

1970 Present: H. N. G. Fernando, C.J., and Wijayatilake, J.

M. M. S. TILAKASIRI MENIKE, Appellant, and W. M. DINGIRI BANDA, Respondent

*S. C. 137/66 (F)—D. C. Kurunegala, 1711/L*

*Prescription Ordinance (Cap. 68)—Sections 3 and 13—Adverse possession as against a minor who is the successor in title of another minor—Computation.*

Where A enters into possession of a land belonging to B, a minor, and, upon B's death during his minority, B's successor in title is C, who is also a minor, the period of A's adverse possession for 10 years for the purposes of section 3 of the Prescription Ordinance would commence to run from B's death and would continue to run even during the period of minority of C if C does not attempt to interrupt A's possession by action or otherwise. In such a case section 13 of the Prescription Ordinance declares that no further time shall be allowed in respect of the minority of any person other than B.

**A**PPEAL from a judgment of the District Court, Kurunegala.

*C. Ranganathan, Q.C.*, with *Lakshman Kadirgamar*, for the plaintiff-appellant.

*W. D. Gunasekera*, for the defendant-respondent.

*Cur. adv. vult.*

June 24, 1970. H. N. G. FERNANDO, C.J.—

This appeal raises an interesting question concerning the prescription of actions. The land to which the action relates was owned in 1/2 shares by Bandimenika and Dingiri Amma. Bandimenika died on 2nd January 1935 leaving an infant child Kiribanda. Kiribanda died on 20th January 1935, and it is common ground that under Kan lyan Law the 1/2 share which Kiribanda inherited from his mother passed to his aunt Dingiri Amma. Dingiri Amma however had title to this 1/2 share only for a short period, for she herself died on 18th October 1936. Dingiri Amma herself was a minor, and had not attained majority at the time of her death. She was survived by her daughter the plaintiff who was born on 18th October 1936.

The plaintiff instituted this action for a declaration of title in January 1964, alleging that the defendant, who had been the husband of Bandimenika and the father of Kiribanda, was in unlawful possession of the land, and the principal question for decision was whether in the circumstances the defendant was entitled to a decree under s. 3 of the Prescription Ordinance. The claim of the defendant is that he entered into possession in 1935 on the death of his son Kiribanda, and that his uninterrupted possession thereafter for a period of 29 years entitles him to a decree under s. 3. This claim the plaintiff sought to meet by relying on s. 13 of the Ordinance, which is a general Proviso to the preceding sections :—

“ 13. Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say—

- (a) infancy,
- (b) idiocy,
- (c) unsoundness of mind,
- (d) lunacy, or
- (e) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as given such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen ; but no further time shall be allowed in respect of the disabilities of any other person ;”

The learned trial Judge however upheld the contention for the defendant, which (stated for the present in lay terms) is that, when there are successive minorities, section 13 makes only the first of them available as a protection against persons claiming a decree by prescription. In the instant case, the position of the defendant was that since Dingiri Amma was minor, then in terms of s. 13 the defendant's possession during her minority would not give the defendant a right or title; consequently, the period of 10 years referred to in s. 3 would commence to run from Dingiri Amma's death. But it was further contended that the defendant's actual possession during that period of 10 years would give him title, because section 13 provides that no further time should be allowed "in respect of the disabilities of any other person", and thus excluded the allowances of further time on account of the minority of the plaintiff.

It is settled principle that once a period of adverse possession has commenced, it will continue to run after the death of the owner despite the fact that his successors may be minors—*Pathumma v. Sinna Lebbe*<sup>1</sup>. To take the example where A possesses the land of X say for five years, then upon X's death at that stage, A's further possession for 6 years will give him title despite the fact that during those 6 years X's heirs may be minors. This principle depends upon what is also a settled construction of s. 13 of the Prescription Ordinance. Section 13 provides that *if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been a minor*, then the protection given by the later part of the section will attach. If the minority of *any person* mentioned in the section has (in my example above) to be taken as a reference to the minority of the heirs of X, then the protection of the section will attach to that minority, and accordingly A must possess for 10 years after that minority ceases before he claims a decree. But the principle already stated was reached upon a different construction of the language of s. 13, namely that *any person* mentioned in the section means (in my example) X himself and not his minor heirs. Since X was not a minor at the time his right to sue first accrued, A's possession for the first five years has to be reckoned for purposes of prescription, because s. 13 does not prevent that reckoning. This construction was adopted in *Sinnatamby v. Meera Levai*,<sup>2</sup> and in the later case of *Pathumma v. Sinna Lebbe* Wood Renton, C.J. pointed out that it was too late in 1916 to disturb that construction.

Applying now that construction to the facts of the present case, the defendant entered into possession on 20th January 1935, when his son Kiribanla died; thereupon in terms of s. 13 there accrued to the owner Dingiri Amma a right to sue the defendant for the recovery of this land. Had Dingiri Amma been a major in 1935, the defendant's possession would have commenced to run in 1935 and would have continued to

<sup>1</sup> (1915) 18 N. L. R. 330.

<sup>2</sup> (1902) 6 N. L. R. 50.

run despite the fact that the plaintiff, a minor, became owner in 1936 (*Pathumma v. Sinne Lebbe*). But because Dingiri Amma was a minor in 1935, the protection given by s. 13 then attached, so that the period of 10 years required by s. 3 would commence to be reckoned only from the death of Dingiri Amma, i.e., from 18th October 1936. Thus the defendant would acquire a right to the decree under s. 3, if the heir of Dingiri Amma did not attempt to interrupt his possession by action or otherwise sometime before 18th October 1946. In this way, the minority of that heir would not bar the defendant, because s. 13 declares that no further time shall be allowed in respect of the minority of any person other than Dingiri Amma.

Mr. Ranganathan advanced a competent argument against this view of the operation of s. 13. He argued that where there has been possession against a minor owner for a period shorter than 10 years, and that owner is succeeded by another minor, the successor does not have to depend upon the first minority, but depends instead only on his own minority; so that prescription will not commence to run against him until he attains his majority; in this case therefore, because there was not a completed period of 10 years of possession during Dingiri Amma's lifetime, the plaintiff relies solely on her own minority, and not on two successive minorities.

I think the fallacy of this argument appears on a consideration of the case in which a land is possessed as against a minor for 5 years, and upon the minor's death at that stage he is succeeded by a major heir. In such a case, of course, prescription will begin to run against the major heir only from the time of the minor's death; but that is because the major heir does depend on the minority of his predecessor in order to exclude the possession for the first 5 years. Unless he depend on that minority, then the 5 years' possession against his predecessor would count against him. In other words, it is s. 13 which entitles a major heir to exclude from the reckoning any period of possession however long or short against his minor predecessor. I am unable to distinguish in principle the case in which one minor succeeds another. In this case, the possessor will maintain for the purposes of s. 3 that he had X years' possession against the first minor plus Y years' possession against the second minor. If then the second minor contests the claim, his position first must be that the period X does not count, and secondly that the period Y also does not count or is insufficient. He cannot exclude the period X, except by relying upon the minority of his predecessor, i.e., by invoking s. 13. That being so, the language of s. 13 declares that no further time shall be allowed in respect of the second minority.

I would hold for these reasons that the plaintiff's action was rightly dismissed. The appeal is dismissed with costs.

WIJAYATILAKE, J.—I agree.

*Appeal dismissed.*