[PRIVY COUNCIL]

1968 *Present :* **Viscount Dilhorne, Lord MacDermott, Lord Hodson, Lord Pearce and Lord Pearson**

A. M. SHERIFF, Appellant, *and* M. N. LAILA, Respondent

PRIVY COUNCIL APPEAL No. 7 OF 1967

S. C. 247 of 1964—D. C. Colombo, 9377/L

Landlord and tenant—Claim, by tenant, to prescriptive title to the rented premises—Quantum of evidence—Prescription Ordinance (Cap. 68), s. 3.

The 1st and 2nd defendants were father and son respectively. They were jointly in occupation of certain premises in respect of which the plaintiff, who possessed documentary title from her father, instituted the present action on 11th January, 1961, for declaration of title. In the Answer filed by the 1st and 2nd defendants jointly, the 2nd defendant claimed that he had been in prescriptive possession of the premises for well over 15 years. The 2nd defendant also testified that he had paid municipal taxes from 1942.

Proceedings relating to an earlier action between the plaintiff's father and the 1st defendant were put in evidence on behalf of the plaintiff without objection. In the settlement recorded in those proceedings on 15th February 1951, the 1st defendant admitted that he was a tenant of the plaintiff's father in respect of the premises.

Held, that the 2nd defendant did not acquire prescriptive title under section 3 of the Prescription Ordinance. The evidence relating to the earlier proceedings was relevant and admissible. With both 1st and 2nd defendants living under the same roof, it was, to say the least, difficult to see how the 2nd defendant could have been building up a prescriptive title during any part of the relevant period while his father was a tenant of the owner, or openly acknowledging his title.

APPEAL from a judgment of the Supreme Court.

M. P. Solomon, with *Alavi S. Mohamed*, for the 2nd defendant-appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo* and *John Baker*, for the plaintiff-respondent.

Cur. adv. vult.

May 1, 1968. [*Delivered by* LORD MACDERMOTT]—

The litigation out of which this appeal arises began with a Plaint filed by the respondent in the District Court of Colombo on 11th January 1961. By this the respondent sought a declaration that she was entitled to the lands and premises within the Municipality and District of Colombo

which are described in Schedule " B " thereto. She also sought an order ejecting therefrom those she had made defendants, namely, the appellant and his father, one M. Abdul.

The Plaint set out the respondent's documentary title to the lands. This title was derived from her father, one M. I. Mohamed, who died in 1954. The Plaint also alleged that the defendant, the appellant's father, had once been a tenant of the said lands under a tenancy from the respondent's father, and that he, the former tenant, and his son, the appellant, were acting jointly and in concert in denying the respondent's title.

The appellant and his father filed a joint Answer to this Plaint on 12th July 1961. This Answer alleged that the appellant's father was living with him, the appellant, and that he, the appellant, had been in prescriptive possession of the lands for well over 15 years. These defendants accordingly asked that the respondent's suit be dismissed and that the appellant be declared entitled.

The defendant M. Abdul died on 7th January 1962. His widow and three children were later substituted as defendants in his place, but they appear to have taken no active part in the subsequent proceedings.

The case having been heard in the District Court, the learned District Judge held in favour of the respondent and entered judgment for her substantially as sought. The appellant appealed to the Supreme Court of the Island of Ceylon which dismissed his appeal on 13th September 1965, but afterwards granted leave to appeal to Her Majesty in Council.

At the hearing of the appeal before their Lordships, counsel for the appellant conceded that the respondent's paper title to the land in question was not in dispute ; that the real issue was whether the appellant had established a prescriptive title ; and that the onus of showing this was upon him. What has to be shown to support such a claim appears from the earlier part of section 3 of the Prescription Ordinance (Chapter 68), which is in these terms : " Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs ".

In the circumstances already mentioned, it is unnecessary to trace the respondent's title to the lands. They had been owned by her father and they were hers when the Plaint was filed if the appellant's prescriptive claim failed. It is, however, necessary at this point to comment on two other matters. The first is that, under section 3 of the Ordinance, the crucial period during which the appellant had to prove his adverse possession, if he were to succeed, was the period of ten years before the filing

of the Plaint, that is to say, the period between 11th January 1951, and 11th January 1961. And the second is that the allegations of fact upon which the appellant founded his case were denied by the respondent and were in sharp conflict with the evidence by which she sought to rebut his claim. It is unnecessary to detail the evidence at length in order to demonstrate this as the factual nature of the dispute will appear from a brief summary of the rival contentions.

The appellant alleged that on his marriage in 1941 the respondent's father, the said M. I. Mohamed, promised him certain property situate at Skinner's Road as part of the dowry ; that this property was sold and that he had been given the lands now in question instead ; that he went to reside on these lands in 1942 and had resided there since, paying no rent to anyone ; that his father came to live with him on these lands in 1959 and had never paid rent for them ; and that from 1942 he, the appellant, paid the municipal taxes on the lands and had obtained the receipts produced which went back to July 1950.

The respondent denied much of this. She said her father had brought the appellant's father to an adjoining plot to act as a watcher and milkman ; that, when a building was put up on the lands in question, the appellant's father went into occupation of it and paid rent therefor ; that her father sued him in action No. 30115 in the Court of Requests ; that on the settlement of that suit the appellant's father agreed to leave the lands by 31st December 1951, but had stayed on ; and that her father had not promised a dowry or given the lands to the appellant on his marriage.

The proceedings relating to action No. 30115 were put in evidence on behalf of the respondent without objection, and their nature must now be described. The Plaint was dated 16th October 1950. In it the respondent's father alleged that the appellant's father held the lands from him as tenant at a rent which had been paid until the end of October 1949, but not thereafter ; that notice to quit had been served for 31st December 1949 ; and that the defendant (that is, the appellant's father) had remained on in wrongful occupation. The Plaint sought judgment for rent in arrear, for damages and for possession of the lands in question. In his answer the appellant's father denied the tenancy and alleged that the plaintiff (that is, the respondent's father) had agreed to give the lands to the defendant's son (that is, the appellant) as dowry in consideration of his marriage ; and that he, the respondent's father, had, after the marriage, put the appellant and his wife in possession of the lands.

At the trial on 15th February 1951, the case was settled and the terms of settlement, as recorded, included the following : (i) an admission by the defendant, the appellant's father, that he had been in arrears of rent ; (ii) a waiver by the plaintiff, the respondent's father, of all rents and charges up to 31st January 1951, and of subsequent damages, if vacant possession was given ; (iii) that there be judgment on consent for the plaintiff in ejection and for damages at Rs. 5 a month from 1st February

1951 ; (iv) that the writ of ejectment should not issue until 31st December 1951 ; and (v) that a further stay of six months be then considered on certain conditions, if alternative accommodation should not have been secured by then. A decree was entered accordingly.

The evidence adduced on behalf of the appellant, including the tax receipts, was certainly not conclusive, and it is clear that neither the District Judge nor the Court of Appeal was prepared to accept it in its material parts or to hold that the appellant had in fact been in adverse possession for the necessary ten years—a period which, as already mentioned, would have gone back to 11th January 1951, or about a month before the earlier action had ended in the settlement just described.

If the matter had ended there, their Lordships would see no grounds, in the circumstances of the present appeal, to justify a departure from their usual practice of not disturbing concurrent findings of fact. Counsel for the appellant, however, submitted that this practice should not be followed in this case, because an important part of the evidence (namely, that relating to the proceedings in action No. 30115) was inadmissible or, alternatively, if admissible, was accorded too much weight by the District Judge.

Their Lordships cannot accede to either limb of this submission. The earlier proceedings were clearly admissible against the appellant's father and his representatives, for they were relevant as going to show that, before the prescriptive period and within the earlier part of it, the defendant's father was in one way or another acknowledging the title which has now passed to the respondent. Their Lordships are also of opinion that those proceedings were no less admissible as against the appellant. They were relevant not just as including admissions made by his father or as *res judicata*, but because they evidenced a transaction that tended to rebut the appellant's story that his father was living with him rather than he with his father, and also because they were incompatible with the whole tenor of the appellant's case. The truth is that the circumstances were such as to make it impossible to segregate the evidence bearing on the position of the father from that bearing on the position of the son. It may be that, as was alleged, the father and son were acting in concert in resisting the respondent's claim ; but whether they were or not, the position of one was bound to affect that of the other as regards the nature of their occupancy and any claim advanced under the Ordinance. With both living under the same roof, it is, to say the least, difficult to see how the appellant could have been building up a prescriptive title during any part of the relevant period while his father was a tenant of the owner, or openly acknowledging his title.

Their Lordships find no ground for the alternative contention that the learned District Judge placed too much weight on the evidence regarding the earlier proceedings. It undoubtedly influenced his decision, but that points to its materiality rather than anything else.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.