

MADUANWALA v. EKNELIGODA.

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D. C., Ratnapura, 727.

Prescriptive possession—Ordinance No. 22 of 1871, s. 3—“Adverse” possession—Difference between possession and occupation—Nature of occupation by tenant or licensee—Attempt to change occupation into possession by secret act adverse to owner.

A person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation.

BONSER, C.J.—Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as owner.

WITHERS, J.—The “adverse” possession spoken of by the Ordinance No. 22 of 1871 implies use of occupation *ut dominus*.

THIS was an action in ejectment. The plaintiff averred that under a writ of execution sued out in case No. 7,477 of the District Court of Ratnapura on 12th February, 1861, against one Muttetuwegama Banda, Korale Mahatmaya, the Fiscal seized the land called Durayagodella, and sold the same to Ekneligoda Tikiri Banda on the 22nd June, 1861, and subsequently, on 22nd September, 1896, conveyed the land to the purchaser by deed No. 3,506; that the land was situated in Batugedara, which was a gabadagama, or royal village, and which the Crown granted to the said Tikiri Banda by grant dated 15th October, 1873; that the said Tikiri Banda having held possession of the land for upwards of thirty years conveyed the land to plaintiff by deed dated 10th June, 1896; that defendants have since that date been in unlawful possession of the said land and prevented the plaintiff from possessing it.

The defendants denied that the sale in execution was legal, that Tikiri Banda ever possessed the land, that Batugedara was a royal village, or that the Crown granted the land to Tikiri Banda, and stated that the original owner of the land was Ekneligoda Kumarihami, who possessed the same for over thirty years till her death in 1893, when the defendants and three others entered into possession as her only heirs.

The District Judge found that M. Banda, Korala, was the original owner of the land in dispute; that it was validly sold by the Fiscal to Ekneligoda Tikiri Banda; that the land was afterwards claimed by the Crown; that the Crown granted it to

1898. Ekneligoda Tikiri Banda ; and that Tikirihamy possessed the land,
August 10. not in her own right, but on behalf of her brother, the plaintiff's
vendor, during the whole period of his possession.

The District Judge, therefore, gave judgment for plaintiff.

The defendants appealed.

Wendt, for appellant.

Dornhorst, for respondent.

10th August, 1898. BONSER, C.J.—

In this case the property in dispute is a piece of land about 8 acres in extent with a house on it, which originally belonged to and was the residence of Muttetuwegama Banda, Korala. He was the husband of a lady who is the sister of the real plaintiff in this action, Tikiri Banda. Immediately after the purchase Tikiri Banda went to live in the house, and lived there for four years until, on being appointed Korala in another village, he went to live in that village. It would appear that there is some evidence that the former owner lived on in the house, at all events they lived there after Tikiri Banda removed to another village. Tikiri Banda says he allowed his sister, who had no means of support, and who was abandoned by her husband about this date, to live on in this house as an act of charity ; that he supplied her with provisions and clothing, and allowed her to take what fruit and produce she pleased from the land. It also appears that he did not give up the house entirely to her, for he kept his furniture and crockery there, and used it as his residence whenever his official duties from time to time called him to the neighbourhood.

In 1873 the Crown made a claim to this property on the ground of it being situated in a royal village. Tikiri Banda came to an arrangement with the Government, by which on payment of half of the then improved value of the property he was confirmed in his possession and received a Crown grant. It appears that he had at various times exercised rights of ownership by granting leases of various portions of the property to persons who entered into possession of those portions.

In 1893 the lady died, and shortly after her death some of her children, the defendants, set up a claim to be the owners of the property. That claim Tikiri Banda resisted with the result that this action was instituted.

The defendants seek to make out that their mother had, by occupation of this land and house, acquired a title to them under the Prescription Ordinance.

The District Judge has found against them, and considers it proved that the sister was merely an occupier ; that is to say, she had no possession of this property, but had merely occupation under license of her brother. In my opinion his judgment is right.

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It is said that we are bound to hold that, if a person allows another out of charity to occupy his house, we are bound to presume that that occupation is possession ; that the license to occupy means license to possess *ut dominus*. If this were so, it would be a presumption not to further the intentions of the parties but to defeat them.

I think in some of the cases a distinction has not been drawn between occupation and possession. Possession, as I understand it, is occupation either in person or by agent with the intention of holding the land as owner. There is one fact in the case which points in the direction of such a possession on the part of the sister, at all events to part of the property, that is, that in 1887 she granted a lease of the property ; but even if we were to hold that the lease establishes an intention on her part to occupy as owner, yet it seems to me that it falls short of establishing the possession required by the Prescription Ordinance—first, because it was within ten years of the bringing of this action ; and second, because there is no evidence that this act ever came to the knowledge of Tikiri Banda. A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation.

As I said before, the District Judge came to a right conclusion in the matter.

WITHERS, J.—

I am of opinion that the judgment is right and ought to be affirmed.

So far from there being any evidence that Tikiri Banda surrendered his rights in this land to any one, and that he intended to make his sister a present of the land so that she might dispose of it as her own property, there is evidence that he took care to exercise his possessory and proprietary rights.

Immediately after his purchase of the land at the Fiscal's sale in execution of a judgment against Muttetuwigama Banda he occupied the land for four years, and left it only because he was appointed a headman in another district. From time to time on his visits to the district he occupied quarters in the house on that land.

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When the Crown asserted a dominant right to this land in the seventies, he was the first to come forward and claim the land, and he obtained a grant from the Crown upon payment of half the improved value of this land. In this class of cases occupation is often confounded with possession, but the two terms are quite distinct in meaning, a person may occupy without possession and a person may possess, without occupation. Our Ordinance speaks of adverse possession which implies use or occupation as *dominus*.

The Chief Justice's observations on the law governing this class of cases meet with my unreserved support.

