

Present: Jayewardene A.J.

RAN NAIDE v. PUNCHI BANDA.

275—C. R. Ratnapura, 48.

Prescription—Usufructuary mortgagee—Long possession—Presumption of ouster.

A Court may presume from lapse of time, in conjunction with other circumstances, that the possession of a usufructuary mortgagee has become adverse.

A PPEAL from a judgment of the Commissioner of Requests, Ratnapura.

E. G. P. Jayatilleke, for defendants, appellants.

N. E. Weerasooriya, for plaintiff, respondent.

June 21, 1930. JAYEWARDENE A.J.—

The plaintiff sued the defendants to redeem a usufructuary mortgage made by one K. M. Punchi Banda in the year 1874. The latter died leaving three children: Kiri Banda, Ram Banda, and Punchi Banda. Kiri Banda in 1879 sold the lands that were mortgaged to the original mortgagee, Endane Kiri Banda, registrar. The plaintiff has acquired title to the two-third shares of the other two sons. The only question for trial was whether the defendants, who are children of the registrar, had acquired title by prescriptive possession. The registrar entered into possession as usufructuary mortgagee and he and his heirs must be presumed to have continued to possess in that capacity, unless they show that the character of that possession has changed, and that there has been something in the nature of an ouster which made that possession adverse to the mortgagor and his successors in title. Where a person who has obtained possession of a land of another in a subordinate character, as for example as a tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by some overt act known to the person under whom he possesses he has got rid of that subordinate possession and commenced to use and occupy the property *ut dominus* (*Government Agent v. Ismail Lebbe*¹). It is for him to show that his *quasi*-fiduciary position was changed by some overt act of possession. This view was adopted by the Privy Council in *Naguda Marikar v. Mohamadu*² and also by the Supreme Court in *Orloff v. Grebe*.³

The registrar bought all the lands mortgaged in 1879 from one of the two sons of the mortgagor. He and his heirs have had possession ever since. If their possession can be referred to the purchase of 1879 and not to the mortgage of 1874, then that possession is

¹ (1908) 2 *Weer.* 29.

² (1907) 10 *N. L. R.* 183.

³ (1903) 7 *N. L. R.* 91.

adverse, if it is shown that the other two sons or their successors had notice of the sale by their brother to the registrar. In 1883 there was litigation about the first land mortgaged, Ehelagahaliadda. The plaintiff in that case, one Ramalhamy, sued the registrar for a declaration of title and ejectment claiming title at a Fiscal's sale in 1880 on a writ against the mortgagor Punchi Banda, who had probably died after action brought but before the Fiscal sold the land. The registrar pleaded that he was the owner of the land by purchase in 1879 from Kiri Banda, the son of the mortgagor. He also set out the mortgage bond of 1874. The registrar stated then that Punchi Banda's son sold the land to pay off his father's debts. His title was upheld.

Again in 1909, his title was challenged by one Tikiri Banda, a purchaser, from the other two sons, but his title was again held to be good, and the Judge observed that the registrar claimed in 1883 on the same title and that the registrar and his children had been in possession ever since. The mortgage bonds produced by the defendants show that they have dealt with these lands as owners at different times. These are usufructuary bonds and the mortgagees have had possession. These bonds have been duly paid and discharged by the defendants as shown by the endorsements on them. It is impossible to think that the sons did not know of their brother's sale to the registrar, of the cases of 1883 and 1909, and of these bonds. The plaintiff, who bought one-third from one brother, Ram Banda, in 1902, lives only half a mile from the lands. In fact plaintiff admitted in cross-examination that he had heard that the registrar, defendant's father, had a transfer from Kiri Banda of all the shares of the land belonging to his father. The plaintiff went to the extent of disclaiming title to Ehelagahaliadda, which he had claimed in his plaint. He said that he did not claim the sixth land too, Delgahaliadda, but he was rehabilitated by his own Counsel and said " Delgahaliadda is No. 4 in P 3, so I do claim it. "

As regards the certificate of quiet possession (P 8), it is in respect of Amurukarahena, which is not included in the mortgage. The first defendant says that he agreed to accept one-third to finish the inquiry. As to the gemming licence of 1903 (P 7), the defendant says that the plaintiff never gemmed on the lands. In 1903 plaintiff was then only entitled to one-third although he seems to have claimed two-thirds for gemming purposes. However, these documents cannot outweigh the large body of evidence in favour of the defendants. I am convinced that the plaintiff and his vendor, the two sons, were well aware of the purchase by the registrar in 1879. The defendants have succeeded in showing that the character of the possession changed and was adverse for well-nigh fifty years. This case is almost on all fours with the case *Fernando v. Perera*

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cited by Counsel for the appellant, where Shaw J. observed that undisturbed possession for a long term of years by a usufructuary mortgagee may, by itself, raise a presumption of an ouster. There too the defendants produced some old cases in which they and others claiming as heirs of the mortgagees had asserted title to the land.

It is open to the Court from lapse of time in conjunction with other circumstances to presume that a possession, originally permissive, has since then become adverse (*Tillekeratne v. Bastian*¹); and as Bertram C.J. pointed out, it is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated.

In *Doe v. Prosser*² Lord Mansfield observed: "An undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster."

In *Hamidu Lebbe v. Ganitha*³, relied on by respondent's Counsel, it was held that it depends on the circumstances of each case whether it is reasonable to presume an ouster from long continued exclusive possession. I feel with Dalton J. that this comes very near to the border line of those "stale claims" referred to by Wood V.C. in *Thomas v. Thomas*,⁴ to which the provisions of the Prescription Ordinance should be applied to the fullest extent and which ought to be discouraged.

I am of opinion that the defendants have proved "adverse" possession against the plaintiff and his predecessors in title for over forty years and have acquired prescriptive title to the lands mortgaged in 1874.

I accordingly allow the appeal and set aside the judgment appealed from. The defendants are entitled to the costs in both Courts.

Set aside.

¹ 21 N. L. R. 12.

² (1774) 1 Cowp. 217.

³ (1925) 27 N. L. R. 33.

⁴ (1885) 2 K. & J. 79.