1967 *Present :* **T. S. Fernando, A.C.J., and Siva Supramaniam, J.**

K. D. EDWIN PEERIS and another, Appellants,
and S. KIRILAMAYA, Respondent

S. C. 211 of 1965—D. C. Ratnapura, 4870

Prescription—Hiwel ande—*Nature of tenure—Usufructuary mortgagee—Date of commencement of adverse possession by him—Addition of parties—Judgment in favour of a person who is not a party—Invalidity.*

Where a *hiwel andekaraya* mortgages the *hiwel ande* of a field to be held and possessed by the mortgagee in lieu of interest, the mortgage is of the usufructuary kind and prescriptive possession of the field by the mortgagee against the mortgagor cannot commence until the mortgage bond is discharged.

A Court can give judgment only in favour of a person who is a party to the action and not in favour of some other person who is neither his predecessor in title nor a party to the action.

APPEAL from a judgment of the District Court, Ratnapura.

C. Ranganathan, *Q.C.*, with *G. P. J. Kurukulasooriya*, for plaintiffs-appellants.

A. C. Gooneratne, *Q.C.*, with *R. C. Gooneratne*, for defendant-respondent.

Cur. adv. vult.

October 22, 1967. T. S. FERNANDO. A.C.J.—

This was an action *rei vindicatio* filed on the 29th June 1962 against the defendant-respondent by the 1st and 2nd plaintiffs-appellants claiming a declaration of title to ¼ and 5/16ths shares respectively of a field called Galpotte Kumbura more fully described in the schedule to their plaint. The defendant prayed for a dismissal of the action claiming that the title to this field had passed to his two daughters Premawathie and Banduwathie on a title somewhat different to that relied on by the plaintiffs as well as by prescriptive possession.

Although the learned trial judge held that the plaintiffs have established the title they pleaded, he dismissed the action on two grounds, (1) that the two children above-named of the defendant have succeeded to the rights of one of the original shareholders of the land, a man by the name of Sinduwa, who began to possess this field long ago after an amicable division of the lands of a certain *Panguwa* which included this field as well, and (2) that these two children and their predecessors in title had acquired a title to this field by prescription.

The claim put forward by the defendant that title passed to Sinduwa at an amicable division of the lands of the *Panguwa* was attempted to be rebutted by the plaintiffs by showing that the defendant himself had acknowledged the validity of the title relied on by the plaintiffs. They pointed to three deeds, P12, P13 and P14, and it is necessary to examine the nature of these documents. By P12 of 1869, one Ukkulamaya, proved to be one of the original shareholders in the plaintiffs' chain of title, reciting that he had received from one Sudantha a sum of £3, and reserving to himself one half-share of the *paraveni ande* mortgaged the *hiwel ande* of this field to the said Sudantha to be held and possessed by the latter in lieu of interest on the said amount. It may correctly be described as an instrument approximating to a usufructuary mortgage bond. Sudantha by P13 of 1911 assigned his rights under P12 to one Rankiriya and his heirs, and, Rankiriya having died, his only son Kiridinga, by P14 of 1939, in turn assigned his rights under P12 and P13 to the defendant. According to the evidence, the bond in the defendant's favour was discharged only in 1957. The defendant himself conceded in the course of his evidence that the person who had given the usufructuary bond, viz., Ukkulamaya, had the right to cultivate, and that it was this right that was passed on to him by P14. That the rights of a *hiwel andekaraya* consist of a right to cultivate and to take a share of the cultivated crop gains some support from a reference to *hiwel ande* contained in the judgment of Keuneman, J. in *Bandulahamy v. Tikirihamy* [1] where it is stated that "undoubtedly it is a term in use. Codrington in his Glossary of Native, Foreign and Anglicized Words describes *hewelande* as (1) cultivator's share of the produce of a field, being half of the crop after deducting various payments called *Waraiwe* . . . . . (2) paddy paid for hire of cattle, (3) share of the

[1] *(1942) 44 N. L. R. at p. 543.*

crops to which a person is entitled for the trouble of ploughing." If, therefore, the defendant's possession prior to 1957 was referable to his rights to possess on the strength of the *hiwel ande*, there was not in any event sufficient time between 1957 and the date of institution of this action for rights to be acquired by prescription. Although the learned trial judge found title as claimed by the plaintiffs established, his later finding that Sinduwa was the owner of the entirety is inconsistent with that finding. In the light of the defendant's own conduct which shows an acceptance by him of the title as claimed for the plaintiffs, the finding in favour of the plaintiffs, viz., the answers to issues (1) to (6) must now be regarded as unqualified.

In regard to the issue of prescription which has been answered in favour of the children of the defendant and their predecessors in title, it is relevant to note that, whereas title is said to have passed to the children by deeds of 1956 and 1961 respectively, and this action was instituted only thereafter (June 1962), no attempt was made at any stage of this trial to have the daughters of the defendant added as parties. It was not open to the defendant to rely on the possession of strangers to the action and their predecessors in title. A court can give judgment only in favour of a person who is a party to the action and not in favour of some other person who is neither his predecessor in title nor a party to the action. This is a view which has consistently been taken in our courts over a long period of time—vide *Timothy David v. Ibrahim* [1].

The judgment of the District Court dismissing the action instituted by the plaintiffs against the defendant cannot therefore be maintained. It is accordingly set aside, and we direct that judgment be entered declaring each of the plaintiffs entitled to the respective shares claimed by them in their plaint, for ejectment of the defendant and for damages at the agreed rate of Rs. 100 per annum from date of action till restoration of possession. The plaintiffs are entitled to the costs of this action and of this appeal.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.