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Present: Schneider J.

APPUHAMY *et al.* *v.* APPUHAMY *et al.*

153—C. R. Dandugamuwa, 5,420

Adverse user of a path when land was being planted under an agreement by a planter—Right of way acquired as against owner and planter—Right of way acquired by a person over land of which he was co-owner.

A used a path over B's land for over ten years, when the land was being planted by C under a planting agreement with B.

Held, that A acquired a title by prescription to the right of way against both B and C.

The planter is on the land for a limited purpose, namely, the planting of the land and the possession, in fact and in law, is with the owner of the land, and, therefore, rights acquired against the land would be adverse to the owner as well as to the planter in so far as the planter's interests are concerned in the land.

Plaintiffs used a path over defendants' land for over ten years. The first plaintiff was a planter under the predecessor of defendant, and was as such a co-owner.

Held, in the circumstances, that the plaintiffs' user was adverse to defendant and his predecessor, in spite of the fact that the first plaintiff was a co-owner with the defendant.

THE facts are set out as follows in the judgment of the Commissioner of Requests (P. Saravanamuttu, Esq.):—

The plaintiffs in this case claim a right of way over the second defendant's land called Palugahawalawatta to the plaintiff's land called Ethudiyakeliyaweagare Palugahawalawatta. The right of way claimed is the portion A to B depicted in plan No. 894 filed of record.

Palugahawalawatta was originally owned by the first defendant, Don Philip Appuhamy, who gave the land to the first plaintiff, Lawris Appuhamy, to be planted on an agreement. According to the terms of the agreement, the first plaintiff became a co-owner with the first defendant, and both possessed the land in common. About the time the first plaintiff began to plant this land, one Joronis was the owner of the land called Ethudiyakeliyaweagare Palugahawalawatta, *i.e.*, the land now belonging to the plaintiffs. Joronis planted this land about the same time. The coconut trees on this land and on defendant's land are of about the same age. By deed No. 4,624 dated October 11, 1911 (P 1), Joronis sold this land to plaintiffs. On March 13, 1920, a deed of partition (D 5), with plan No. 39 (D 4), was drawn up between the first plaintiff and the first defendant, *i.e.*, the co-owners of the land called Palugahawalawatta. By this deed the first plaintiff became the owner of the southern portion, and the first defendant the owner of the northern portion of the land. The choice of the portions was perhaps decided by the fact that the southern portion adjoined the first plaintiff's present residing land, and the northern portion was in proximity to another land owned by first defendant. The first defendant soon after on April 1, 1920, sold his portion of the land together with other lands to second defendant by deed No. 931 (D 3). It is obvious that the partition between the first plaintiff and the first defendant was made with a view to selling the first defendant's portion to the second defendant. * * * * I shall now deal with the point of law raised in issue No. 6 by defendant's Counsel. Mr. Samarakoon contends that as the first plaintiff was a party to deed of

partition No. 11,498 dated March 13, 1920, and plan No. 30 attached thereto, the first plaintiff cannot lead oral evidence to contradict deed of partition and plan. He quotes section 92 of the Evidence Ordinance in support of his contention. He also contends that a deed of partition is analogous to a partition decree. I cannot agree with him. A partition decree is valid as against the whole world, and it is a decree entered by Court after a careful examination of the titles of all the interested parties. A deed of partition is merely a "cross transfer," and must be regarded more in the nature of an ordinary transfer, and the servitude is not extinguished by the transfer, although the right is not expressly reserved in the notarial agreement. Again, the plaintiff's land was the dominant tenement. This land was not the subject matter of the deed of partition. The right of way claimed is a real and not a personal right. It attaches to the lands. The right existed when Joronis was the owner of the plaintiff's land. In October, 1911, plaintiffs became the owner of the dominant tenement. The first plaintiff began to use this road in his capacity as part owner of the dominant tenement and as one of the successors in title of Joronis. It is true that the first plaintiff was co-owner of the servient tenement, too, up to March, 1920. But it cannot be maintained that during the period October, 1911, to March, 1920, the first plaintiff had only a permissive use of this road. He used the road as an owner of the dominant tenement.

I therefore do not think that issue No. 6 arises in this case. Even if it does, there was a tacit agreement between the first plaintiff and the first defendant that the first plaintiff should use the road, and the case falls under proviso (2) of section 92. This is supported by the fact that the first plaintiff used this road for a few months after the deed of partition was executed.

The Commissioner entered judgment for plaintiffs.

The defendant appealed.

Samarawickreme (with him *Samarakoon*), for defendants, appellants.

Soertsz (with him *Rajakarier*), for plaintiffs, respondents.

October 3, 1922. SCHNEIDER J.—

This is an appeal by the defendants against whom the learned Commissioner has given judgment in respect of a right of way claimed by the plaintiffs. There are two plaintiffs. They claimed a right of way over the defendants' land from the points A to B. There is a strong body of evidence in support of the plaintiffs' claim to the right of way. It would appear that the plaintiffs' land, which is to the north of A, was owned by one Joronis, who himself planted the land. The evidence establishes that Joronis planted that land about 25 years ago, and since that time and up to October, 1911, when he sold to the plaintiffs, used the cart way between the points A and B. The defendants' land which is to the south of A appears to have belonged to one Paiappu, and was planted under him by the first plaintiff. Paiappu sold to the defendants. There is reliable evidence that the plaintiffs, since their purchase in 1911, have used the track between A and B as a cart road up to the date of the obstruction alleged by them.

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The learned Commissioner, in a carefully considered judgment, upheld the claim of the plaintiffs, that they had acquired a title by prescription. He held that Joronis had acquired this right by prescription before the date when he sold to the plaintiffs, and that, therefore, the user by the plaintiffs was adverse to the defendants.

It was contended on appeal that Joronis' user was not adverse for two reasons. It would appear that Joronis and the first plaintiff were married to two sisters of the second plaintiff. It was contended that the first plaintiff was, as a planter, in possession of defendants' land, and was also co-owner with the defendant, in that he was entitled to a share of the soil as a planter, and that Joronis was permitted by the first plaintiff, because of their relationship to use the path in question, but, although this contention receives some support from the fact that first plaintiff and Joronis were related to one another, yet there is no evidence to support the contention, inasmuch as the first plaintiff does not say that Joronis was permitted by him to use the path in question, nor is there any other evidence to the effect.

It was next contended that the first plaintiff was the actual person in possession of the defendants' land during the period of time at which Joronis used the path in question, and that, therefore, Joronis could not acquire prescriptive rights over the land as against Paiappu. The contention was that the first plaintiff must be regarded as having been a lessee of the land under Paiappu. I am unable to uphold this contention for the reason that a planter is on the land for a limited purpose, namely, the planting of the land, and that the possession, in fact and in law, is with the owner of the land, and that, therefore, rights acquired against the land would be adverse to the owner as well as to the planter, in so far as the planter's interests are concerned in the land.

It was then contended that the user by the plaintiffs since October, 1911, cannot be said to be adverse to the defendants or their predecessor, because the first plaintiff was a co-owner with the defendants' predecessor in the defendents' land. It was contended that the first plaintiff was entitled as such co-owner to use the path in question over the defendants' land. It seems to me that this contention, too, is not sound. In the first place, there are two plaintiffs who claim the right of servitude in this case. The second plaintiff is not a co-owner with the defendants' predecessor. Therefore, user by the second plaintiff was obviously adverse to the defendant' predecessor and the defendant. As regards the user by the first plaintiff, too, I would regard it as adverse to the defendants' predecessor, because the first plaintiff used the track, not in his capacity as co-owner with the defendants' predecessor in title, but in his capacity as owner of his own land, that is of the dominant tenement.

I therefore dismiss the appeal, with costs.

Appeal dismissed.