

1945

Present: Wijeyewardene and Jayetilleke JJ.

MALLIKA ACHCHILLAGE RANHAMY, Appellant, and
WELLERA ACHCHILLAGE SINGHA APPUHAMY, Respondent.

300—D. C. Kegalla, 2,032.

Prescription—Step taken to get legal title from persons bound to give it—Not an act in acknowledgment of any right in them—Prescription Ordinance, s. 8.

When a person takes a step to obtain legal title from persons who, on the facts proved, are under a legal obligation to vest in him title to land of which he is in possession and claims to be in possession as of right, such a step does not amount to an act done in acknowledgment of any right in them to the possession of the land but an assertion of his right to be clothed with legal title.

Silva v. de Zoysa (32 N. L. R. 199) followed.

APPPEAL from a judgment of the District Judge of Kegalla.

L. A. Rajapakse, K.C. (with him C. R. Guneratne), for the plaintiff, appellant.

R. N. Ilankoon. (with him G. T. Samarawickreme) for the defendant, respondent.

Cur. adv. vult.

May 30, 1945. WIJEYWARDENE J.—

One L. P. Appuhamy mortgaged in 1922 undivided eight-ninth shares of Nikagollehena with three persons—Marthelis, Ago and Samel. The bond was put in suit against Appuhamy in February, 1927, and the mortgage decree was entered against him in May, 1928. The property was sold in satisfaction of the mortgage decree on December 15, 1928, and purchased by Marthelis, Ago and Samel who entered into possession immediately afterwards. They obtained the auctioneer's conveyance in 1934 and their heirs conveyed all their interests to the defendant by two deeds in 1939.

There was a partition action in respect of Nikagollehena and the final decree entered on July 27, 1927, allotted to L. P. Appuhamy the divided lot C in Plan P. IA. Appuhamy conveyed that lot C in 1939 to one Pieris who conveyed it to the plaintiff in September, 1941. That lot C is depicted as three lots A, B and C in plan No. 2,557 of May 21, 1941.

The plaintiff filed this action in 1942 stating that the defendant was in wrongful possession of the sub-divided lot B shown in the above-mentioned plan No. 2,557 and asking for a declaration of title against him.

The learned District Judge held that the plaintiff's deed prevailed over the defendant's deeds by virtue of section 7 of the Registration of Documents Ordinance but that the defendant had acquired title to the entirety of lot B by prescriptive possession and dismissed the plaintiff's action with costs.

The Counsel for the plaintiff, appellant, argued that the adverse possession which commenced in 1928 ceased to be adverse in 1934 when Marthelis, Ago and Samel obtained the auctioneer's conveyance and thereby did 'an act from which "an acknowledgment of a right" existing in L. P. Appuhamy could be inferred within the meaning of section 3 of the Prescription Ordinance. He submitted that a distinction should be drawn between a person obtaining a deed after acquiring a title by prescriptive possession and a person obtaining a deed before the lapse of ten years of possession from the very party against whom he is seeking to complete his ten years of adverse possession, as in the former case the execution of the deed could not possibly wipe away the prescriptive title already acquired though it may in certain circumstances give rise to pleas of estoppel, while in the latter case the obtaining of the deed being an "acknowledgment" within the meaning of the section operated against the possession prior to the deed being reckoned in counting the ten years of adverse possession necessary to establish prescriptive title. If this argument is sound, then in the present case the defendant could rely on adverse possession only from 1934 to 1942 and not from 1928 to 1942 and therefore the finding of the District Judge on prescriptive possession in favour of the defendant would have to be set aside.

Whatever merit there may be in this contention, I am unable to distinguish the present case from *Silva v. de Zoysa*¹ which was cited by the Counsel for the respondent. In the course of his judgment in that case Garvin S.P.J. said:—

"The phrase 'by any other act' (in section 3 of the Prescription Ordinance) 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

¹ (1931) 32 N. L. R. 199.

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''.

In view of the above decision I hold against the appellant and dismiss the appeal with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.

