1931

Present : **Macdonell C.J. and Garvin S.P.J.**

SILVA *v.* DE ZOYSA.

239—*D. C. Galle*, 27,456.

Prescription—Interruption of possession—Act acknowledging the right of another—Ordinance No. 22 *of* 1871, *s.* 3.

In 1916 A bought a land, sold by auction in administration proceedings, at the request of B, who provided the money. No transfer was exectued in favour of the purchaser, A, at the time.

B remained in possession of the land till 1925, when he procured a conveyance in favour of A from the administratix and continued in possession. In 1929 A sold the property to C.

Held (in an action brought by B's lessee for possession of the land), that the act of B in procuring a conveyance in favour of A did not amount to an acknowledgment of a right existing in another within the meaning of section 3 of Ordinance No. 22 of 1871.

THIS was an action for declaration of plaintiff's right to possess a land, which belonged to one Girigoris de Zoysa. On his death his administratrix caused the land to be sold by auction, with leave of Court, when it was purchased by one Sahabandu at the request of the second defendant and with his money. The sale took place in 1916. No formal transfer was made in favour of Sahabandu. Second defendant entered into possession of the land and continued to be in possession till date of action, September, 1929. On September 9, 1925, the administratrix of

the estate of Girigoris de Zoysa executed a conveyance in favour of Sahabandu at the request of the second defendant. On June 13, 1929, Sahabandu purported to sell the land to first defendant. The plaintiff,who was a lessee of second defendant, claimed to be entitled to the possession of the land and called upon the second defendant to warrant and defend title. The learned District Judge held that the second defendant had acquired prescriptive title to the land.

Hayley, K.C. (with him *Ameresekere* and *Gratiaen*), for first defendant, appellant.—Second defendant, who paid for the purchase, was uncle of the purchaser Sahabandu and *in loco parentis*. Therefore no constructive trust and inference is that purchase was for Sahabandu's benefit, see *Fernando v. Fernando*.[1] Second defendant's possession from 1916 to 1925 was on behalf of Sahabandu, and therefore not adverse. Even otherwise possession of a *cestui que* trust cannot be said to be adverse to the trustee. In any case the rights of a *bona fide* purchaser are unaffected (section 98 of Trusts Ordinance, No. 9 of 1917).

Assuming second defendant's possession from 1916 was adverse to Sahabandu, it ceased to be adverse in 1925 when second defendant got a legal conveyance from the administratrix in Sahabandu's favour in 1825, because it was an act in acknowledgment of a right in Sahabandu (section 3 of Ordinance No. 22 of 1871).

Second defendant is estopped from denying title of first defendant, because second defendant by getting conveyance in Sahabandu's favour and registering it held out Sahabandu to the world as the owner. Counsel also cited *Sinnatamby v. Kanthar*,[2] *Sangarpillai v. Seenar*,[3] and *Bickerton v. Walker*.[4]

Rajapakse, for respondents.—Sahabandu was constructive trustee of second defendant (section 84 of Trusts Ordinance). That second defendant did not intend. Sahabandu to benefit by the purchase is evidenced by second defendant removing barbed wire of his adjoining land and possessing the two lands as one.

Second defendant entered into possession in 1916 in his own right and independently of the administratrix and of Sahabandu and therefore his possession was adverse to both from 1916. He continued in such possession till 1929. In 1925 he merely intended to secure to himself the outstanding legal title by getting a transfer from the administratrix to Sahabandu and from Sahabandu to himself, though the latter could not be executed. His possession was never in fact and in relaity disturbed or interrupted. No change in the character of his possession in 1925. Far from acknowledging a right to the possession in another, he intended to strengthen his possession by such act.

Estoppel is neither pleaded nor raised in the issues at the trial. Moreover, no proof that any reprsentation was made by second defendant, upon which first defendant acted to his detriment.

January 21, 1931. MACDONELL C.J.—

In this case the learned District Judge held that the second defendant acquired title by prescription to the land in dispute and from this decision the first defendant appeals.

The facts are as follows :—The land in dispute originally belonged to the brother of the second defendant, the respondent, and came to his wife as administratrix. She, with leave of the Court, put the land up for sale by auction on September 16, 1916, when it was bought by one Sahabandu but with the money of the second defendant-respondent ; this was found as a fact in the Court below. Sahabandu thereupon became a trustee of the land for the second defendant; he is a nephew of the second defendant and was quite young at the time of the sale. No conveyance of the land was executed after the sale to Sahabandu or to anyone else ; the legal estate remained in the administratrix by whose direction it had been sold by auction

[1] 20 *N. L. R.* 244.
[2] 6 *Weer.* 53.
[3] 3 *C. W. R.* 342.
[4] (1855) 31 *Ch. Div.* 151.

but the second defendant went into possession of the land forthwith, that is, in 1916, and marked his possession thereof by removing a barbed wire fence which separated this land from another adjoining lot of land that had been his since an earlier date. On February 18, 1928, that is to say after he had been in possession of the land for over eleven years, he leased it to the plaintiff in this action.

Meanwhile he, the second defendant-respondent, had on September 9, 1925, induced the administratrix by whom the land had been sold in 1916 to excute a conveyance of it to Sahabandu ; this conveyance recites the sale of September 16, 1916. The notary attesting says in evidence that it was executed by the administratrix at her house on the instructions of the second defendant-respondent, who however was not present at the time, that at the time of the execution of the deed Sahabandu was living with the second defendant-respondent, and that he, the notary, drew up yet another deed at the instance of the second defendant-respondent, which however was not signed because Sahabandu left the village. From these facts the natural inference is that in 1925 the second defendant-respondent determined to have his equitable title turned into a legal one, and that he was taking the obvious steps to that end, namely, a conveyance from the vendor to Sahabandu, his trustee, as a conduit-pipe, who was then to make over the legal estate to him, the second defendant-respondent, by means of the second deed drawn up but not executed because of Sahabandu's absence.

The only remaining facts that are material are that on June 13, 1929, Sahabandu executed a conveyance of the land in dispute, for value, to the first defendant-appellant, who in July, 1929, evicted plaintiff, the lessee of the second defendant-respondent ; it is not proved that first defendant-appellant knew that his vendor Sahabandu was a trustee. Plaintiff commenced this action on September 5, 1929, and obtained a judgment from which the first defendant brings this appeal.

One of the grounds stated in his petition of appeal is that the second defendant having permitted the conveyance of 1925 to be made in Sahabandu's name gave him the means and opportunity of perpetrating a fraud on an innocent purchaser, *i.e.*, the first defendant, and that he is thereby estopped from denying that Sahabandu, when he sold to the first defendant, was the rightful owner, but this estoppel was not pleaded below, nor was it argued to us on appeal. I therefore express no opinion upon it.

The case was argued to us on, and must be decided on, the question of prescription and the point for decision seems to be this : Did the second defendant when in 1925 he instructed a notary to draw a conveyance in favour of Sahabandu, and induced the administratrix as vendor to execute that conveyance to Sahabandu, do an " act " as " possessor " of the land conveyed " from which an acknowledgment of a right existing in another person could fairly and naturally be inferred " ? He had been in possession of the land since September, 1916, that is for some nine years, by reason of a title adverse to that of the administratrix the vendor, since he claimed to be in possession as the implied *cestui que* trust of her purchaser Sahabandu, and also adverse to that of Shabandu himself since he had advanced the purchase money and Sahabandu was therefore implied trustee for him. It had been, then, up to September 9, 1925, a possession by title adverse to that of the administratrix vendor till then the legal owner, and adverse to that of Sahabandu who from the sale in September, 1916, had been entitled at any time to call for the legal title from the administratrix vendor ; was that possession now " interrupted " by " an act acknowledging a right existing in another person " ?

To answer this question it is necessary to take all the facts relevant thereto. The section No. 3 of Ordinance 22 of 1871 speaks of an " act . . . . from which the acknowledgment of a right existing another person would fairly and naturally

be inferred ", so we must ascertain what the " act " was before we can say whether or not a certain inference "fairly and naturally " arises from it, which is simply another way of saying that we must know and take into account all the component parts of that " act ". for if we do not, if we simply take one isolated fact apart from its surroundings, we would not be giving weight to those words in the section which say that the inference of acknowledgment of right in another must be one that arises " fairly and naturally ".

Now the relevant facts here are these. The second defendant instructed Sahabandu to buy the land in dispute and gave him the purchase money. The fair and natural inference from this is that the second defendant intended to acquire to this land a title adverse to and independent of that of the administratrix vendor, since she was alienating her right to the land to Sahabandu the purchaser, and adverse to and independent of that of Sahabandu himself since his rights after purchase would be those of a trustee for the second defendant, whether he did or did not take a conveyance from the administratrix vendor. Immediately after the sale, the second defendant went into possession. To what is this act referable ? Clearly to the title he had acquired to the land in dispute adverse to and independent of that of the administratrix vendor and of that of his nominee Sahabandu. He remains in possession for nine years, and this remaining in possession is referable to the same adverse title. These positions were indeed conceded in argument and without question. In 1925 he gets a conveyance executed by the administratrix vendor to Sahabandu. To what is this act referable? Even if it stood alone, it would surely be referable to the same adverse title. Sahabandu, his nominee, is still without a conveyance, has still himself only a right to the legal estate but not the legal estate itself, and, wanting that legal estate, he, Sahabandu, and his *cestui que* trust, the second defendant, are always exposed to the risk of a conveyance for value to some third party ignorant of the trust. Until Sahabandu has obtained this conveyance and the legal estate with it, the second defendant cannot get in the legal estate to himself. He could not have asked the administratrix vendor for a conveyance to himself for she would have answered, quite correctly, that her sale of the land was not to him, the second defendant, but to Sahabandu ; therefore he has to ask for a conveyance to the man to whom she did make the sale. This conveyance to Sahabandu is the condition precedent to the second defendant obtaining the legal estate for himself, fot it must go first to his nominee or conduit-pipe before it can come to him. If the procuring of a conveyance to Sahabandu is to be relied on as evidence of " an acknowledgment of a right existing " either in the administratrix vendor or in him, then surely it must be shown that the relations of the parties, of the second defendant, the administratrix vendor, and Sahabandu to each other had thereby changed. What change is there in the relations of the parties ? Prior to the conveyance of September 9, 1925, the administratrix as paid vendor had been under an obligation—an implied trust—to convey to her purchaser Sahabandu whenever required to do so. She is now required to, and does convey. Why ? Because of her sale of September, 1916 ; her execution of the conveyance is a recognition of that fact, not a change in her previous relations either to Sahabandu or to the second defendant. She has by reason of the conveyance of September, 1925, divested herself of the legal estate in favour of the person, Sahabandu, in trust for whom she had been holding it for nine years, and Sahabandu instead of having merely the equitable ownership of the land as against the administratrix vendor has now obtained the legal ownership. His relation to the second defendant is not thereby changed either. Prior to the conveyance of September 9, 1925, he was a trustee for the second defendant though with only an equitable estate himself ; now he has obtained the legal estate, but is he

any the less a trustee for the second defendant ? If the fact of second defendant paying the purchase money in 1916 made him an implied *cestui que* trust of Sahabandu, from the moment the land was sold to Sahabandu, is the force of that fact exhausted now that Sahabandu has done the very thing he was under obligation to do for the second defendant from the moment the land was sold to him, namely, to take a conveyance of it ? The question answers itself. Did Sahabandu, by taking a legal conveyance obtain any " right " as against the second defendant which he did not have before ? Clearly not ; he was an implied trustee before he got the conveyance and he remains the same now that he has got it ; *nemo sibi ipse causam possessionis mutare potest.* Then, has the second defendant by procuring the conveyance " acknowledged a right existing " in Sahabandu ? It is not easy to see how he has, since Sahabandu in relation to the second defendant is, after that conveyance exactly what he was before, an implied trustee of the land for his benefit. Nothing else is suggested that could change the relation of these two persons, but if so, then their relations remain what they were before the conveyance of September 9, 1925, and there is no evidence of any " acknowledgment " by second defendant of " a right existing in another person ".

This, it seems to me, would be the inference to be drawn from the conveyance of September 9, 1925, even if it stood alone. But it does not ; there was the other conveyance which the notary drew but which remained unexecuted because of Sahabandu's departure. It was, then, a conveyance that was to be executed by him at the instance of the second defendant. Then it is a warrantable inference that it was a conveyance making over to the second defendant the legal estate in the land which it was at last in Sahabandu's power to make over now that he had got a conveyance of it from the administratrix vendor. Then every detail in the " act " of the second defendant in regard to these two conveyances is referable to the sale of September, 1916, and to the title the second defendant acquired thereby "adverse to and independent of that of the administratrix vendor and that of Sahabandu ; it was an " act " to perfect his own " existing right, " and if so it cannot well have been an " acknowledgment of a right existing in some other person ". Then it was no " interruption " of his possession of the land in dispute which had commenced some time in 1916. As no other " interruption " has been suggested, that possession matured into a prescriptive title in favour of the second defendant some time in 1926, that is to say, over two years before the conveyance from Sahabandu of June 13, 1929, under which the first defendant claims. The second defendant then has made good his title to the land in dispute, and the plaintiff, his lessee, is entitled to be restored to possession under the lease.

For the above reason I am of opinion that the decree appealed from was right and that this appeal must be dismissed with costs.

GARVIN S.P.J.—

The question for decision upon this appeal is whether the learned District Judge was right in holding that the second defendant had acquired a prescriptive title to the land which is the subject-matter of this action.

Admittedly it once belonged to one Girigoris de Zoysa. On his death his administratrix, with the leave of the Court, caused the land to be put up for sale by public auction, when it was purchased by one Mahinda Sahabandu at the request of the second defendant and with his money. No formal transfer was executed. This sale took place on September 26, 1916.

The second defendant thereupon entered into possession of the premises. Being the owner of the adjoining land, he removed the dividing fence and thereafter held and possessed the two lands as one.

His possession of the land in dispute continued without interruption up to the date of the action on September 5, 1929.

On September 9, 1925, the administratrix of the estate of Girigoris de Zoysa executed a conveyance of the premises in favour of Sahabandu, the second defendant's nominee. The deed was drawn and attested by the notary on the instructions of the second defendant, but neither he nor Sahabandu was present at the execution.

It would seem from the evidence of the notary who attested this deed that he also drew up a deed to be executed by Sahabandu. It is evident that this was to be a conveyance in favour of the second defendant.

By reason of Sahabandu's absence that conveyance was never executed.

On June 13, 1929, by deed No. 401 Sahabandu purported to sell and transfer the land in favour of the first defendant.

The plaintiff, who is the lessee of the second defendant, claims to be entitled to the possession of the land and has called upon the second defendant to warrant and defend his title.

Now the learned District Judge has found that the first defendant took the conveyance from Sahabandu without notice of the circumstance under which he came to purchase the land and in ignorance of the fact that Sahabandu was a trustee for the second defendant. It was urged that though the second defendant had been in continuous possession of the land, as found by the learned District Judge, his possession did not mature into a prescriptive title.

There can, I think, be little doubt that when the second defendant entered into possession of these premises he did so with the intention of holding as owner. The legal title was still in the administratrix, but the facts and circumstances set out above show beyond doubt that at the date of his entry the second defendant was entitled to the possession of the land and to have the title to the land vested in him. He entered not under another nor in recognition of the right or with the permission of another but to hold for himself as owner by virtue of the purchase made for him and with his money by his agent. Notwithstanding his knowledge that the legal title was still outstanding in some one else, it was clearly adverse possession within the meaning of section 3 of Ordinance No. 22 of 1871.

It was urged, however, that when nine years later the second defendant procured the execution of the deed by the administratrix his possession at the moment was not adverse to Sahabandu and that as against Sahabandu and those claiming under him adverse possession only commenced to run after the execution of the deed.

The argument, as I understand it, is that when the second defendant caused the execution of the deed by the administratrix in Sahabandu's favour he did an act acknowledging the " right " of Sahabandu within the meaning of section 3 of Ordinance No. 22 of 1871.

The words in parenthesis in section 3— " 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 can fairly and naturally be inferred "—have been held to be a definition of " adverse possession ". The phrase " by any other act " must I think be read *ejusdem generis* with " payment of rent or produce or performance of service or duty " and as meaning an act which indicates that the possession is not adverse to but is acknowledged to be subordinate to the right of another to possession of the land. What the second defendant did was to take a step with a view to gathering into his hands the legal title from persons who on the facts proved in this case were under a legal obligation to vest in him the title to the land of which he was in possession and claimed to be in possession as of right. It was not an act done in acknowledgment of any right

in them or either of them to the possession of this land but an assertion of his right to be clothed with the legal title as well.

Had the question arisen between the second defendant and Sahabandu—it being assumed that Sahabandu had refused to sign the conveyance and that a sufficient period of time had elapsed to bar the second defendant's right of action for a conveyance in execution of the trust—it would have been impossible to say that in procuring the execution of the deed in favour of Sahabandu the second defendant acknowledged or intended to acknowledge any right in Sahabandu to the possession of the land. His possession was from its inception that of a person who claimed to be entitled to possession in his own right and at no time did he acknowledge the right of any other person to the possession of the land.

No question of estoppel arises in this case for it is not suggested that the first defendant was influenced in his purchase from Sahabandu by the circumstance that it was the second defendant who procured the execution of the conveyance in Sahabandu's favour.

The appeal is dismissed with costs.

Appeal dismissed.