1960 *Present :* **Basnayake, C.J., and Sansoni, J.**

M. SAMUEL, Appellant, *and* A. J. DHARMASIRI and another, Respondents

S. C. 301—D. C. Kegalle, 6988

Prescription—Decree for delivery of immovable property—Right of judgment-debtor to acquire title to the property by prescriptive possession—Prescription Ordinance (Cap. 55), s. 3—Civil Procedure Code, s. 337 (1).

A judgment-debtor against whom a decree for ejectment from a land has been passed acquires a right to a decree under section 3 of the Prescription Ordinance if, despite attempts made at execution of writ, he continues to remain on the land for a period of over 10 years after the date of the decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or any other person.

A obtained a decree for delivery of certain immovable property against B. After a period of time had elapsed, application for execution of writ was refused by Court on the ground that it was barred by the operation of section 337 (1) of the Civil Procedure Code. Subsequently C, to whom A had sold his interests, sued B for declaration of title to the same land.

Held, that B was entitled to judgment in his favour if he established prescriptive possession under section 3 of the Prescription Ordinance as against A and C.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, Q.C., with *E. A. G. de Silva*, for Plaintiff-Appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for Defendants. Respondents.

June 1, 1960. BASNAYAKE, C.J.—

The only question that arises for decision in this case is whether a judgment-debtor against whom a decree for ejectment from a land has been passed acquires a right to a decree under section 3 of the Prescription Ordinance by continuing to remain therein for a period of over 10 years after the date of the decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or any other person.

Shortly the facts are as follows :—On 22nd October 1934 K. M. P. Kumarappa Chettiyar and K. M. P. R. Periya Caruppen Chettiyar, as plaintiffs, instituted in D. C. Kurunegala Case No. 17767 an action against Jalathpedige Ruben the 2nd defendant to this action, and his father Jalathpedige Unga. They alleged that by deed No. 2383 of

2—J. N. B 16720—2033 (4/61).

10th May 1932 Unga and Ruben, the defendants, sold and transferred to them the shares in the lands described in the schedule to the plaint and that on the same day the defendants entered into a deed of agreement whereby they undertook to pay to the plaintiffs a sum of Rs. 6,000/- within a period of four years, on receipt of which payment the plaintiffs undertook to transfer the said shares in the lands to the defendants. They also alleged that it was agreed that the defendants should remain in possession of the said shares in the lands paying interest on the sum of Rs. 6,000/- at the rate of 10 per cent. per annum, and that if they failed to pay the capital or the interest on the due dates, the agreement should be declared null and void and that the defendants should hand over possession of the said shares in the lands to the plaintiffs. As the defendants had failed to pay the interest and upon such default had failed to quit and deliver possession of the lands as agreed upon by them, the plaintiffs prayed that the agreement be declared null and void, that the defendants be ejected from the said lands, and that they be placed in quiet possession. They also asked that the defendants be ordered to pay jointly and severally damages in a sum of Rs. 500/- and continuing damages in a sum of Rs. 500/- per annum till they were restored to possession. The plaintiffs succeeded in that action and on 16th December 1935 a decree was entered in their favour ordering and decreeing that the agreement dated 10th May 1932 be declared null and void. The decree further ordered that the defendants be ejected from the lands described in the schedule to the decree and that the plaintiffs be placed in quiet possession thereof. The defendants were also ordered jointly and severally to pay to the plaintiffs the sum of Rs. 500/- as damages and continuing damages at the rate of Rs. 500/- per annum till the plaintiffs were restored to possession of the said lands. On 20th February 1936 the plaintiffs moved for a writ of possession against the defendants and the application was allowed. On 29th June 1936 the Deputy Fiscal, Kurunegala, returned the writ of possession and reported that the plaintiffs did not attend to take delivery of possession of the lands. No further attempt appears to have been made to execute the decree till 7th November 1940, when another application was made for the issue of a writ of possession. On this application the Court ordered that affidavits should be filed and that notice be issued on the defendants. No further steps appear to have been taken on that application, because on 6th February 1942 another application was made by the plaintiffs for a writ of possession. An affidavit from the plaintiffs' attorney was filed and the plaintiffs' Proctor moved that the writ of possession be re-issued for execution and that it be against Ruben alone, because by that time his father Unga had died. The Court ordered notice to issue on the 2nd defendant. Though notice was served and order for a writ of possession was made, no steps were taken by the plaintiffs till 19th October 1942 when they moved for execution of the writ of possession. Objection was taken to that application by the 2nd defendant on the ground that he had acquired a right to a decree in his favour under section 3 of the Prescription Ordinance

in respect of the lands in dispute, and that the plaintiffs had failed to exercise due diligence to procure satisfaction of the decree and that 10 years had elapsed from the date of the decree. The learned trial Judge refused the application for execution of the writ on the ground that it was barred by the operation of section 337 (1) of the Civil Procedure Code.

The instant action was instituted by the plaintiffs, Mutunayakage Samuel, to whom Reena Meiyappa Chettiar, the attorney of Kumarappa Chettiar and Caruppen Chettiar, had sold their interests. He prayed that he be declared entitled to ½ share of the said land and that the land be partitioned in terms of the provisions of the Partition Ordinance. The defendants resisted the action and asked that it be dismissed. The main issue tried by the learned Judge is one of prescription which he has held in favour of the defendants. In his judgment he observes that " it is perfectly clear that from the date of the decree in D. C. Kurunegala Case No. 17767 ordering the ejectment of Unga and Reuban, the possession of Unga and Reuban became adverse. That their possession continued to be adverse is proved by the fact that various applications were made for a writ of possession by the chetties, and attempts were made by them to obtain possession ".

The learned District Judge has rejected the evidence that the defendants gave the Chetties a share of the produce. Learned counsel for the appellant confined his arguments to the question of law. It is common ground that after the decree in D. C. Kurunegala Case No. 17767 the defendants continued to be in possession of the lands and to enjoy the produce. The 2nd defendant was (the 1st having died) in possession of them even at the time of this action. It is urged that a judgment-debtor who remains on a land which is the subject-matter of the action does not become entitled to claim the benefit of section 3 of the Prescription Ordinance by so remaining, and that in the instant case the fact that when the plaintiffs sought to obtain possession of the lands, the defendants urged that no due diligence had been shown in executing the writ of possession was an indication of a right existing in another person.

We have been referred to the cases of *Wimalasekera v. Dingirimahatmaya* [1], *Fernando v. Wijesooriya* [2], and *Jane Nona v. Gunawardena* [3]. In the first of those cases it was held that a successful action for declaration of title to land is an interruption of defendant's adverse possession of the land (p. 28). In the second case Canekeratne J. observed :

" Another essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity ; and whether a possession is ' undisturbed and uninterrupted ' depends much upon the circumstances. If the continuity of possession is broken before

[1] *(1937) 39 N. L. R. 25.* [2] *(1947) 48 N. L. R. 320 at 325–326.*

[3] *(1948) 49 N. L. R. 522.*

the expiration of the period of time limited by the statute, the seisin of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had. Where there is a contest as regards the title to a land if the claim of the parties is brought before a Court for its decision and there is an assumption that meanwhile the party occupying shall remain in possession, the running of the statute in favour of the defendant is suspended; otherwise a bar will all the while be running which the plaintiff could by no means avert. If the plaintiff fails in his action there has been no break in the continuity of possession of the defendant. If the plaintiff succeeds the continuity of possession of the one who was keeping the rightful owner out of his possession is broken; the result of the finding of the Court is to restore the seisin of the plaintiff."

In the third case (*Jane Nona v. Gunawardena*) it was held following *Muttu Caruppen et al. v. Ran Kira et al.*[1] that a judgment-debtor can by adverse possession for the requisite period after he has lost his title by the sale in execution obtain a decree declaring him entitled to the land.

The question whether the defendant to an action is entitled to a decree in his favour by virtue of undisturbed and uninterrupted possession by a title adverse to or independent of that of the plaintiff is one that falls to be determined on the facts of each case. No hard and fast rule can be laid down. If the facts establish an undisturbed and uninterrupted possession for ten years previous to the bringing of the action unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred, then the defendant is entitled to a decree in his favour. In the instant case it is not disputed that the 2nd defendant had undisturbed and uninterrupted possession for ten years previous to the bringing of the action. There is no claim that any rent was paid by him; and the claim that he paid a share of the produce to the plaintiff's predecessor has been rejected by the learned District Judge and we see no reason to disagree with that conclusion.

The only remaining question then is whether there is any other act of the 2nd defendant from which an acknowledgment of a right existing in the plaintiff or his predecessors in title may fairly and naturally be inferred. The evidence is that though the plaintiff's predecessors obtained a writ of possession on 20th February 1936 they did not attend to take delivery of possession of the lands. Four years later, on 7th November 1940, another application was made for writ of possession and though notice of it was given to the 2nd defendant no steps were taken till 19th October 1942 when the plaintiffs moved for execution of the writ of possession. The 2nd defendant objected to that application and claimed that he was entitled to the land by virtue of his possession. It would appear therefore that the only act of the 2nd

[1] *(1910) 13 N. L. R. 326.*

defendant was a denial of the right of the plaintiff's predecessors to the land. His act is therefore not an act from which an acknowledgment of a right existing in the plaintiff's predecessors may fairly and naturally be inferred and he is entitled to the decree he asks for.

We are of opinion that the appeal should be dismissed with costs and we accordingly do so.

SANSONI, J.—I agree.

Appeal dismissed.