

Sept. 30, 1910

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

MUTTU CARUPPEN *et al.* v. RANKIRA *et al.*

D. C., Nuwara Eliya, 117.

*Prescription—Possession by judgment-debtor after Fiscal's sale for ten years—Adverse possession—Civil Procedure Code, ss. 289 and 291—"Deemed."*

There is nothing in sections 289 and 291 of the Civil Procedure Code which debars a judgment-debtor who has been in possession of the land sold for ten years after Fiscal's sale, and before the execution of the Fiscal's transfer, from claiming title to the land sold by prescription.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the first defendant, appellant.—The judgment-debtor continued to be in possession of the land sold for a period exceeding ten years after the sale by the Fiscal and its confirmation by the Court. The purchaser at a Fiscal's sale, when the sale is confirmed by Court after the lapse of thirty days, must procure his conveyance forthwith. After the sale, and until the confirmation of the sale and the execution of the Fiscal's conveyance, the judgment-debtor may use and enjoy the property sold in the manner laid down in section 291 of the Civil Procedure Code, but the judgment-debtor is not entitled to the crops and produce of the land (section 291, sub-section (3), Civil Procedure Code). But if the judgment-debtor not only uses and enjoys the property in the manner limited by section 291, but appropriates the crops and produce and otherwise possesses the property *ut dominus*, he is entitled after the expiry of ten years to claim a title by prescription (*vide* the remarks of Withers J. in *Silva v. Hendrick Appu*<sup>1</sup>).

Bawa, for the plaintiffs, respondents.—The effect of the provisions of sections 289 and 291 of the Civil Procedure Code is to constitute the judgment-debtor a trustee for the purchaser. The purchaser cannot turn the judgment-debtor out till he gets a conveyance, and section 291 gives the judgment-debtor a statutory right to remain in possession of the land till the execution of the conveyance. Where, for instance, a purchaser gets a conveyance within ten years of the sale, he is always at liberty to plead the judgment-debtor's possession as his own as against third parties, who set up title on the ground of prescription. [WOOD RENTON J.—Sections 289

<sup>1</sup> (1895) 1 N. L. R. 13.

and 291, Civil Procedure Code, cannot over-ride the Prescription Ordinance. The sections merely define the position of the judgment-debtor after sale.] The Prescription Ordinance only comes in when the possession is adverse. The possession is not adverse in this case, because the law makes the judgment-debtor only a licensee; the judgment-debtor should not be permitted to say that possession, which the law says is on behalf of some one else, is as a matter of fact on his own behalf. [HUTCHINSON C.J.—But section 29, sub-section (3), says he cannot appropriate the crops and produce, but if he does so, does not his possession become adverse?] No; the execution-purchaser cannot take possession as he has not obtained a Fiscal's conveyance, which alone divests the judgment debtor of his rights.

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September 30, 1910. HUTCHINSON C.J.—

The plaintiff's claim is for a declaration of title to certain lands, which the first plaintiff bought at a Fiscal's sale, in execution against the first defendant, on May 11, 1894. The sale was confirmed in October, 1895. The Fiscal's transfer was not obtained till September 26, 1906. The first defendant, who is the appellant, asserts that, notwithstanding the sale, and ever since the sale in 1894, he has had undisturbed and uninterrupted possession by a title adverse to that of the plaintiffs, and so has acquired a right under Ordinance No. 22 of 1871. There were issues settled as to whether the first defendant has been in possession since 1894, and whether he or the first plaintiff had acquired a title by prescription. The District Judge, however, said that, under sections 289 and 291 of the Civil Procedure Code, the defendants are debarred from claiming title by prescription, upon which ground alone their claim is based, and he therefore gave judgment for the plaintiffs. It is a very common thing, in my experience in Ceylon, for a judgment-debtor, whose land has been sold in execution of a decree against him, to remain in possession after the sale for a long time, and afterwards set up a title by prescription under that possession. But it is said on behalf of the respondents, and I suppose that is what the District Judge thought, that the purchaser of the land can, after the judgment-debtor has been in possession for ten years and upwards after the sale, prevent him from setting up a title by prescription by taking his Fiscal's transfer; and it is said that the effect of sections 289 and 291 is to make the possession of the judgment-debtor, during all the period, however long, between the sale and the Fiscal's transfer, the possession of the purchaser; that, in fact, it is impossible for him to have adverse possession. Section 291 empowers the person in possession to continue in possession for certain purposes between the date of the sale and the date of the Fiscal's conveyance. He may continue to use the property as

*Sept. 30, 1910* before and to cultivate the land, but he is not entitled to the produce of it. The effect of that is that the possession of the judgment-debtor in such a case is not necessarily an adverse possession. What the appellant wishes to prove is that his possession was not such a possession as is authorized by section 291, but that it was an adverse possession, as defined by Ordinance No. 22 of 1871. If he can prove that, he is entitled to succeed. I think, therefore, that the decree dismissing the action should be set aside, and the case go back for trial of the other issues which were settled. I think that the costs of this appeal should be paid by the respondents in any event, and the costs in the District Court will be costs in the cause.

HUTCHINSON  
C.J.

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WOOD RENTON J.—

I am of the same opinion, and as we are differing from the learned District Judge, and the point raised in appeal is an interesting one. I will add a few words. It appears to me that sections 289 and 291 of the Civil Procedure Code only define the ordinary relations between the execution-creditor and his judgment-debtor for the period between the Fiscal's sale and the execution of the Fiscal's conveyance, and that they cannot be held to over-ride the power of proving prescriptive title created by section 3 of Ordinance No. 22 of 1871. I desire to add that in my opinion, the word "deemed" in section 289 of the Civil Procedure Code should not be interpreted in the sense which it sometimes bears in Acts of Parliament as "taken conclusively to be," and that it merely creates a presumption which is capable of being rebutted by evidence. I agree that the appeal should be allowed with costs.

*Appeal allowed.*

