and that the others had dealt with those shares on the footing that they were owners.

Mr. Rajapakse, who appeared for the respondent argued that the object of possessory decrees under the Roman-Dutch laws was to preserve possession and not to allow it to be interfered with by acts of violence on the part of others. Although this may be one of the reasons for the granting of such decrees the Roman-Dutch law rquires that the possession which the law would protect in this way should be a possession described in the Roman-Dutch law as *possessio civilis*. I think the evidence negatives what was required by the law on this point, and it is needless to discuss the other points arising in this case. The judgment of the learned Disrict Judge should therefore be set aside.

The appeal is allowed with costs in this Court and the Court below, the judgment and decree of the lower Court being set aside.

KOCH J.—I agree.

Appeal allowed.