1951 *Present:* **Dias S.P.J. and Gratiaen J.**

LUCIA PERERA, Appellant, *and* MARTIN PERERA, *et al.*, Respondents

S. C. 371—D. C. Gampaha, 159/13,462

Prescription—As between constructive trustee and beneficiary—Distinction between assertion of title and acknowledgment of title—Trusts Ordinance (Cap. 72), ss. 82, 84, 98.

A bought an undivided one-fourth share in a land at the request of his daughter B who had paid the purchase price, but, contrary to his mandate, he obtained from the vendor a conveyance in which A, and not B, was named as the purchaser. Shortly thereafter, B, under the belief that she was the absolute owner, went into occupation of a divided allotment which represented the undivided share and remained in occupation of it for over 19 years on the basis that she was entitled to possession in her own right. During that period A, whenever he was requested by B to execute a fresh conveyance in her favour, promised to do so. Subsequently, however, A, without the knowledge of B, conveyed the one-fourth share to C who was, in fact, a *bona fide* purchaser for value without notice of the trust.

Held, that B had acquired prescriptive title to the land before the date on which the share was conveyed to C and, therefore, her rights were completely protected. The requests of B that A should give her a conveyance of the property did not constitute an acknowledgment of A's rights so as to interrupt B's possession *ut dominus*.

APPEAL from a judgment of the District Court, Gampaha.

E. G. Wikremanayake, K.C., with *T. B. Dissanayake* and *Christie Seneviratne, for the plaintiff appellant.*

H. V. Perera, K.C., with *Kingsley Herat*, for the defendant respondent.

Cur. adv. vult.

May 2, 1951. GRATIAEN J.

There was a sharp conflict of testimony in the Court below on certain points of controversy, but our task as an appellate tribunal has been made easier because Counsel have agreed that the learned District Judge's findings of fact should form the basis of our decision.

The plaintiff was the married daughter of the first defendant Abeyeratne. In December, 1925, she had purchased an undivided one-fifth share in certain premises. She thereupon, for convenience of possession as a co-owner, went into occupation of a divided allotment, bearing assessment No. 25B, on which a thatched house had previously been erected by her predecessors in title. In March, 1926, she desired to purchase an additional one-fourth share in the larger land. At that time she and her husband were living in Kadugannawa, and she therefore requested her father Abeyeratne to negotiate the deal on her behalf. The transaction went through and the agreed purchase price was paid to Abeyeratne by the plaintiff. The understanding between father and

daughter was that the conveyance should, as on the earlier occasion, be obtained in her name, but on March 12, 1946, Abeyeratne, acting contrary to his mandate to this extent, obtained from the vendor a conveyance in which he was named as the purchaser. Shortly thereafter the plaintiff, under the belief that she had now become the absolute owner of this additional share by right of purchase, went into occupation of another divided allotment (bearing assessment No. 25) which represented the undivided share conveyed by the vendor. The premises No. 25 and 25B adjoined one another, and continuously from that date she regarded herself as entitled to occupy both blocks of land on the basis that she was entitled to the separate undivided shares purchased in 1925 and 1926 respectively. Since 1935 these two divided allotments were treated for purposes of assessment and in all other respects as one consolidated block, and it is very significant that on some date between the years 1930 and 1935, the plaintiff and her husband pulled down the old thatched house standing on lot No. 25B and erected in its place a more substantial dwelling house the foundations of which still stand not only on lot 25B but on lot 25 as well.

I return now to the circumstance that the conveyance of March 12, 1926, had been obtained by Abeyeratne in his own name instead of that of his daughter. This complication first came to her knowledge some monthe later, and when he was taxed with it he plausibly explained that this had been done merely for convenience because she, the true purchaser, had not been able to be present at the Notary's office at the time of the conveyance. The explanation was accepted, and Abeyeratne promised from time to time to execute a fresh conveyance in favour of his daughter. Relations between father and daughter were extremely cordial at the time, and, procrastination being a not uncommon characteristic of our race, his failure to implement his obligations in the matter was not regarded by his daughter as having any sinister significance. Abeyeratne died pending the present action and before he could explain his behaviour in the matter. It would therefore be uncharitable, and it is certainly unnecessary, for us to decide that his action in having the conveyance made out in his own name was in the first instance actuated by improper motives. Be that as it may, it is not possible to take a lenient view of his conduct 19 years later. On March 6, 1945, he secretly, and without the knowledge of his daughter, conveyed the one-fourth share for valuable consideration to the second defendant. As soon as this transaction came to the plaintiff's notice, she sued her father and the second defendant in this action to vindicate her title to this share.

The learned District Judge has held that, although Abeyeratne's legal estate in the share had been held by him subject to a constructive trust in favour of the plaintiff, the second defendant was a *bona fide* purchaser for value without notice of the trust. He was therefore protected by the provisions of section 98 of the Trusts Ordinance in so far as the plaintiff's claim was based on the footing of a trust. To this extent the learned Judge's view was clearly right.

Mr. Wikremanayake contends that the plaintiff is entitled to succeed in the action notwithstanding her inability to rely on a constructive trust in her favour. Her claim is that she had acquired

prescriptive title to the land before the date on which the share was conveyed to the second defendant. On this issue too the learned Judge held against the plaintiff, but his judgment does not indicate the grounds on which he arrived at the conclusion. The view I have formed is that Mr. Wickremanayake's contention must prevail in view of the strong finding on fact in her favour on all the questions which seem to me to be material to the issue of prescription.

Let me shortly recount the relevant facts. In 1926 the plaintiff, believing herself to be not only the beneficial but the absolute owner of the undivided one-fourth share in question, went into occupation of the divided allotment of land represented by that share, and remained in occupation of it for over 19 years on the basis that she was entitled to possession *in her own right*. It therefore follows that, on the expiry of 10 years from the date of the conveyance of March 12, 1926, she acquired prescriptive title to the premises not only against the original vendor but also as against her father who, by acting contrary to his mandate, had acquired under the conveyance only the " bare bones " of the legal estate. At the time of the purported sale to the second defendant in 1945, the plaintiff had already become the absolute owner of the share and Abeyeratne had no title which he could effectively convey to the second defendant. The present case seems to be indistinguishable in principle from the ruling of this Court in *Silva v. de Zoysa* [1], which was recently adopted with approval in *Ranhamy v. Appuhamy* [2].

Out of respect for Mr. Perera's argument, I desire to explain more fully the reasons for my conclusion on this issue. He invited us to hold (*a*) that the plaintiff's claim to prescriptive title failed because her possession throughout the period 1926 to 1945, was only the possession of a " beneficial owner " and not that of an " absolute owner ", and (*b*) that whatever her state of mind may have been when she first entered into possession of lot No. 25, she soon realised and indeed acquiesced in the position that her father was a trustee vested with legal title to this share. Mr. Perera suggested for our consideration that the subsequent " acknowledgment " by the plaintiff of her father's status and powers as a " trustee " interrupted her possession *ut dominus* long prior to the time when prescriptive title could have been acquired by her. Finally, he argues, the plaintiff was already a co-owner of the larger land in respect of the share purchased by her in 1925, and her possession of lot 25 after 1926, was *prima facie* referable to her position as a co-owner to that limited extent. Indeed, according to this argument, Abeyeratne must himself be regarded as a co-owner by reason of his so-called rights as the transferee named in the conveyance of 1926, and the plaintiff's claim to prescribe against her father, *qua co-owner*, is negatived by the principle laid down by the Privy Council in *Corea v. Appuhamy* [3].

I find myself unable to accept any of these attractive submissions. Questions as to the acquisition of prescriptive title must be examined in relation to the realities of a given situation. It is no doubt true that for at least 10 years since March 12, 1926, Abeyeratne must be

[1] *(1931) 32 N. L. R. 199.* [2] *(1945) 46 N. L. R. 279 at page 280.*
[3] *(1911) 15 N. L. R. 65.*

regarded by operation of law as a trustee vested with " legal title " to the disputed share because, acting contrary to his mandate, he had obtained the conveyance in his own name instead of that of his daughter who was intended to become the real purchaser. This circumstance immediately imposed upon him an " obligation in the nature of a trust " (section 82 of the Trusts Ordinance) which required him to hold what he had acquired for the benefit of his daughter (section 84). In this particular case—although it makes little difference either way—this obligation was created not because " it stood upon the presumed intentions of the parties to the transaction " but because it " *was forced upon the conscience of the party* (i.e., Abeyeratne) *by operation of law* ". (*Story on Equity—3rd Edition—paragraph 1195*). How can it be reasonably contended that in such a situation the plaintiff's later discovery of her father's unauthorised action and her repeated requests thereafter that he should give her a conveyance of what he had improperly acquired constituted an " *acknowledgment of his rights* " to the property so as to interrupt her possession *ut dominus* ? If the behaviour of parent and child be examined in the cold light of reason, I would rather say that her demand for a conveyance constituted not an acknowledgment of his rights but an assertion of hers—and indeed his promise to make good his obligation in the matter was an acknowledgment *on his part* of her right to regard the property as her own. As Story puts it in paragraph 1262 " in cases of this sort the beneficiary is not at all bound by the acts of the other party (i.e., the constructive trustee). He has the option to insist upon taking the property or he may disclaim any title thereto and proceed upon any other remedies to which he is entitled ". In the present transaction, the plaintiff exercised the option of insisting upon retaining the property, and she remained in possession thereof *ut dominus* without interruption. By permitting a long delay in the execution of a conveyance, she took the risk of her rights being defeated by a clandestine sale by the so-called " trustee " to an innocent third party for value, but after the prescriptive period had elapsed (as has happened here) her rights were completely protected.

To regard the relationship between plaintiff and her father as that of " co-owners " seems to me equally unreal in the present case. *Corea v. Appuhamy* (supra) lays down the principles to be applied in disputes between co-owners who are jointly entitled to enjoy *dominium* in the common property. The facts here are entirely different. The plaintiff's occupation of lot 25, after March 1926, was a clear assertion of her claim to rights of co-ownership additional to those which she had previously enjoyed as a co-owner under her earlier purchase.

In my opinion the judgment appealed from should be set aside. The plaintiff is entitled to a decree against the second defendant declaring her entitled to an undivided one-fourth share of the land described in the schedule to the plaint. She is also entitled to her costs both here and in the lower Court.

DIAS S.P.J.—I agree.

Appeal allowed.