1912.

Present: Lascelles C.J. and Wood Renton J.

RAKI *et al. v.* LEBBE *et al.*

127—D. C. Kandy, 20,358.

Prescription—Cultivation of a small portion out of a large land—Must title by prescription be restricted to area cultivated?—Adverse possession—Must possession be adverse to the whole world?—Ordinance No. 22 of 1871, s. 3.

The question whether title acquired by prescription must be limited to the actual area of which possession is had must be answered with due regard to the nature of the property and to the use and cultivation of which it is susceptible.

It is possible for a party to an action to establish title by prescription without proving that his possession was adverse to the whole world.

WOOD RENTON J.—I do not think that the words "another person" in that explanation (in section 3 of Ordinance No. 22 of 1871) would justify us in holding that a declaration of title on the ground of prescriptive possession could never be successfully claimed unless the claimant was in a position to show a title

adverse to the whole world. It would, perhaps, not be right to limit the scope of the words "another person" to the particular person against whom prescriptive title was set up. Where it appeared, for instance, on the pleadings or on the face of the evidence that the person claiming such title was only a tenant at will of a third person, he could scarcely expect to have his title upheld. But I demur to the suggestion that a decree for declaration of title could only be made on such evidence as would be necessary if it operated as a decree *in rem*.

LASCELLES C.J.—Possibly the explanation (in section 3) means no more than that the possession, in addition to being adverse to the plaintiff or claimant, must also be *ut dominus*, or it may be—and I am inclined to think that this is the more likely explanation—that the words "in any other person" are loosely used so as to cover the case where the plaintiff sets up prescription against the defendant, as well as the case where the defendant relies on prescription for his defence.

THIS was an appeal from a judgment of the District Judge of Kandy (F. R. Dias, Esq.). The facts are set out in the judgment.

H. A. Jayewardene, for the appellants.

Bawa, K.C., for the respondents.

Cur. adv. vult.

July 3, 1912. WOOD RENTON J.—

This is an action for declaration of title to the land described in the plaint. According to the plaintiffs-respondents, it belonged to Suppen Kangany, the husband of the first plaintiff-respondent, and the father of the others, and devolved on them under a deed of gift from him dated August 31, 1890. They also claim title to it by prescription. Under a writ issued in case No. 20,124 of the District Court of Kandy, the first defendant-appellant seized the land as the property of the second. The respondents have, therefore, brought this action claiming the declaration of title above referred to. The appellants allege that the original owner of the land was one Meyapulle, and that on his death it devolved on his son, the second defendant-appellant, who has acquired title to it by prescription. They also say that Suppen Kangany only worked the land under Meyapulle, and never had a title to it of his own. The learned District Judge has upheld the respondents' claim of title by prescription, and after carefully considering all the evidence and the arguments on both sides which were urged at the hearing of the appeal, I have come clearly to the conclusion that he is right.

The land in question would appear to have belonged at one time to the firm of George Wall & Co., who sold it to a Moorman, Dawudu Saibo, in 1871. In 1872 Dawudu Saibo granted a tertiary mortgage over the crops for 1872 and 1873 of the estate, which was planted with coffee, to Meyapulle, through whom the respondents claim.

1912.

WOOD RENTON J.

Raki v. Lebbe

It is obvious, as the learned District Judge has pointed out, that a document of this kind could confer no paper title, and forms a somewhat unsatisfactory starting point for title by prescription. The land would seem to have been subsequently abandoned on the failure of the coffee industry in Ceylon some thirty-five years ago. It is said to have been worked for a few years by a Mr. Newman, with Suppen as his head kangany, and then to have been abandoned by him to Suppen in payment of, or as a security for, his indebtedness to the latter. The evidence of these facts is shadowy, and for the most part hearsay. But what is clear is that the land remained for twenty-five or thirty years in Suppen's exclusive possession. The appellant's counsel contends, however, that, even assuming that Suppen took over the land from Newman under the circumstances suggested, he did so in a subordinate character, and that nothing has happened since to convert his occupancy into possession *ut dominus*. As I have already pointed out, there is no strict proof of the fact that Suppen entered upon the land under Mr. Newman at all; and in the absence of such proof, the facts, to which I will refer in a little while, are amply sufficient to establish his title by prescription. But, even assuming that Suppen's occupancy commenced under Newman under the circumstances described in the evidence, his possession would, I think, be adverse, within the meaning of section 3 of Ordinance No. 22 of 1871, as against the present appellants, who have been found by the District Judge to have no title to the land at all. Comparatively little help is to be had from English cases on the point that I am now considering; for in England adverse possession in the strict sense of the term was abolished by the Real Property Limitation Act, 1833 (*3 and 4 Will. 4, c. 27*). But it seems that prior to that enactment the question whether possession was or was not adverse was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold estate in the claimant (see *Smith's L. C., 18th ed., II., p. 651*). The same principle seems to me to be embodied in section 3 of Ordinance No. 22 of 1871, where the adverse title spoken of is one independent of the claimant or plaintiff in the action. It is true that the explanatory clause in section 3 speaks of acknowledgment of a right existing in another person. But I do not think that the words " another person " in that explanation would justify us in holding that a declaration of title on the ground of prescriptive possession could never be successfully claimed unless the claimant was in a position to show a title adverse to the whole world. It would, perhaps, not be right to limit the scope of the words " another person " to the particular person against whom prescriptive title was set up. Where it appeared, for instance, on the pleadings or on the face of the evidence that the person claiming such title was only a tenant at will of a third person, he could scarcely expect to have his title upheld. But I

demur to the suggestion that a decree for declaration of title could only be made on such evidence as would be necessary if it operated as a decree *in rem*.

I have carefully examined all the cases that were cited to us by the appellants' counsel at the argument of the appeal. I do not think, however, that any of these authorities can be said to be applicable to the facts with which we have here to deal. The general principle laid down by the Privy Council in *Naguda Marikar v. Mohammadu* [1] is, of course, beyond dispute. But here, as I have pointed out, there is no strict proof of the reason for the commencement of Suppen's tenancy, and the action is brought, not against an owner, but against the respondents, with no title at all. This observation disposes also of the cases of *Maduanwala v. Ekneligoda* [2] and *Orloff v. Grebe*.[3] It was further contended by the appellants' counsel that in any case Suppen Kangany could establish title only to the small portions of the land in question which he actually cultivated, and could not show that such cultivation was a constructive possession of the whole land. See on this point *Mohini Mohan Roy v. Promoda Nath Roy*,[4] *Radhamoni Debi v. Collector of Khulna*,[5] *Clark v. Elphinstone*,[6] *Glyn v. Howell*.[7] The question, however, in every case is one of fact, and it appears to me that here the circumstances taken as a whole are sufficient to establish Suppen's title beyond all doubt. We begin with his continued and exclusive possession. If Mr. Newman put him in possession of the land, neither he nor any other of the former owners asserted any kind of subsequent claim to it. The evidence shows that it was abandoned altogether save for the possession, which the District Judge has discredited, of Meyapulle. There is proof that Suppen cultivated two distinct and widely separated portions of the land. The presumption is that he did so in virtue of his claim to the whole. He paid the tax due on the cultivated portions till it was done away with. His coolies left the land, but he remained and brought up his family there. He sold the materials of the storehouse and took the purchase money as his own. He also granted a firewood contract affecting the whole land. There are other items in the evidence to which I might have referrred, but these, I think, are sufficient.

I would dismiss the appeal with costs.

LASCELLES C.J.—

It is unnecessary to recapitulate the facts of the case, which have been fully set out in the two judgments of the District Court and in the previous judgment of this Court. It is admitted that the

[1] *(1903) 7 N. L. R. 91.*
[2] *(1898) 3 N. L. R. 213.*
[3] *(1907) 10 N. L. R. 183.*
[4] *(1896) I. L. R. 24 Cal. 256.*
[5] *(1900) I. L. R. 27 Cal. 943.*
[6] *(1880) A. C. 171.*
[7] *(1909) 1 Ch. 666, 677.*

1912.

LASCELLES C.J.

Rahi v. Lebbe

defendants have no title at all to the land in dispute, but exception is taken to the learned District Judge's finding that the plaintiffs have acquired title by prescription on two grounds, which I shall proceed to examine. In the first place, it is objected that the possession of the plaintiffs and that of Suppen Kangany, through whom they claim, was not " adverse " within the meaning of section 3 of Ordinance No. 22 of 1871. It is conceded that the possession of the plaintiffs was adverse to the defendants. But that, it is said, is not enough; the possession, in order to be " adverse " for the purposes of the section, must be unaccompanied by any act of the possessors, from which an acknowledgment of a right existing, not merely in the defendants, but in " any other person," would be fairly and naturally inferred.

The appellants' argument is that, inasmuch as Suppen Kangany is stated by the second plaintiff to have entered the land on Mr. Newman's request to take it over until he came back, Suppen Kangany's possession was dependent on Mr. Newman's title, and was therefore not "adverse" even as against the defendants in this action.

On the facts proved I do not think that this argument can succeed, for there is no evidence whatsoever of any act on the part of Suppen Kangany or of the plaintiffs from which any acknowledgment could be inferred of any right existing in Mr. Newman. The second plaintiff, in the passage relied on by the appellants, stated that his parents had told him that when Mr. Newman left the property about thirty-five years ago, owing money to Suppen Kangany, he told the latter to take over the property until he came back. But Mr. Newman abandoned the property and never came back, and Suppen and his family remained in possession. It would be unreasonable to construe the second plaintiff's evidence into an admission that Suppen Kangany occupied the land under Mr. Newman, when it is clear from the evidence that Mr. Newman abandoned the land without any intention of resuming possession, and that Suppen Kangany possessed it on his own account.

The construction of the words "a right existing in another person" in the parenthesis in section 3 of Ordinance No. 22 of 1871 gives rise to some difficulty. The parenthesis purports to explain the meaning of the words " a title adverse to and independent of that of the claimant or plaintiff." But the explanation appears to go far beyond the meaning of the expression it purports to expound, and to interpret these words to mean a title which is adverse, not only to that of the claimant or plaintiff, but to that of any other person. The possession of the defendant must be such as is incompatible with the title of the plaintiff or claimant if such possession is to be deemed adverse to him, but I confess that I cannot understand why it should also be required to be incompatible with the title of any other person. None of the reported cases throws any light on this difficulty.

Possibly the explanation means no more than that the possession, in addition to being adverse to the plaintiff or claimant, must also be *ut dominus*, or it may be—and I am inclined to think that this is the more likely explanation—that the words " in any other person " are loosely used so as to cover the case where the plaintiff sets up prescription against the defendant, as well as the case where the defendant relies on prescription for his defence. Be that as it may, there is, as I have stated, no evidence of any act on the part of the plaintiffs from which an acknowledgment of a right existing in any other person can be inferred.

The other ground of appeal relates to the extent of land to which the plaintiffs have established title. It is said that title acquired by prescription must be limited to the actual area of which possession is had, and authorities were cited for that proposition. This, as a general proposition, is good law, but it must be applied with due regard to the nature of the property and to the use and cultivation of which it is susceptible. The property in question is about 66 acres in extent. It was formerly planted with coffee, but, like much other land so planted, it was abandoned, and has relapsed into patana covered with mana grass and some trees.

It is proved and found by the learned District Judge that Suppen Kangany made three paddy fields in different parts of the property at least as far back as 1887; that he grazed cattle there; that he sold all the trees on the land for firewood; that the first plaintiff let out the produce of the whole of the lands, high and low, to Sirimala; that Suppen sold the materials of a store on the property; and that he lived on it and brought up his family there. I do not think that it is straining the doctrine of constructive possession to hold that Suppen and the plaintiffs had occupation of the whole land. The greater part of it was uncultivable or could not be cultivated without great expense, and the occupation of Suppen and of the plaintiffs was, in my opinion, such occupation as was to be expected, having regard to the nature and condition of the land. It would be unreasonable to expect them to have reclaimed the patana land and to have planted it with tea, as such an operation would require a considerable expenditure of capital.

In my opinion the judgment of the District Judge is right, and I would dismiss the appeal with costs.

Appeal dismissed.