

IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
(CIVIL)
A.D. 1990

19/10/90

SUIT NO. 474 of 1988

BETWEEN:

ERROL BROWNE SUING ON BEHALF OF HIMSELF AND
OTHER PARTIES INTERESTED OF SOUTH RIVERS

PLAINTIFF

AND

1. MAURICE DE FREITAS
2. FERDIE BUTLER

DEFENDANTS

Mr. E. Robertson for Plaintiff

Mr. A. Williams for Defendants.

September 24;
October 12.

JUDGMENT

MATTHEW J.

The Plaintiff Errol Browne suing on behalf of himself, and presumably Samuel Isaacs and Elsie Hooper, filed a writ against the Defendants on November 24, 1988 and followed this up with a Statement of Claim filed on December 15, 1988.

As relief in the Statement of Claim the Plaintiff asked for a declaration that he is entitled to certain pieces of land described in deed no. 1288 of 1973; an order for possession of the said land; damages for trespass; mesne profits; a perpetual injunction and costs.

The first Defendant entered an appearance on January 12, 1989 and filed a defence on March 15, 1989. The second Defendant did not enter appearance and has not taken any part in these proceedings. The essence of the defence is that the first Defendant is no longer on a portion of the land in the deed called Three Rivers and that he has a valid title deed, 2401 of 1973, to a portion of the land at South Rivers which is also contained in deed 1288 of 1973. The First Defendant contends that the Plaintiff's deed 1288 of 1973 was in substance a mortgage.

The first Defendant in his counterclaim asked that the Plaintiff's deed be rectified to exclude the land described in deed 2401 of 1973; and also that

deed 1288 of 1973 be declared a mortgage.

In his reply and defence to counterclaim filed on February 28, 1990 the Plaintiff denies any knowledge of a mortgage and pleads that his deed 1288 of 1973 was registered in priority to deed 2401 of 1973 and that by virtue of the Registration of Documents Ordinance No. 30 of 1937, the Defendants' later deed is void.

At the trial Errol Browne, Samuel Isaacs and Elsie Hooper gave evidence for the Plaintiff and Maurice DeFreitas was the only witness for the defence.

Before evidence was led learned Counsel for the Defendant took a point in limine that Errol Browne is the only Plaintiff in this case. He submitted that the case was not a properly constituted representative action and he referred to Order 15 Rule 12 of the Rules of the Supreme Court. Counsel looked at the prayer to the Statement of Claim and submitted that in respect of the property at Three Rivers Errol Browne was the only person who had an interest.

In his reply learned Counsel for the Plaintiff submitted that on the face of the writ it was a representative action and paragraph one of the Statement of Claim made that clear. Counsel submitted that there was one central issue in the case and it was whether Gertrude Lemmore or Rosanna Goodridge having disposed of her property to Browne on June 21, 1973 subject to the life interest could on November 16, 1973 sell a portion of the property to Maurice DeFreitas. Counsel submitted that it was a proper matter for a representative action.

Order 15 Rule 12(1) is as follows:

"Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

After hearing the evidence it appears to me that the "numerous" persons alleged to have the same interest are only Errol Browne, Samuel Isaacs and Elsie Hooper. In my judgment these three persons have not got the same interest in the proceedings. Barnard in his second edition of "The Civil Court In Action" at page 39 speaking of representative actions states:

"The essence of such a case is that all the persons represented have a common interest which is threatened and that the relief claimed benefits them all."

Samuel isaacs and Elsie Hooper have no interest whatsoever in the land at Three Rivers.

41

I uphold the submission that this is not a properly constituted representative action and the only Plaintiff in this suit is Errol Browne.

It may be apposite to deal here with another submission by learned Counsel for the Defendant made in his closing speech. Counsel seemed to have been blowing hot and cold. The very last submission made by Counsel was that the only Plaintiff in the case is Errol Browne and he can only sue in respect of Three Rivers. This suggests that Counsel concedes that the action can be maintained by Errol Browne only. Yet an earlier submission was that if the Court found that it was not a representative action the case should fall. Counsel relied on the authority of *ROCHE v. SHERRINGTON* 1988 2 AllER 426.

In my judgment this case is no authority for stating that if the Court finds that action is not a properly constituted representative action the case falls. In Roche's case one of the features is that there was no personal liability placed on Sherrington. Slade J. stated at page 432 letter (a) as follows:

"The Statement of Claim does not suggest that there are any facts which operate to place Mr. Sherrington, who is not even mentioned in the body of the pleadings, under a personal liability different from that which it suggests falls on each and every present member of OPUS DEI, whomsoever and wheresoever, in any part of the world." Later at page 433 (g) he said:
"Mr. Sherrington has been joined as a party to the action solely to represent all such members. It has not been suggested that he personally has done anything wrong or that he personally has benefitted or is capable of benefitting from the relevant payments in any special manner different from the rest of the membership."

The claim in the case was against all present members of OPUS DEI and the Court held that the writ based on undue influence disclosed no reasonable cause of action against such members. The Court further held that it was not a properly constituted representative action because all the members did not have a common interest as among other things, there might have been separate defences open to members of OPUS DEI who were not such members at the respective dates of the relevant payments which would not be open to persons who were members at such dates.

Another preliminary point taken by Counsel for the Defendant, acting as *amicus curiae*, was that since one year had elapsed and no action had been taken against Ferdie Butler, the second Defendant, the matter in so far as it concerns him should be deemed abandoned. Counsel relied on Order 34 Rules 7 and 11. Counsel for the Plaintiff seems to have conceded for in his closing

/4.....

cfb

address he asked me to decide the case in respect of the Parties before me.

The contest therefore seems to be between Errol Browne and Maurice DeFreitas. The case deals with two portions of land; one located at Three Rivers and the other at South Rivers. The Plaintiff's case is that he obtained both portions by virtue of deed 1288 of 1973 and it was largely a deed of gift by one Rosanna Goodridge subject to her life interest. Rosanna died on July 2, 1987. In respect of the land at Three Rivers he states that he gave DeFreitas a valid notice to quit and DeFreitas is still there. DeFreitas states that he received the notice and left the place before the expiry of the notice.

As regards South Rivers the Plaintiff states that he sold one house lot to Samuel Isaacs and he kept the other which he is presently in possession of. He states that DeFreitas trespassed on both portions. Defendant claims he is entitled to a portion of the South Rivers land by virtue of his deed 2401 of 1973 and alleges that the Plaintiff's deed 1288 of 1973 is in essence a mortgage.

Errol Browne tendered in evidence a copy of deed 1288 of 1973 executed on June 21, 1973. A feature of this deed is that it was signed by "Rosanna Goodridge". He also tendered a death certificate of the said Rosanna Goodridge dated July 2, 1987. He further tendered a copy of the notice he sent to DeFreitas in respect of the land at Three Rivers. He states further:

"Since I gave him the notice he has not left the land even up to now. He has animals there." In respect of the land at South Rivers he stated: "Rosanna lived in one of the houses. Up to the time of her death she lived in one house and Elsie Hooper lived in the other. I sold to Samuel Isaacs a lot of land and a house on it. I sold him the house Mrs. Goodridge used to live in. I gave Elsie permission to live in the house Gladys Baptiste used to live in. Having sold the land to Isaacs I went there and put him in possession Holes were dug on both pieces of land, the one I sold and the one I kept for myself."

When he was cross-examined he stated in part: "Since March 1988 I have been to these lands" (Three Rivers). "I bought lands bounding with it. I have seen DeFreitas on the land. I have seen him more than once. I saw him on the land about two months ago changing a cattle on the land. I am not lying. I have seen Maurice with his children planting bananas after the notice

/5.....

4)

Mrs. Goodridge had bad eyes. She wanted to go to Trinidad once to fix her eyes. I lent her \$300. I borrowed the money from a friend to give her. That is not how she managed to transfer the land to me. She had transferred the land before that. I was kind to her so she gave me the land. It was five months before she went to Trinidad she made the deed. I got back the \$300. Mrs. Goodridge gave it back to me when I told her I borrowed the money. I do not know where Mrs. Goodridge got the money from. I know Lawrence Brewster. Before I got the \$300. I did not have a discussion with Maurice DeFreitas about the money. Mr. Brewster gave me \$300. from Mrs. Goodridge. It is not true she signed the deed and I passed on the money to her.

Samuel Isaacs stated that he purchased a piece of land at South Rivers from Browne on November 7, 1988. He stated that Elsie Hooper is his common-law wife. He stated further: "I saw Mr. DeFreitas roll away a drum I had taken to make an oven. He cut down the clothes line. He broke down the steps to the house in which Elsie lived and threw it away. I saw Ferdie plant up the whole place with bananas. He planted on the two lots of land where Elsie was living and where Mrs. Goodridge was living. I saw Maurice DeFreitas show Ferdie where to plant and Ferdie carried out his instructions. Upon cross-examination he stated:

"Mr. DeFreitas is still on the land I bought. I have seen DeFreitas on the land. I cannot remember the date. I saw when he broke down the steps and cut down the clothes line."

Elsie Hooper stated that there were two houses on the land at South Rivers and that she eventually lived in one which was earlier occupied by Gladys Baptiste in her life time. She stated further: "While living there DeFreitas came with Ferdie and said he is seizing both houses and he told Ferdie anything he wants to do with the land he could do; plant bananas or anything else. Ferdie planted bananas on the land. I was closed out of the house. This was in December 1988. Maurice DeFreitas came back and brought two fellows and began to dig. DeFreitas chopped the coconuts, threw my steps away and rolled away the drum. It was a baking drum. He threw away the galvanize I had as a shelf with my kitchen things. When she was cross-examined she stated: "Ferdie and his father did all the wicked things. I heard Maurice tell Ferdie to plant anything he wants. I was there when Maurice dug the foundation. I still live in the house but Maurice is saying it is his." When she was re-examined she stated: "I am living on the land for several years. DeFreitas came and claim the land. He came there after Mrs. Goodridge died."

48

Maurice DeFreitas stated: "I remember Gertrude Lemmore, otherwise known as Rosanna Goodridge. She asked me to buy a lot of land from her and I bought it. I paid her \$500. for the piece of land in November 1973. I got a deed for this land." The deed was admitted in evidence. The deed executed on November 16, 1973 was signed by a person who could not sign her name. There is a mark witnessed by a Solicitor's clerk. Learned Counsel for the Plaintiff has observed that the document is invalid as not complying with the Illiterate Protection Ordinance, for there was no jurat. DeFreitas stated that before he bought the land he spoke to Errol Browne who told him he should buy. He said he paid for the land and got a receipt. He admitted that he rented the Three Rivers land from Mrs. Goodridge but since he got the notice he left the land. When he was cross-examined he stated: "I saw Elsie living in the house Gladys used to live in before she died. I cannot say how many years Elsie lived in the house. I believe Elsie is living in the house for about five years. I bought the spot where Elsie has her house. There were not two lots of land. I bought the spot of land where both houses are located."

I find as a fact that Maurice DeFreitas is still in possession of the Plaintiff's land at Three Rivers. I accept the evidence of the Plaintiff that he saw the Defendant on the land about two months ago changing a cattle on the land. I do not believe DeFreitas that he left the land even before the expiry of the notice. DeFreitas is not a witness of truth. In his defence he denied that the Plaintiff terminated his tenancy but in his evidence he stated he left before the period of notice. In his defence he also stated that he rented the 3½ acres of land from Mrs. Goodridge yet in examination in chief he stated: "Since I got the notice I have never been on the land. Not before or after." Strange indeed!

As regards the land at South Rivers I find as a fact that it was after Mrs. Goodridge died that DeFreitas set foot on that land. If in fact DeFreitas bought in November 1973 while Mrs. Goodridge was still alive, it seems he either bought the house lot where Mrs. Goodridge lived or the other where Elsie eventually began to live. How is it then he did not get possession in 1973? Why this sudden realisation of his legal rights in December 1988 after the death of Mrs. Goodridge?

There is another feature of the Defendant's claim. Is it established that Rosanna Goodridge is the same person as Gertrude Lemmore simply because DeFreitas says so? Is it conceivable that on June 21, 1973 the vendor scribbles her name "Rosanna Goodridge" on the Plaintiff's deed and less than five months

thereafter she makes a deed and, not only calls herself Gertrude Lemmore, but this time she cannot sign her name? I do not believe Rosanna Goodridge and Gertrude Lemmore are one and the same person.

If the Defendant has no valid deed to the land at South Rivers then he has clearly trespassed. Not only does Browne, Isaacs and Hooper say he trespassed on both portions of land which includes Browne's portion, but Defendant himself lays claim to both portions when he says he bought the spot of land on which both houses are located.

Assuming I am wrong that Rosanna and Gertrude are different persons. Is the Plaintiff's deed in substance a mortgage? The Plaintiff has denied that he gave Mrs. Goodridge \$300. and the land was conveyed to him as a result. There is no direct evidence to the contrary. When DeFreitas was cross-examined he stated: "I do not know of mortgage between Browne and Mrs. Goodridge." The Defendant therefore speculates that there was a mortgage. I do not believe Browne had any conversation with DeFreitas before the latter bought. The Defendant's transaction can in like manner be explained thus: that Rosanna notwithstanding that she had made deed 1288 of 1973 still thought that because she had a life interest she could sell a portion of the land and repay the loan. The Court cannot speculate. There must be evidence to substantiate a mortgage. If Rosanna had disposed of the land subject to a life interest she could not give a free-hold interest to the Defendant. NEMO DAT QUOD NON HABET.

The Plaintiff is entitled to the declaration and the order for possession sought, subject to some minor amendments, damages for trespass; a perpetual injunction and costs.

It is trite law that special damages in personal injuries cases have to be specifically pleaded. The case cited by learned Counsel for the Defendant in that respect, Domsalla and Another v. Bank and others 1969 3 ALLER 487 C/A was a case dealing with personal injuries. At Halsbury Laws of England Fourth Edition paragraph 1170 the learned author states: "Particular rules have been evolved in cases of trespass to land. A Plaintiff is entitled to nominal damages for the trespass even if no damage or loss is caused; if damage or loss is caused, he is entitled to recover in respect of his loss according to general principles. Where by the trespass the Plaintiff has been wholly deprived of his land he is to be compensated according to the value of his interest and if he is a freeholder entitled to possession the damages will be the value of the produce of the land during the period of deprivation."

Plaintiff has been deprived of the land at Three Rivers as from March 1988, a period of more than two years. He gave figures which have not been specifically denied. Yet he ^hwas not given proof of his loss other than his parol evidence to that effect. In respect of South Rivers the Plaintiff can only obtain damages for trespass to his portion of the land. No evidence is given of the value of the extent of the damage done.

In all the circumstances I think an award of \$5000. damages in trespass will do justice in the circumstances. The far more important orders are the declaratory order and the order for possession.

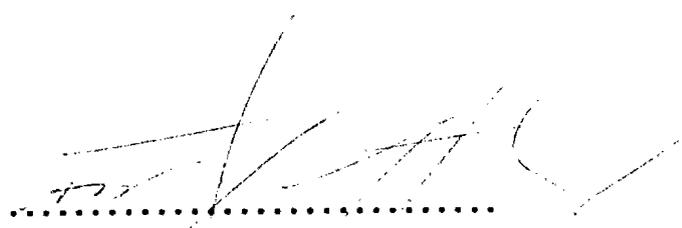
I declare that the Plaintiff is entitled to all the lots, pieces or parcels of land as described in the Schedule to deed 1288 of 1983 subject to the portion sold to Samuel Isaacs by deed 3132 of 1988.

The corollary to that is that I declare that deed no. 1288 of 1973 is not a mortgage and the request that this deed be rectified is denied.

The Plaintiff is entitled to the possession of all the lots described in deed 1288 of 1973 subject to the portion sold to Samuel Isaacs.

I order that the Defendant be restrained whether by himself, his servants or agents, from working or occupying or executing acts of ownership over the Plaintiff's land at Three Rivers and that portion of the Plaintiff's land at South Rivers.

The Plaintiff is to have his costs to be taxed, if not agreed.



.....
A.N.J. MATTHEW
PUISNE JUDGE