BEFORE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1903. *June 18,*

(18th June, 1903.)

NAGUDA MARIKAR *v.* MOHAMMADU.

D.C., Colombo, 7,068.

Prescription—Entry into possession as agent—Outlay of money on repairs of houses occupied and enjoyment of rents—Exclusive possession—Want of change of quasi fiduciary *possession to adverse possession—Ordinance No. 22 of 1871, s. 3.*

Where M, in consideration of certain services and outlays of money, was permitted by the owners of a house to enjoy its rents and recoup himself, and he repaired the house, paid taxes due thereon, leased it, and did not account for the rents or any surplus for about twenty years,—

Held, by the Judicial Committee of the Privy Council, that in the absence of any evidence to show that he got rid of his character of agent, he was not entitled to the benefit of section 3 of Ordinance No. 22 of 1871.

Anthonisz v. Cannon (3 C. L. R. 65) over-ruled.

THIS was an appeal preferred to the Judicial Committee of His Majesty's Privy Council by the plaintiff from a judgment of the Supreme Court of Ceylon delivered on the 18th January, 1898, setting aside the decree made by the District Court of Colombo in favour of the plaintiff.

The only question pressed in this appeal was whether one Wappu Marikar, the added defendant in the case, had acquired a title by prescription to the immovable property claimed in the action.

The action was raised against one Nina Mohammadu (the original defendant) to recover possession of certain premises occupied

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by the defendant in Sea Street, Colombo. The defendant pleaded that he held the premises under a lease granted by Wappu Marikar in 1893. Thereupon Wappu Marikar was added as a defendant in the case.

The added defendant, now deceased and represented by his administrator, Wappu Marikar Mohammadu, in his reply alleged that he was put in possession of the premises by one Pattuma Nachchiya twenty-five years before that date, and that he had undisturbed and uninterrupted possession for that period by a title adverse to and independent of the plaintiff and his alleged predecessors in title, and had thus acquired a prescriptive title thereto by virtue of section 3 of Ordinance No. 22 of 1871.

It was admitted by all the parties that the property belonged at one time to Pattuma Nachchiya, widow of Uduma Lebbe Mapillai; that the rents were collected for her up to 1871 by her son-in-law and her grandson, the added defendant; that in 1871 Pattuma Nachchiya gifted the northern portion of the land to her daughter Muttu Nachchiya, the central portion to her granddaughter Zeynambu Nachchiya, and the southern portion to her daughter Kadija Umma, who in turn shortly afterwards conveyed her share to her daughter Tumumma; that though these gifts appeared to be absolute, Pattuma Nachchiya continued to enjoy the rents until her death in 1878; that in 1878 the added defendant leased the premises to one Karupen Chetty for three years ending 30th November, 1881; that at the commencement of that lease one Meera Saibu, being in possession as monthly tenant, refused to quit owing to a claim against the owners for improvements made by him during his tenancy; that the added defendant gave Meera Saibu a lease for five months from the 1st November, 1878, to the 31st March, 1879, covenanting to pay him compensation; that in June, 1879, Meera Saibu instituted action No. 78,280 in the District Court of Colombo against the added defendant claiming compensation for improvements made by him, and obtained judgment in due course for Rs. 804 and costs; that this judgment was satisfied by the added defendant, and thereupon the premises were vacated by Meera Saibu; that Karupen Chetty, not being satisfied with the lease signed in his favour by the added defendant on the 13th November, 1878, obtained nearly a year later from Muttu Nachchiya, Zeynambu Nachchiya, and Tumumma another lease for a term of six years from the 15th November, 1879, to the 15th November, 1885; that from the time of Karupen's entry the added defendant appropriated the rents of the property to his own use; and that when Karupen Chetty went out of possession in 1885, the added defendant leased the property for three years from the 1st

March, 1886, to one Meera Saibu, and again for three years to one Marinai from March, 1889 to 1892, and again for three years to one Nagamani, and again for four years to the original defendant.

Commenting on the circumstances which led the added defendant to appropriate the rent adversely to the claims of all others, the District Judge of Colombo, Mr. D. F. Browne, found as follows:—

"The added defendant does not sustain the allegation in his answer that Pattuma Nachchiya put him in possession, but he says that after the decree in 1878 to 1880 his father and mother and his aunt Muttu Nachchiya gave over the house to him to collect and take the rent for his use. In another place he says that Pattuma also joined them in giving it to him, but that his sisters, Tumumma and Zeynambu, did not. What happened, he says, was this—that after the decision in case No. 78,280, his father and mother said to him, 'You take charge of the house', for till that date the rent had been paid to them.

"The construction I place upon this incident is, that when the added defendant satisfied the decree for Rs. 804 and costs, the owners for whom he was managing agreed he should recoup himself out of the rents. Possibly they never applied for an accounting thereafter, and his practice of keeping the money to himself has inured to the present time.

"But will this give him title? I consider not, for the lease by the owners to Karupen Chetty, under which possession may be presumed to have been held from the 30th November, 1881, until the 15th November, 1885, would be a possession by them, and the defendant would not begin to have adverse possession until he had recouped himself by the rents received. And again, when on the 20th April, 1880, he accepted from his aunt Muttu Nachchiya the gift of one-third for his son and nephew, it is idle for him to say he has been prescribing against them. The added defendant has failed to satisfy me that he has acquired statutory title by adverse possession for a period exceeding ten years as against the parties presently entitled by deed to the house."

The learned District Judge gave judgment for plaintiff.

The added defendant appealed to the Supreme Court of Ceylon on the 7th August, 1896, and the judgment of the District Court was set aside by Lawrie and Withers, J.J., by the following judgments:—

28th January, 1898. LAWRIE, J.—

In my opinion it is proved that for ten years before the institution of this action the added defendant was in exclusive possession of this house, leasing it and repairing it, paying the

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taxes, and receiving the rents. The other members of his family who hold paper titles did not interfere with him and did not share in the profits nor contribute to the expenses incident to possession and ownership. The added party seems to be in a more favourable position than the successful party in *Anthonisz v. Cannon*, for, though originally he entered as agent and collector of rents for his grandmother, he shortly after her death spent large sums of money on their house, and there is evidence that his position as agent and collector changed to that of a man who, the family acknowledged, was in equity entitled to possession, at least until the money spent by him was repaid. That money never was repaid, and his continued possession was, I think, on an adverse title.

I dissented from the judgment in *Anthonisz v. Cannon*, but of course I am bound by it; and relying on that, and treating it as of conclusive authority, I would set aside this judgment and dismiss the action. The added party is entitled to his costs.

WITHERS, J.—I am of the same opinion.

These judgments of Lawrie and Withers, J.J., were brought in review before a Full Bench of the Supreme Court at the instance of the plaintiff, and the case was argued on the 8th November, 1898, before Bonser, C. J., and Lawrie and Withers, J.J.

Their Lordships delivered their judgments in review on the 17th March, 1899, and by a majority confirmed their previous decision of the 28th January, 1898.

Lawrie and Withers, J.J., were agreed in holding that the possession of the added defendant was *ut dominus*, but the Chief Justice dissented from that view. The following were the judgments of the learned Judges:—

17th March, 1899. BONSER, C.J.—

The only question in this case is whether the defendant has made out his plea of prescriptive possession. In my opinion he has not done so. He admits that he was "given charge of the house." That being so, it is for him to show that his *quasi fiduciary* position was changed by some overt act to possession, *i.e.*, a holding with the intention of keeping the property to himself. This he has failed to do. I cannot agree that the rebuilding of the house was of itself sufficient to give the owners notice that he intended in future to treat the property as his own regardless of their rights. Considering that the parties are Mohammedans, I think that the defendant's acts and conduct are

quite consistent with the position of manager of the property of his female relatives. He would be entitled to retain the rents until he had recouped himself his expenditure. 1903. *January 13.*

As regards *Anthonisz v. Cannon* (*3 C. L. R. 65*), in the decision of which I took part, I have more than once stated in open Court that in my opinion that case was wrongly decided, and ought not to be considered an authority. I am afraid that at the date of that decision I did not sufficiently appreciate the force of the term " possession " in Roman-Dutch Law.

LAWRIE, J. -

In my opinion the judgment under review should be confirmed. I desire to modify slightly the judgment I gave, and in lieu of it to say that I hold it proved that for more than ten years prior to the 4th March, 1894, the date of the institution of this action, the added defendant was in exclusive possession of the house: he leased it and took the rents; he repaired it and paid the taxes.

The other members of the family, who afterwards sold to the plaintiff, did not interfere with him; they did not share in the profits nor contribute to the expenses incident to possession and ownership. The reason of this probably was that about 1882 or 1883 the house fell into a dilapidated state and required extensive repairs, if not indeed total reconstruction. This was done by the added defendant at his own cost. He had for several years before been the ostensible landlord, who had given leases and against whom actions had been brought; but I am willing to hold that he there acted as agent for the family.

But when the house was repaired or rebuilt at his own expense the agency ceased. He possessed thereafter *ut dominus*. Possibly his aunts and nephew looked forward to the day when they could in equity claim to be restored to possession, but they allowed full ten years to elapse before that claim was made, and I read the evidence for the added defendant (none was adduced for the plaintiff) as proving that the possession by the added defendant was on an adverse title.

The position of the added defendant towards his own son, for whom he accepted the gift of a share of the house, is different, and the right of the son is not adjudicated on and is not affected by this judgment.

WITHERS, J.—

We are all at one, I think, about the law applicable to a case of this kind. The only question before us is one of fact. Now, whatever the circumstances may have been under which the

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defendant dealt with the house in dispute, they ceased to exist when the house, if it did not cease to exist, became untenantable for want of repair, and had virtually to be rebuilt. The defendant restored it at his own cost, and without being asked to do so by his sisters or aunts. From that time he used the house as his own; he let it and took the rents for himself. The house was restored more than ten years before action brought. In my opinion the judgment in review should be affirmed.

From this judgment the plaintiff appealed to the Privy Council.

The case came on for hearing before Lord MacNaghten, Lord Robertson, Sir Andrew Scoble, and Sir Arthur Wilson.

Arthur Cayley, for appellant.

Chalton Hubbard, for respondent.

The judgment of the Court was delivered by Lord MacNaghten on the 18th June, 1903, as follows:—

Their Lordships are of opinion that this appeal must succeed.

The added defendant, who is represented by the present respondent, entered upon the premises in dispute as agent for other persons. He never got rid of his character of agent, but having spent some money on the repairs of the house, which fell down, and not having duly accounted for the rents or for any surplus, he claimed that he was entitled to hold the property as his own under the Ceylon Ordinance, No. 22 of 1871. It appears to their Lordships that there is no foundation whatever for this claim, and that this appeal ought accordingly to be allowed.

Their Lordships will therefore humbly advise His Majesty that the decree of the Supreme Court ought to be discharged with costs and the decree of the District Judge restored. The respondent will pay the costs of the appeal.