

1951

Present : **Basnayake J. and Pulle J.**

DANASEKARA, Appellant, and RANMENIKA *et al.*, Respondents

*S. C. 54—D. C. Kegalle, 5,148*

*Prescription—Sale of land in execution proceedings—Continued possession by judgment-debtor—Fiscal's conveyance executed long time thereafter—Acquisition of prescriptive title—Civil Procedure Code, s. 291.*

When, pending execution of the Fiscal's conveyance, a judgment-debtor continues for a long time to be in possession of immovable property sold against him in execution proceedings, the character of his possession may be such as to form the basis of an independent title by prescription, notwithstanding the provisions of section 291 of the Civil Procedure Code.

**A**PPPEAL from a judgment of the District Court, Kegalle.

*C. R. Gunaratne*, for the 6th defendart appellant.

*A. L. Jayasuriya*, for the 4th and 5th defendants respondents.

*Cur. adv. vult.*

April 20, 1951. PULLE J.—

The appellant is the 6th defendant in an action instituted in 1917 for the partition of a land called Hitinawatte in extent 1A. 1R. 10P. Originally there were five defendants and by the interlocutory decree dated the 31st May, 1948, the fourth and the fifth defendants were each allotted 1/8th share. On the 29th June, 1949, the 6th defendant intervened and claimed the shares allotted to the 4th and 5th defendants on the basis that he purchased at a sale in execution on the 22nd May, 1918, a 1/4th share belonging to one Arathchillegedera Ranmenika, the mother of the 4th and 5th defendants under whom they claimed by inheritance. Although the sale took place as far back as 1918 and the intervention was on the 29th June, 1949, the 6th defendant obtained a Fiscal's conveyance only on the 29th July, 1949, of an undivided western portion "in extent one timba paddy sowing" out of the land sought to be partitioned.

The intervention involved a contest between the 6th defendant on the one side and the 4th and 5th defendants on the other whether, in spite of the sale, Ranmenika and the 4th and 5th defendants had acquired a title by prescription to a divided portion as set out in their statement of claim.

The learned District Judge found in favour of the 4th and 5th defendants that, in spite of the sale, Ranmenika not merely continued to possess but that she and her children had acquired title by prescription to that portion of the land lying to the south of road depicted in Plan No. 900, marked 'X'. The evidence of the 6th defendant that Ranmenika continued after the sale in execution to remain on the land with his leave and licence was, by implication, rejected.

Learned Counsel for the 6th defendant did not seek to disturb any of the findings of fact and confined himself to the submission that as Ranmenika's title had not been divested in the interval between the sale in 1918 and the conveyance in 1949, it was not possible for her or her successors to acquire a fresh title by prescription, as any possession referable to a lawful title could not be regarded as adverse. In my opinion, on the evidence in this case and the findings, this submission cannot be accepted. The acts of possession of Ranmenika and her children were not limited to the purposes indicated in section 291 of the Civil Procedure Code. While the 6th defendant obtained a conveyance in 1949 of an undivided share of one timba paddy sowing extent, Ranmenika's right to a divided portion was acknowledged by the co-owners of the land to the north of the road as far back as 1939 as is evidenced by the proceedings instituted in D. C. Kegalla Case No. 1,091. It was recognized by the 6th defendant's own son who is the plaintiff in the case under appeal and to a lesser extent by the 6th defendant

himself who took no steps for over 30 years to obtain a conveyance. The title of Ranmenika after the sale in execution was a precarious one not only liable to be determined at any moment but with retrospective effect. I am unable to say that in no event can the character of the possession of a judgment-debtor be regarded as the basis of an independent title by prescription. If the argument urged on behalf of the 6th defendant is accepted, assuming that he never entered into possession of what he purchased, he would be placed in a position of advantage by having obtained the Fiscal's conveyance in 1949 rather than in 1918, for it would then have to be conceded that if he had obtained the conveyance in about 1918, the title of the 4th and 5th defendants could not have been challenged. An argument which leads to such a result is unacceptable. The case of *Muttu Caruppen et al. v. Rankira et al.*<sup>1</sup> is an express authority for the proposition that it is possible for a judgment-debtor pending the execution of a Fiscal's conveyance to acquire title by prescription to the land sold against him in execution proceedings. The possibility of such title being set up and proved is also recognised in *Carolis v. Perera et al.*<sup>2</sup>.

I would dismiss the appeal with costs.

BASNAYAKE J.—I agree.

*Appeal dismissed.*

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