[PRIVY COUNCIL]

Present: Lord Buckmaster, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Walter Phillimore, Bart.

1917.

TAMEL *et al.* *v.* ANOHAMY *et al.*

Prescription—Interruption by unsuccessful actions—Possession by a person under a planting agreement—Adverse possession.

An unsuccessful action by an owner of land against a trespasser in possession does not interrupt the running of prescription.

Plaintiffs' predecessors in title, who were owners of the land in question, entered into a planting agreement in 1872 with one Pelis, by which he was to plant the land, and at the end of eight years should get half the trees without the soil, the landowners getting the remaining half and the entire soil.

The land was leased on December 30, 1879, to Gabriel (father of Pelis), Mathes (brother of Pelis), and the sixth defendant for one year. Pelis was then in jail. In 1888 plaintiffs' predecessors in title brought an action against Gabriel, Pelis, Mathes, and other brothers of Pelis (predecessors in title of present defendants), averring that they had dispossessed them on November 7, 1887. The plaintiffs in this case were ordered to amend their plaint, and as they failed to do so, the case was struck out for want of prosecution.

On October 20, 1902, plaintiffs brought a partition action. The widow and children of Pelis (defendants 1 to 5) and seven others (predecessors in title of the present defendants 6 to 14) were

1917.

Tamel v. Anohamy

defendants in the partition action. This action was dismissed, with liberty to bring an action for declaration of title to the land. The plaintiffs thereupon brought the present action for declaration of title.

Held, that in the circumstances of this case the defendants had acquired a title by prescription to the land.

THE facts are set out in the judgment.

March 27, 1917. Delivered by Sir WALTER PHILLIMORE, Bart.:—

This is an appeal from a judgment of the Supreme Court of the Island of Ceylon reversing a judgment of the District Judge.

The appellants are three of the four plaintiffs in the case. The action was brought on June 19, 1912, for a declaration that they were entitled to certain shares on a coconut plantation, and for possession and damages. There were twenty-one defendants to the action, but of these only the first fourteen were concerned in resisting the plaintiffs' claim, and they are the present respondents.

The case made by the plaintiffs was as follows. They deduced title from one Thambi Vidhane, who had been seized and possessed of the land in question at least sixty-five years before the action, from him through his daughter Maria, and thenceforward by various instruments of partition and conveyance. They stated that on February 15, 1872, the then owners, successors in title to Thambi Vidhane and predecessors of the plaintiffs, entered into a planting agreement with one Palis, or Pelis Appu, by which Pelis was to plant the land, so far as it was unplanted, with coconut trees, and at the end of eight years should get half the trees without the soil, the landowners getting the remaining half and the entire soil. They set forth a subsequent lease of December 30, 1879, for one year to one Gabriel, father of Pelis, and one Mathes, a brother of Pelis, and the sixth defendant. They complained that the fourteen defendants had been since the month of June, 1908, in forcible and wrongful possession of the plaintiffs' shares in the land, and they sought relief accordingly.

The fourteen defendants, with whom alone this appeal is concerned, disputed the plaintiffs' title, set up an adverse title under the wife of Gabriel, father of Pelis, and said that the alleged agreement and lease were forgeries. They further pleaded that they and their predecessors in title had been in undisturbed and uninterrupted possession for the period of more than ten years by a title adverse to and independent of the plaintiffs, ten years being the term of prescription provided by section 3 of the Ordinance No. 22 of 1871.

At the trial the District Judge found in favour of the plaintiffs' title, and believed that the planting agreement and lease were genuine, and so found. His findings in this respect were not

disagreed with by the Judges of the Supreme Court, and their Lordships accordingly accept them. This leaves for decision the question upon which the Supreme Court differed from the District Judge, that is, the issue raised by the defendants' plea of prescription.

As has been already stated, the plaintiffs relied in the present proceedings upon an ouster by the defendants in June, 1908. If the plaintiffs had been in possession till that date, or having been put out of possession previously, had been again restored to possession and not finally ousted till that date, their action was brought in time, and the plea of prescription failed. But the facts are not so simple. Under the planting agreement, as already stated, on the expiry of eight years the possession given to the planter for the purpose of planting would come to an end, and the land was to be delivered over to the owners and then to be divided into two. The owners would have to give to the planter the trees of one half share alone without the soil, as and for his planting compensation, and keep the rest. This should have come to pass on or about February 15, 1880. The lease for one year, made shortly before this date, was said by the plaintiffs to have been made to the father and brother of Pelis, to enable them to do their best for Pelis and his family, Pelis being then in jail under sentence for a term of nine years. At the latest, therefore, the plaintiffs ought to have been in possession by the year 1881. There is no definite information as to what actually happened. But in 1888 their predecessors in title, together with the present sixteenth and eighteenth defendants, brought an action against Gabriel, Pelis, Mathes, and other brothers of Pelis, who, or their successors in title, are the present defendants, averring that the defendants had dispossessed them on November 7, 1887.

To the libel then filed by the plaintiffs there was a demurrer upon various grounds, one of them being want of parties. It is immaterial to state how the defect arose, but upon this ground the demurrer was upheld and the plaintiffs were given leave to amend their libel. They did not appeal from the decision on the demurrer, and they did not amend their libel. After the expiration of a year and a day the case was struck out for want of prosecution, according to the provisions of the Code of Civil Procedure. So far there was an admission of ouster dating as far back as November 7, 1887.

The plaintiffs sought to get rid of their difficulty by alleging that further proceedings became unnecessary, because both parties remained in possession by amicable arrangement, the defendants agreeing to take half of their own plantation, and the plaintiffs taking the other half of the new plantation and the whole of the former plantation, consisting of sixteen coconut trees and four jak trees. This was one of the matters of fact that had to be determined at the trial.

1917.

SIR WALTER PHILLIMORE

Tamel v. Anohamy

On October 20, 1902, the plaintiffs and certain other persons, not now parties, but claiming in the same right, brought a partition action, making some persons claiming in the same right as themselves, and the widow and children of Pelis (now the first five defendants) and certain other persons defendants. To these defendants there were added, by order of the Court, seven other defendants, who are, or are represented in interest by, the other nine present defendants.

In this action the plaintiffs averred title as before, and set up the planting agreement, and prayed for a partition, both as between themselves and the defendant landowners and as between themselves and the defendants who represented the planters. There is no pleaded defence among the papers, but the District Judge who tried the case evidently had before him the same case for the defendants as that which they now make; and, without deciding the other issues, he came to the conclusion that the plaintiffs had never been restored to possession since November 7, 1887; that the defendants had been in possession of the land in dispute for at least the last fifteen years; and that the plaintiffs were taking undue advantage of certain benefits which attach to an action of partition. And he dismissed the action.

From this judgment there was an appeal to the Supreme Court, which, on May 23, 1905, dismissed the appeal, reserving to the appellants, or any of them, liberty to bring, if they should be so advised, an action to vindicate their title to the land. Thereupon, after further delay, the present action was brought.

The plaintiffs asserted (paragraph 25 of the plaint) that after the partition action and the appeal had been dismissed they recovered possession of their shares, and retained possession till June, 1908. This is the second issue of fact which had to be determined.

Whatever presumption there may be against a title by adverse possession when set up by a tenant against his landlord—particularly a tenant under a planting agreement such as the present—this presumption would only apply against Pelis and those claiming under him, that is, the first five defendants. The remaining defendants, who are brothers of Pelis or persons claiming under them, have no concern with the planting agreement. Their possession was entirely wrongful and adverse to the plaintiffs. This must not be forgotten in considering the judgment of the District Judge.

The evidence tendered by the plaintiffs upon the issues was, first, that of Manuel Fernando, the eighteenth defendant, having the same interests as the plaintiffs. He was examined twice: first, before a previous District Judge, and then before the District Judge who tried the action. Objection was taken at the trial to the admission of his first deposition. And it would appear as if the trial Judge had rejected it, and confined himself to the consideration of the evidence given before him. But the earlier deposition is found

among the papers, and was relied upon by the Supreme Court. It is, therefore, perhaps better to consider both depositions, as their Lordships have been asked to do by counsel for the appellants. The witness said generally, without fixing dates, that the landowners got their share of the produce; that they used to go—sometimes one, sometimes two; that they had the nuts picked; that they sold the nuts, gave the planters their share, took their own, and came away, That after the decision on the demurrer they were about to appeal, when several of the defendants came to his house, fell at his feet, and begged for forgiveness; and that thereupon the plaintiffs were restored to possession. But he added that his memory was bad, that he could not remember what took place ten or twelve years ago; and in cross-examination he corrected his statement as to his going on the land, picking nuts and selling them, and substituted the statement that the defendants gave him Rs. 20 or Rs. 30, which he said would be a reasonable sum for his share. This evidence was given on the first occasion. On the second occasion he said in general terms that Pelis and his father and brothers continued to live on the land, that the plaintiffs shared the produce with them, and used frequently to go on the land. He added that they more than once tried to settle disputes both before and after the partition case. They went to a notary, and a deed was drawn up for signature but never signed, because all the claimants could not be got together. He further made the case already stated, that there was an amicable settlement after 1888; and having said on the first occasion that he was in possession at the date of the partition action, he said upon the second occasion that the defendants were in possession of the land during that action, and that he could not remember that the plaintiffs ever possessed the land at all since the partition action, which is inconsistent with the alleged ouster in 1908. The other witness was Manuel Tissera, the second plaintiff, claiming in right of his wife. He said that when Pelis went to jail, Pelis's father and brothers continued on the land, that his parents-in-law used to have a share of the produce, that he used to go there with his father-in-law, and had seen him get his nuts. But it would appear that his father-in-law had died long since. He also said that they possessed their shares at the date of the partition action and up till 1908, but then somewhat inconsistently added: "We lost possession about five and a half years ago (which would be 1908), or two months before the partition action" (which would be August, 1902). He also spoke of the abortive proceedings before the notary, and this fact was confirmed by the notary himself.

On the other hand, the defendants gave evidence that they possessed the whole land, had divided it between themselves, had fenced it, and built their separate houses upon their lots; and that none but themselves had exercised acts of ownership for many years, and they denied the alleged settlement in 1888.

1917.

SIR WALTER PHILLIMORE

Tamel v. Anohamy

It does not appear that the defendants' positive evidence as to their acts of ownership was disputed. This being so, the plaintiffs had to rest upon the acts of ownership, or assertion of ownership, to which they deposed, and the contention that the acts of ownership by the defendants were not adverse nor exclusive. Their predecessors having alleged ouster in November, 1887, they had to prove their recovery of possession since; and as their own admissions indicated that they had been out of possession at the date of the partition action, so that if they had once recovered possession they had lost it again, they had to prove a further resumption of possession since the partition action, or, to put it in other words, they had to prove the ouster which they alleged in their plaint as having occurred in June, 1908.

If upon these disputed questions of fact the District Judge had come to any clear and positive conclusions, their Lordships would be slow to disagree with them. But their Lordships cannot, as the Supreme Court could not, find any clear indication of such a decision.

What the learned Judge says upon this subject is contained in the following portion of his judgment: "But the contesting defendants' claim to title by prescription has yet to be dealt with. That these persons and their families have been in occupation of the land all along is admitted. They have lived on it, and taken, at any rate, most of the produce; they themselves say they have taken all the produce without interruption at any time. Plaintiffs say they have from time to time taken produce and asserted their right of ownership. Be that as it may, the question is whether the contesting defendants have by any overt act challenged or repudiated the plaintiffs' title, and continued and maintained that attitude without counter-challenge for ten years or more. The mere fact of having been left in undisturbed occupation for that period is in itself not sufficient to support a claim by prescription as against co-owners or landlords. I look in vain through the voluminous record of this action for evidence of any such alleged act of defiance by the contesting defendants directed against the plaintiffs, such as is required by our law to prove title by prescription. Efforts undoubtedly they have made to throw off the yoke of the plaintiffs' ownership, but they have invariably roused the plaintiffs to assert and re-assert their overlordship—witness the *rei vindicatio* action, D. C. 25,971, brought by the landowners in 1889, and the partition action, D. C. 2,750, brought by the same parties in 1902, and finally this present action. I am perfectly satisfied that the contesting defendants' claim to title by prescription must fail."

The learned Judge seems to have thought it unnecessary to determine whether the plaintiffs were right in saying that they had from time to time taken the produce and asserted their rights of ownership. He speaks of the mere fact of the defendants having been left in undisturbed occupation as insufficient to support a claim

by prescription as against co-owners or landlords. There would no doubt be an occupation, which would not be inconsistent with the landlord's possession. But if the occupation were as large as that deposed to on behalf of the defendants, it would apparently be inconsistent and adverse. Moreover, the last nine defendants did not claim under tenants or co-owners. The learned Judge appears to have attached weight to the fact that the plaintiffs had from time to time asserted their title by litigation. But, as the Supreme Court has well pointed out, these unsuccessful actions would not prevent prescription.

It has been said that there is one direct finding of fact by the District Judge in favour of the plaintiffs, because he says: "On the question of ouster I see no reason to disbelieve the assertion of the plaintiffs, that the contesting defendants ousted them in June, 1908". But this statement may not be intended as a finding upon a disputed point, but only as the taking of a date from which to assess the damages. And as the plaintiffs alleged an ouster on this date, and the defendants asserted an ouster from a long previous date, there was no difficulty in accepting the date for this purpose. If this statement was intended as a finding that there was an ouster in June, 1908, there is no evidence to support it. It may be observed that the District Judge expresses no opinion as to the alleged amicable settlement, or as to any re-taking of possession after ouster. . . . .

On appeal, the learned Judges of the Supreme Court had to determine these matters, formed their own opinion, and, with the local knowledge which they possess, disbelieved the alleged settlement and the alleged re-possessions and ultimate ouster. And if this view is taken, the plaintiffs are found alleging an ouster in 1887, and unable to prove a resumption of possession subsequent to that date. The Judges of the Supreme Court were further of opinion that the evidence of any successful assertion of title was wholly unreliable, and, having regard to the vagueness and the inconsistencies in the evidence of the two witnesses for the plaintiffs, and the strength of the undisputed acts of adverse ownership exercised by the defendant; and, in the absence of any direct finding to the contrary by the District Judge, their Lordships must come to the same conclusion. They will therefore humbly advise His Majesty that the judgment of the Supreme Court ought to be affirmed, and the appeal be dismissed, with costs.

Appeal dismissed.