[FULL BENCH]

June 30, 1916

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

ODRIS *et al.* *v.* MENDIS *et al.*

D. C., Galle, 9,318

Evidence Ordinance (No. 14 of 1895), s. 116 — Estoppel — Adverse possession—Ordinance No. 22 of 1871, s. 3.

In 1870, A agreed, by a deed which recited that B was the owner of a piece of land, to plant it up within six years and to have the trees divided between A and B. It was further agreed that if A failed to plant he was to have no right, and that the land should be given back to B. A remained in sole possession of the land, and took the produce till 1908.

Held, under the circumstances of this case (see judgment), A was not estopped by the planting agreement from disputing B's title.

Held further, that A's possession was "adverse" within the meaning of section 3 of Ordinance No. 22 of 1871.

Naguda Marikar v. Mohamadu [1] explained.

THE facts of this case are set out in the judgments.

H. A. Jayewardene (with him *Zoysa*), for the appellants, defendants.—The plaintiffs took a planting voucher for this land in 1870 from the defendants and their predecessors in title; they must be considered to hold the land in the character of planters or lessees, until by some overt act they have changed that character (*Naguda Marikar v. Mohamadu*,[1] *Eknelligodde v. Maduanwela.*[2]). It is clear in this case that the plaintiffs considered themselves to be merely planters, from the fact that they took planting vouchers from the defendants in 1884 and 1900.

The division of the land into different blocks is arbitrary, and made solely for the purpose of the sale by the Crown; the planting voucher of 1870 shows that the land in question was considered as one entire land, so that even if portions of it be left uncultivated, the cultivation of a part would give the claimants a title to the entirety. (*Jones v. Williams*,[3] *Saibo v. Andris et al.*[4]). The plaintiffs' present defence, that although they took the vouchers they were not acted upon, is one which is highly improbable and should not be accepted.

[1] *(1903) 7 N. L. R. 91.*
[2] *(1898) 3 N. L. R. 213.*
[3] *2 M. & W. 326.*
[4] *(1898) 3 N. L. R. 218.*

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A. St. V. Jayewardene, for the respondents.—The learned District Judge has found that the land consists of three different lots: (1) The portion containing a plantation about forty years old; (2) the portion containing a young plantation not ten years old; and (3) the forest portion. As regards (1), the plaintiffs have only obtained a certificate of quiet possession, and claim it by prescriptive title; as regards (2) and (3), they claim under the Crown grant. As regards (2) and (3), the defendants have shown neither title nor possession, and it was forest and uncultivated land, and was the property of the Crown under Ordinance No. 12 of 1840 at the date of the conveyance to the plaintiffs. The principle that the cultivation of a portion of land within defined boundaries gives title to the entirety does not apply where the cultivated portion is much less than the uncultivated portion, as in this case. As regards (1), the plaintiffs have acquired a title by prescription. The District Judge has found the following facts: (*a*) That the defendants' predecessors had no title to the land at the date of the voucher of 1870; (*b*) that the first plaintiff had entered upon the land before the planting voucher was granted; (*c*) that the plaintiff obtained the planting voucher in order to have some show of right in case of dispute; (*d*) that the plantations made by the plaintiff were not made under the planting vouchers; and (*e*) that since 1870 the plaintiffs have enjoyed the produce of the land. The obtaining of a deed from another under the circumstances found by the District Judge does not amount to the admission of the title of the person from whom the grant is obtained. See *Angell on Limitation*, *p. 420.*

Even if the planting voucher amounted to an admission of the defendants' rights, the plaintiffs could have acquired a title by prescription. For under the voucher the defendants were entitled to take a half share of the produce at the expiration of six years from the date of the voucher. The defendants have not done so; and the plaintiffs have taken that share of the produce without acknowledging defendants' title. Where one co-owner has been in sole and uninterrupted possession for a considerable length of time the Court will presume ouster. [*(1774) 1 Cowper 217;* see also *Bahavant v. Bhal Chandra.*[1]]

H. A. Jayewardene, in reply.

Cur. adv. vult.

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The plaintiffs claim a declaration of their title to 6 acres 1 rood 29 perches of land, and to recover possession and damages. The land is composed of several blocks marked A to E on the plan No. 2,724 accompanying the Commissioner's report filed in the case. The plaintiffs claim A, D 1, D 2, D 3, and E under two Crown

[1] *29 Bom. 300.*

grants made in February, 1908, one of which was of 23,882 (A) to the second plaintiff, and the other was of 23,885 and 23,886 (D 1, D 2, D 3, and E) to the first plaintiff; and they claim B and C 23,883 and 23,884) by prescriptive title. The defendants in their answer denied the right of the Crown to make the grants to the plaintiffs, and denied the plaintiffs' title, and asserted that the plaintiffs had planted the land—which they said is one entire land defined by a deep ditch—under planting vouchers from some of the defendants. Block A has never been planted; it is jungle. There are plantations from four to eight years old on D 1, D 2, and E made by the second plaintiff and his brother. There are plantations about forty years old on B and C made by the first plaintiff. There is no evidence as to who has taken the produce of the plantations, but it seems from the evidence that the plaintiffs have always been in possession since they made the plantations.

In 1870 the first plaintiff and three others took a planting voucher from Sylvestri Mendis, owner of two-thirds, and Andris de Abrew Gunasekere Appuhamy, owner of the other third, of about 11 acres of land, which is rather vaguely defined, but is admitted to include B and C; under this " the other middle portion " was to be planted by the first plaintiff, and the planting was to be finished in six years. The defendants claim through Sylvestri, and they allege that the plaintiffs planted B and C under this voucher, and cannot now dispute the title of the representatives of Sylvestri. The plaintiffs depose that the first plaintiff had squatted on the land, which was then waste, before he took the voucher of 1870, and that the voucher " was never acted upon. " In their plaint the plaintiffs alleged that the plantations on D 1, D 2, and E were made by the second plaintiff and his brother on a planting voucher given by the first defendant to them in June, 1900, at a time when the first defendant was considered the owner, but afterwards, the Crown having claimed those lots, the plaintiffs bought them from the Crown; and the defendants in their answer admitted this. This 1900 voucher was not put in evidence, and we do not know whether it referred to the whole land or only to D 1, D 2, and E. The issues settled were—

(1) Had the Crown title to deal with the land?
(2) Were the plantations made by the plaintiffs under the defendants or their predecessors ?

The District Judge held that the Crown had title. With reference to the second issue, he found that the first plaintiff signed the voucher of 1870 after he had been some years on the land, and that the voucher " was not acted upon. " This refers only to B and C. He expresses no opinion on the plaintiff's claim of prescriptive title to B and C, and, indeed, there was no issue as to that. But, finding that the defendants had no title to B or C, and that the plaintiffs

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had cleared and planted them, he gave judgment declaring the plaintiffs entitled to them. With regard to the other blocks, there is no doubt that A, which is still jungle, and to which the defendants have not proved any title, was Crown land, and the second plaintiff has a good title to it under his grant from the Crown; for there is no evidence that he took any planting voucher which included A. The plantations on D 1, D 2, and E were made or begun by the second plaintiff and his brother under a planting voucher given to them by the first defendant in 1900; but the finding of the Judge was right, that those blocks were then, and at the date of the Crown grant, Crown land; and his finding that the first plaintiff has a good title to them under his grant from the Crown is right, unless the first plaintiff is estopped by the planting voucher which he took in 1870 from denying the defendants' title.

It is this question of estoppel which has caused the difficulty. The voucher of 1870 appears to include the whole of the land; the area is stated as about 11 acres, whereas the actual area is only 6 acres 1 rood 29 perches, but the boundaries given appear to include all these blocks, and no more. The first plaintiff also admitted that he and another man, about twenty-five years ago, took a planting voucher for the northern portion from the first defendant, but there is no other evidence as to what that voucher was or whether anything was done under it, except that he says it was " not acted upon ". A tenant cannot, during the continuance of the tenancy, deny that his landlord had a title to the land at the beginning of the tenancy (Evidence Ordinance, section 116). Under the 1870 voucher the first plaintiff was to plant " the other middle portion " within six years, and then the trees were to be divided. So far as the evidence shows, the first plaintiff's co-planters did nothing under that voucher, and from its date no claim was ever made under it by Sylvestri, or those claiming under him, but the first plaintiff remained in sole possession of B and C for more than thirty years after the expiration of the six years mentioned in the voucher. I think that it is the reasonable conclusion from these facts that he disputed the defendants' title to B and C at the end of the six years, and has disputed it ever since, and it is too late now for them to assert it. In his plaint he claimed B and C by prescriptive title; and although there was no issue as to prescription, I think that, after such a long period of adverse possession since the term fixed in the voucher, he is not precluded from now disputing the defendants' title.

The case as to D 1, D 2, and E is different. The first plaintiff has not planted them or possessed them. They were planted by the second plaintiff and his brother under a voucher given by the first defendant in 1900; and the first plaintiff bought them from the Crown in 1908. It seems clear that the Crown had a good title to them in 1908; but is the first plaintiff estopped by his 1870

voucher, or the mysterious voucher of twenty-five years ago from alleging? I think that the same reasoning applies as in the case of B and C. The 1870 voucher was spent in 1876; but of the voucher of twenty-five years ago we know nothing; and for a great many years he has denied the defendants' title, and he is not now estopped from denying it.

There is no evidence as to any planting on D 3. The same reasoning applies to that block; the first plaintiff is in possession of it under a Crown grant; the Crown had a good title to it; and the first plaintiff is not estopped from denying the defendants' title. No objection was made in the District Court or in this Court as to misjoinder of plaintiffs.

I think that the appeal fails.

MIDDLETON J.—

The main question raised in this case is whether the first plaintiff, who admittedly planted what are designated as B and C in plan No. 2,724, and form lots 23,883 and 23,884 of the land in dispute, is not estopped from denying the first defendant's title to these lots from the fact that in May, 1870, he accepted from the defendant's predecessors in title a planting agreement, under which it is alleged he acknowledged their title to the land in question, and thereby held possession on their behalf for upwards of thirty years, such possession enuring to the benefit of the defendants as against the Crown, who have assumed to grant to the plaintiffs.

As subsidiary to this, it is argued that the first plaintiff by accepting this agreement as regards one-half thereby acknowledged the title of the defendant's predecessors in title to the whole land, and is thereby estopped from denying the defendant's title to it; and further, that the first plaintiff is also estopped by his acceptance of another planting voucher to another portion of the said land; and finally, that the second plaintiff is estopped in a similar way by accepting a planting voucher in 1900 for a portion of the said land. It is very material, I think, before deciding these questions, to see what is the evidence in the case, and whether the findings of the learned Judge upon it are correct.

I think the learned Judge was correct in finding that all the plantations on all the land were made by the first plaintiff and his sons, and that the evidence does not show that the ditch was cut by the defendants or any person whom they deem their predecessors in title. The first defendant himself admits practically that the land was no more than chena, and that first plaintiff planted it, when he says " it was not planted except with vegetables and fine grain. Then plaintiff came on the land and he planted. " There is no evidence that first defendant ever exercised any act of ownership over the land himself personally, or by others, except by the granting

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of the planting vouchers. The written evidence is that by deed in 1870 Sylvestri Mendis and Andris de Abrew Gunasekere Appuhamy, reciting themselves respectively as owners of two-thirds and one-third of the land in question, then described as 11 acres in extent, granted 1 acre on the north-western boundary to be planted by one Alasiyahandi Sengoris and of the remaining land, granted half on the southern-side to be planted by Nigamuni Odris Mendis Appu and Hiddamarakkala Janadoris, and the other middle portion by Hendavitarana Odris (the plaintiff); the land to be planted up within six years, and the trees divided between the planters and the soil owners. On failure to plant, the planters to have no right, but the houses to be vacated and the land given back to the soil owners. The judge finds that the first plaintiff signed his planting voucher after he had been some years on the land, and that B and C, representing lots 23,883 and 23,884 in the plan No. 2,724, were jungle when he began planting, and were planted entirely by him; that of the three others who signed the voucher with him he alone planted, while he also finds that A, repesenting lot 23,882, is still jungle, and D1, representing lot 23,885, D2 and D3 and E, representing lot 23,886, were jungle until quite recently.

These findings on the evidence appear to be correct. As regards the first defendant's title, he has D5, dated January, 1877, No. 6,687, by which Sylvestri Mendis purports to convey to him and two others one-sixth of the land; while on the same day a mortgage, D6, for Rs. 100 was granted by Sylvestri Mendis to Kappina Kasturi Andris Mendis Seneviratne Appuhamy on one-third of the said land. The deed D5 did not reserve any planter's rights in favour of the plaintiff, as it ought to have done, if D1 had been recognized by Sylvestri Mendis. He has also a Fiscal's transfer, D9, for one-third of Koswatta, bought in execution against one Darlis, and described as being of 5 acres 3 roods and 22 perches in area, and another Fiscal's transfer, D10, in favour of Arnolis Perera Appuhamy for one-ninth part of Koswatta, containing in extent 7 acres, bought in execution against Wiyadoris Perera Appuhamy, Agiris Soysa Appuhamy, and Senerat de Soysa Hamine, whom he alleges were heirs of Sylvestri Mendis. He has also produced D3, a copy of the proceedings in Court of Requests case No. 13,411, by a stranger named Harmanis, in 1863, against Sylvestri and others, claiming one-eight of one-fifth of Koswatta, in which the judgment declares the plaintiff has failed to prove his case and was non-suited. He also stated he produces D2, alleged to be the planting voucher No. 1,176, dated 1900, granted by him to the second plaintiff and his brother, which I am unable to find filed in the record. He also produces D7, a planting voucher No. 1,589, dated 1894, given by him to the second defendant and one Sandiris, and D8, No. 1,634, of 1903, by which the second defendant purported to mortgage his planter's interest to the third defendant. The

plaintiff brought Court of Requests action No. 6,574, the proceedings in which are marked D4, in 1908 against the second and third defendants, and the first defendant being added as a party, the Commissioner holding that he had no jurisdiction dismissed the action, with leave to bring the present action. Hence it seems to me has been exhumed, what otherwise would have been tacitly admitted to be, the undisputed right of the plaintiff to B and C.

The conduct of the first defendant in abandoning his alleged rights to B and C under the planting voucher D1 from 1870 to 1908 shows clearly that he had either given up all claim to the land, or had in his opinion no rights whatever. As regards the plaintiff accepting the voucher D1, the learned Judge seems to think he did so to further fortify his title to plant in case of dispute.

In America it has been held (*Jackson v. Newton;*[1] *Angell on Limitations, p. 421*) that if the party in possession claiming under a deed, and supposing that there was a defect in the title, applies to purchase the title of a person claiming the same premises for the purpose of strengthening only or quieting his own title, it is not an abandonment of his own title, nor an admission of a superior title in another. Here the plaintiff was a squatter without title, and for the purpose of quieting his very uncertain title took the planting voucher from the first defendant. The plaintiff was in possession at the time, and had not to acknowledge the defendant's alleged right in order to obtain it. Even, however, if there was originally an estoppel here, does not the holding over of the plaintiff after the six years mentioned in D1 for upwards of thirty years, coupled with the conduct of the first defendant in tacitly assenting thereto, amount to a denial of the first defendant's title acquiesced in by him which would amount to an ouster in law sufficient to found a title by prescriptive possession in the plaintiff as against the first defendant?

In the old case of Doe *ex dim, Fisher and wife and Taylor and wife v. Prosser,*[2] it was held by Lord Mansfield, Mr. Justice Willes, and two other learned Judges that the thirty-six years' sole and uninterrupted possession by one tenant in common without any account to or denial made or claim set up by his co-tenant in common was a sufficient ground for a jury to presume an actual ouster.

In *Naguda Marikar v. Mohamadu*[3] the Privy Council held that, in order to obtain the benefit of section 3 of Ordinance No. 22 of 1871, it was necessary that there should be proof of a change of status in the case of a person who had got possession as agent. In the present case the first plaintiff took possession as a squatter, accepted a planting agreement from the first defendant for six

[1] *18 Johnson N. Y. 355.*

[2] *(1774) Cowper's Reports 217.*

[3] *(1903) 7 N L R 91.*

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years, ignored its obligations which was at the same time acquiesced in by the first defendant, and in my opinion there is sufficient evidence here to show that the plaintiff got rid of his character as tenant by the non-enforcement by the first defendant of the terms of the planting agreement within six or even ten years from the termination of the original six years stipulated for in the agreement, and started on a possession which was adverse in fact and in law to that of the first defendant 'sections 6 and 7 of Ordinance No. 22 of 1871).

I think, therefore, that the argument for the first defendant on the first point of estoppel should not prevail, as under section 116 of the Evidence Ordinance the plaintiff was not debarred at the date of the action from denying his alleged landlord's rights owing to the termination of the tenancy, which must in any event have terminated under the Prescription Ordinance at the end of ten years from the expiration of six years stipulated for in the planting agreement. In my opinion, therefore. the first plaintiff should succeed upon the main question.

As regards the planting voucher admitted by the first plaintiff to have been taken by him and one Juan Naide twenty-five years ago, it is not produced, nor any evidence given upon it, by the first defendant. The first plaintiff says that it was never acted on, and I think the same argument, if it had been produced, must apply to it, as I have applied to the voucher of 1870. The argument that the acknowledgment by the first plaintiff of the defendant's right to a part of the land involves his acknowledgment of the first defendant's right to the whole fails, I think, with the annulment of the acknowledgment on similar grounds. As regards the planting voucher of 1900, accepted by the second plaintiff from the first defendant, the evidence shows that the land was jungle when the second plaintiff began to plant, and as such presumably waste land, and the alleged planting agreement is not filed with the record, and it is impossible to say to what portion of the land it applies. The second plaintiff says he signed this agreement when his father was away, and the first defendant says first plaintiff was angry at his doing so.

The signing of this agreement might possibly estop the second plaintiff from denying the first defendant's rights, but certainly it would not estop the first plaintiff, to whom the land may have been granted, and who may be entitled thereunder to its possession, as against the second plaintiff.

As it is impossible to say to what particular portion this alleged estoppel against the second plaintiff applies, I would not give it any force or effect as against the plaintiffs, as the plaintiffs being in possession, the burden under section 110 of the Evidence Ordinance is on the defendant to prove he is owner as against the plaintiffs.

In my opinion the judgment of the District Judge is right, and should be affirmed, and the appeal of the defendants dismissed with costs.

WOOD RENTON J.—

I concur. I think that, in interpreting the words "adverse possession" in section 3 of Ordinance No. 22 of 1871, we must have regard to the clause immediately following: "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." See on this point the following cases: C. R., Batticaloa, 9,653;[1] *Sinno Appu v. Sitta Umma*;[2] and *Jain Corim v. Pakeer*.[3] I do not think that there is anything to conflict with these decisions in the judgment of the Privy Council in *Naguda Marikar v. Mohamadu*.[4] In that case the acts relied on by the appellant in support of his claim to have acquired a title by prescription were referable to the terms on which he was originally permitted to occupy the premises in suit, and there was nothing to show that he ever got rid of his original subordinate character. The facts, as found by the learned District Judge in this case, are quite different, and I entirely agree with my Lord the Chief Justice and my brother Middleton in the inference which they have drawn from them.

Appeal dismissed.

[1] (1870) *Vanderstaaten 44.*
[2] (1876) *Ram. 7276, 318.*
[3] (1892) *1 S. C. R. 282.*
[4] (1903) *7 N. L. R. 91.*