[FULL BENCH.]

Present : Bertram C.J., De Sampayo J., and Loos A.J.

ALWIS *v.* PERERA.

269—D. C. Colombo, 52,257.

Prescription—Transfer of land—Possession by vendee and his heirs thereafter for sixty years—Adverse possession.

Where a person transferred his lands to certain family connections, but continued in possession till date of action (sixty years), the Supreme Court held (in the circumstances) that the possession was not permissive, but that it should be presumed to have become adverse.

Tillekeratne v. Bastian [1] followed.

Semble, even apart from this presumption, a vendor, who after sale remains in possession, should be considered as possessing adversely to the purchaser.

ONE Bastian Alwis was the original owner of the land in dispute. In 1850 he transferred a divided one-fifth share of it to his sister Toronchi, and in 1851 transferred two-fifths to one Don Cornelis. Later, in 1852, he and his sister Toronchi together conveyed three-fifths of the land to the same Don Cornelis. In 1864, Helena, the widow of Don Cornelis, transferred the divided one-fifth share back to Toronchi. Thus, the paper title was partly in Helena and partly in Toronchi, but the possession of the land remained with Bastian Alwis and his family. In 1917, when the land belonging to John, a grandson of Don Cornelis, was seized by his creditors, it was claimed by Sadiris, son of Bastian Alwis. The claim was allowed, and the seizure was withdrawn later. In the same year a portion of this land was sold under the Riot Damages Ordinance as the property of the same Sadiris. Later, Sadiris bought it back from the purchaser. At this stage the defendant bought a portion of the interest of Toronchi and commenced to build a road right across the portion which he purported to have acquired. Christina, the daughter of Bastian Alwis, brought this action, and claimed to be entitled to the land over which the road is being constructed. The District Judge held that the plaintiff occupied it by permission of the defendants, and dismissed the action.

E. W. Jayawardene (with him *Nagalingam*), for the plaintiff, appellant.—The possession by the plaintiff was not permissive at any stage. It is not proved that the plaintiff got into possession with the permission of the defendant or his predecessors in title.

[Bertram C.J.—There may be a presumption of permissive possession in the case of relatives.]

[1] *(1918) 21 N. L. R. 12.*

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There is no evidence that Bastian Alwis and Don Cornelis were relatives, except that they had the same *ge* name. Where vendor continues to be in possession after his sale, his possession would be adverse. *Tew v. Jones;* [1] *Anand Coomari v. Ali Jamin.* [2] Bastian Alwis and his family have been in uninterrupted possession, although the lands were alienated.

If there be long treatment of possession amounting to ownership, effect must be given to such possession. The family of Cornelis had never challenged or disturbed the plaintiff's rights. When the land was seized as the property of John, it was claimed by Sadiris, and the claim allowed. A portion of this land was also sold under the Riot Damages Ordinance as the property of Sadiris.

F. de Zoysa (with him *Croos-Dabrera*), for the defendant, respondent.—The paper title was in the defendant's predecessors in title, and the parties are relatives. We only admitted that the plaintiff was in occupation. There is no evidence of possession by the plaintiff or by Bastian. The claim by Sadiris in 1917 and the sale under the Riot Damages Ordinance can only point to a period from which prescription may have begun, but no presumption can be drawn from that regarding previous possession.

There is no evidence to prove the exclusive possession of the whole land by Bastian.

December 17, 1919. BERTRAM C.J.—

This is an appeal which was argued before us on materials that appear to be of a very meagre description. Very little evidence is called on either side. The result is that we have a few isolated facts spread over a considerable number of years, and these facts have to be made the basis of conjectual conclusions. I will first of all deal with the facts of the case prior to the year 1864.

One Bastian Alwis was the owner of the land. In the years 1850, 1851, and 1852 Bastian Alwis executed a series of deeds. On July 17, 1850, he transferred a divided one-fifth of the land to his sister Thoronchi, marking off a specific portion with reference to the rest of the land. On November 3, 1851, he transferred two-fifths of the land to one Don Cornelis of Colombo, reciting that this was done to settle a debt of twenty-five rix-dollars on a bond dated 1843. On August 11, 1852, he and his sister Thronchi joined together in conveying three-fifths of the land to the same Don Cornelis, alleging that this was done to satisfy a judgment and to pay a debt. Nothing happened between 1852 and 1864. But in that year, Helena, the widow of Don Cornelis, who was married in community of property, re-transferred to Toronchi, the sister of Bastian Alwis (who had the same *ge* name as herself), the divided one-fifth share which Toronchi in 1852 had joined in conveying to

[1] *(1844) 13 M. & W. 12.*

[2] *(1885) 11 Cal. 229.*

Don Cornelis. Let us, therefore, draw a line at that point. What do we find? We find that the paper title to the land is partly in Helena, the widow of Don Cornelis, and partly in her kinswoman Toronchi. I say the paper title for this reason, that, notwithstanding these documents, it is conceded that the possession of the land remained with Bastian Alwis and his family. The form of these documents and the final reconveyance to Toronchi suggest extremely forcibly that these documents were never intended to be acted upon, and that, having had their effect, which was probably a protective effect against creditors, no special action was taken to reverse them, but that what was done was all that was necessary to do, that is to say, a reconveyance was made to Toronchi of one-fifth. At any rate, that is a very plausible explanation of the effect of the series of deeds.

What do we find then? We find the family of Bastian Alwis in possession. It appears that Bastian Alwis continued in possession down to his death, and that after his death his children, the present plaintiff Christina, and her brother Sadiris, who died a year ago, continued in possession of the property. I use the term "in possession" advisedly. The evidence is that they lived upon the land. I do not understand the District Judge to draw any distinction between the fact that they lived on the land and the fact that, as is alleged, they took the produce. As I read the facts of the case, they not only lived upon the land, but they lived on the land as their own. This continued down to quite recent times, and in these quite recent times, that is to say, in the last two or three years, there were two incidents. One was a seizure of the land belonging to John, a grand son of Don Cornelis. On Sadiris asserting title to the property, his claim was allowed, and the seizure was withdrawn. The other case was a proceeding under the Riot Damages Ordinance, in which a portion of this land was sold as belonging to Sadiris. Sadiris dealt with the purchaser and bought back the portion sold. It is very clear, therefore, that on this date, at any rate, the family of Bastian Alwis were asserting an adverse title to the land.

Now, what is the next incident? At this point a stranger appears upon the scene, buys in a certain portion of the interest originally assigned to Toronchi, and commences to build a road right across the portion which he purports so to have acquired.

Bastian Alwis, his son and daughter, and the family of that daughter have thus been in continuous possession to a time beyond the present memory of those belonging to the family. This is the first time that any attempt has been made to challenge or disturb such rights as they may be supposed to have enjoyed.

Christina, the plaintiff, brings the action against this disturber, and claims to be entitled to the portion of the land over which this

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road is being constructed. Now, what is the answer to that? No attempt has been made to establish any effective separate title to the land originally conveyed to Toronchi. It appears by common admission that Toronchi's portion was never marked off, and that the land was treated as a whole.

The defence put forward is based upon the evidence, not of any descendant of Toronchi, but of the evidence of one Don William, who is a grandson of Don Cornelis. He says: " It is perfectly true that the plaintiff has always lived upon the land by our permission." By " our permission " he appears to mean the permission of the family to which he belonged. The learned District Judge accepts that account of the matter. I hardly like to say that he finds it as a fact. He rather adopts it as a theory that all the facts of the case are best explained by the supposition that Bastian Alwis and his descendants were allowed to remain upon the land by the permission of the other members of the family, and he says on that, " it is the fact that Bastian, in spite of his transfers, lived and died on the land, and the plaintiff has lived there all her life. That alone will not give her title. The fact that one is permitted to live on the land of a relative will not give the tenant the title, which can spring only from adverse possession."

On this view of the facts the principle thus laid down by the District Judge is unexceptionable. But it appears to me that (even if this view be accepted) he has not taken account of another principle, the principle which was expounded in the case of *Tillekeratne v. Bastian*,[1] and that is this, that where it is shown that people have been in possession of land for a very considerable length of time, that fact, taken in conjunction with the other circumstances of the case, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession. It does seem to me that this is a case in which that presumption ought justly to be drawn. Here is a family which for sixty years have been in possession, quite possibly, as the District Judge suggests, originating by permission. It does not seem to me just that they should be disturbed through a stranger, for purposes of his own, buying in an outstanding paper title. In the circumstances of the case, I think it is just that it should be presumed that the possession at some appropriate date had become adverse.

When I say that the principle laid down by the District Judge is unexceptionable, I should like to point out an alternative view of the case which deserves consideration. Mr. Jayawardene has cited to us two weighty authorities. One is the case of *Tew v. Jones*,[2] which lays down that where a vendor after parting with his interest continues to remain in possession, his possession is adverse possession.

[1] *(1918) 21 N. L. R. 12.*

[2] *(1844) 13 M. & W. 1* [2]

That view has been adopted in the Indian case, which was also cited by Mr. Jayawardene: *Anand Coomari v. Ali Jamin.*[1] If that is to be the principal that has to be applied to this case, then Bastian Alwis had an adverse possession from the very start, and, on that view of the case, there would be no occasion to presume a change in the character of the possession, because the possession of Bastian Alwis and his heirs would have been adverse from start to finish.

We have been pressed in this case to order a new trial, and at one period in the argument I was disposed to accede to that suggestion. But I wish to draw attention to what is the real matter in dispute between the parties.

The action is brought with reference to the land marked out for the new road. It is brought against the purchaser from Sadiris and Podinona, the children of Toronchi. These persons purported to convey to the defendant a certain particular strip out of the divided portion originally conveyed to their mother. The only original parties to the action were the plaintiff and the defendant. As I said at the beginning of my judgment, the facts are extremely meagre. There are witnesses on both sides who might have been called. It is quite possible that if they had been called, we might have had very much fuller information on the question of the enjoyment of the produce and as to the alleged permission granted to the family of Bastian Alwis. But these questions could only be fully gone into if all persons having an interest in the property were joined and made parties to the action, and if the action were thus converted into a land case with regard to the whole. I feel that there would be a certain unfairness in taking this course at this stage of the case. Holding the view I have mentioned as to the justice of making a presumption of adverse possession, and bearing in mind the authorities cited by Mr. Jayawardene on the alternative point of view, namely, that Bastian Alwis had adverse possession from the start, I have come to the conclusion that the justice of the case does not require a new trial. But I would point out that all that our judgment determines will be the mutual rights of the plaintiff and the defendant. It will be open, not only to the descendants of Don Cornelis in regard to four-fifths of the land, but also to Sadiris and Podinona the children of Toronchi, in regard to the remainder of the one-fifth conveyed to their mother when the actual strip assigned to the road is eliminated, if they think fit, to set up any title which they may claim to possess, and any judgment that we give in this case should, I think, be given without prejudice to any right they may think fit subsequently to assert.

I have only two things to add, and I add them not so much with reference to this particular case, but in regard to actions of this sort generally. I think that in cases of this kind, on which the whole livelihood of the parties depend—where what has to be decided

[1] *(1885) 11 Cal. 229.*

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is whether they should lose their land for ever—it is much to be desired that Courts of first instance should thoroughly search out and elucidate the facts; that they should ask questions which would give the case a certain body and life which it has not on paper if the evidence is not fully recorded. A Judge of first instance, particularly one who is familiar with the country, may on the view of the witnesses feel that he instinctively discerns the true facts of the case. A picture may leap at once to his eyes and he may form a conclusion, which, though instinctive and conjectural, may nevertheless be the right conclusion. It is much to be desired that a Judge in that position would see that facts are recorded which would assist the Court of Appeal to form a similar conception of the actual life of the people engaged upon the land, a conception which they are not in the same position to form as the District Judge.

There is also another point. I wish very much that District Judges--I speak not particularly, but generally—when a witness says " I possessed " or " we possessed " or " we took the produce," would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts, as the witnesses have in their minds, are stated in full, and appear in the record. In making this observation I feel sure that I am expressing the mind of all my colleagues on this Bench. I do not think that Judges of first instance realize the strong feeling which is entertained in this Court as to the recording of bare expressions of this nature. I wish that every Judge of first instance would come to regard it as a personal reproach to himself if he allows such an expression as " I possessed " or " I took the produce " to appear unexplained on his record.

In view of the opinion I have expressed, I would allow the appeal, and give damages for the amount claimed, with costs, both here and below.

DE SAMPAYO J.—I agree.

LOOS A.J.—

At the close of the argument of this case I was inclined to dissent from the opinion of the rest of the Court, but on further consideration of the cases cited I am content to agree with the decision arrived at in the case.

At the same time I desire to state that I think it would have been more satisfactory if the case could have been sent back for a fresh trial and the production of further evidence on both sides, for the evidence now in the record is extremely meagre and somewhat unsatisfactory.

Appeal allowed.