

1948

Present: Dias and Basnayake JJ.

JANE NONA, Appellant, and GUNAWARDENE, Respondent.

*S. C. 193—D. C. Negombo, 13,959**Prescription—Execution sale—Debtor in possession after sale—Interruption—Delivery of possession by Fiscal—Undivided share—How far delivery valid—Civil Procedure Code—Section 288.*

Appellant mortgaged an undivided half share of a field which was sold in execution and purchased by M. Order for delivery of possession was issued and the Fiscal reported that he was unable to trace the co-owners and that the purchaser failed to attend to receive possession. The Fiscal then purported to act under section 288 of the Civil Procedure Code and deliver possession to the purchaser. Appellant continued in possession of the field.

Held, (i) that a judgment debtor who continues in adverse possession after a sale in execution can acquire title by prescription ;

(ii) that symbolical possession by a purchaser at a court sale is not interruption of such possession. There must be an interruption of actual physical possession.

(iii) Where property is not in the occupation of anyone section 288 of the Civil Procedure Code has no application and the action of the Fiscal was a nullity.

A PPEAL from a judgment of the District Judge, Negombo.

N. E. Weerasooria, K.C., with *B. Senaratne*, for the defendant appellant.

No appearance for the plaintiff, respondent.

Cur. adv. vult.

April 20, 1948. BASNAYAKE J.—

As security for a loan of Rs. 1,500 by deed No. 1,443 dated June 22, 1926, attested by A. D. C. Amirthaweera, Notary Public, the defendant-appellant (hereinafter referred to as the appellant) created a mortgage in favour of two persons named Kaluaratchige Herath Appuhamy and Weerasinghe Aratchige Charlis Perera over her undivided half share of a field called Pitakotuwe Kumbura in extent four acres, two roods, and thirty-three perches, and some other lands. The mortgagees above-mentioned instituted D. C. Negombo, Case No. 3,502 for the recovery of the debt due to them and in execution of the decree therein the appellant's share in the field Pitakotuwe Kumbura was sold and purchased by one Weeragoda Achchilage Mudiyanse to whom it was transferred by deed No. 140 of April 4, 1936, attested by H. C. Sansoni, Notary Public.

On February 17, 1937, an order for delivery of possession was issued. The order was in the following terms :

“ You are hereby ordered to put the said purchaser or his agent into possession of the said lands and fields and the buildings and if need be to remove any person bound by the decree who may refuse to vacate the same.”

On March 23, 1937, the Fiscal reported :

“ My Officer reports that he was unable to trace the co-owners of the undivided lands and that the purchaser failed to attend and receive possession of the divided lands.”,

and asked for an extension of time to enable him to proceed under section 288 of the Civil Procedure Code. The extension was granted. On February 3, 1938, he reported :

“ By virtue of the hereto annexed Order for Delivery of Possession marked A issued in case No. 3, 502 of the District Court of Negombo, I have caused my Officer D. S. A. Amerasekera to deliver possession of 1, 2, 4 and 6th named undivided shares to the purchaser on January 24, 1938, in terms of section 288 of the C. P. C. and the complete possession of 3rd and 5th named lands which are more fully described in the Order for Delivery of Possession to the purchaser on the same day, as will appear from the affidavit of the said Officer, Marked B dated February 3, 1938.”

Affidavit B referred to :

“ I, D. S. A. Amarasekera, Fiscal's Officer, do hereby declare and affirm that I did on January 24, 1938, deliver possession of the 1st, 2nd, 4th and 6th named undivided shares in terms of Section 288 of the C. P. C. and the complete possession of 3rd and 5th named lands which are more fully described in the Order for Delivery of possession to the purchaser.”

On September 4, 1944, Mudiyanse transferred the half share he purchased in Pitakotuwe Kumbura by deed No. 3,849 attested by S.M.A. Raheeman, Notary Public, to the plaintiff-respondent (hereinafter referred to as the plaintiff), who instituted this action on May 29, 1946, for a declaration that he is entitled to an undivided half share of the field and for an order of ejection against the appellant who he alleges is in unlawful possession of the field. The appellant while admitting the sale in execution of the decree against her states that even after the sale in execution she continued to possess her share adversely to the purchaser Mudiyanse and the plaintiff, his successor in title, for a period of over ten years and claims to have acquired a prescriptive right to her share. The appellant denies that she was entitled to half share in the field as alleged by the plaintiff but states that she was entitled to only three-tenths of the field. But that part of the dispute is immaterial for the purposes of this appeal.

The learned District Judge finds that the appellant has been in possession of the field after the sale in execution of the decree in D. C. Negombo, Case No. 3,502 but holds that her possession was interrupted by the action taken by the Fiscal under section 288 of the Civil Procedure Code in that case. I find myself unable to agree with the

conclusion of the learned Judge. It has been held in the case of *Siman Appu v. Christian Appu*¹ that possession is interrupted if the continuity of possession is broken by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party prescribing is not in occupation. In the same case Lawrie A.C.J. states:

“If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by lawsuits, or by claims in execution, or by violence; if he has succeeded in holding possession, these attempts to oust him only make it the more certain that he held adversely to those who disputed with him.”

Lawrie J. amplified this view in the later case of *Emanis v. Sadappu et al.*² wherein he said:—

“What is undisturbed and uninterrupted possession? It is defined in the Ordinance itself: it is a possession 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. In the present case the defendant has possessed the lands for more than ten years. He has paid no rent, no produce, nor has he performed any service or duty, nor has he, either in Court or anywhere else, done any act from which an acknowledgment of a right in the plaintiff could fairly and naturally be inferred.”

Apart from the fact that the appellant's possession has according to the decisions I have cited been “undisturbed and uninterrupted”, it seems to me that the plaintiff's predecessor in title, the purchaser Mudiyanse, never obtained even legal possession of the land. The Fiscal's first report, on being ordered to place the purchaser in possession, was that he was unable to trace the co-owners of the undivided lands and that the purchaser failed to attend and receive possession of the divided lands. How then can it be said that Mudiyanse obtained possession? On the facts appearing in that report the Fiscal was not entitled to proceed under section 288 of the Civil Procedure Code.

That section reads:

“When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a conveyance in respect thereof has been made to the purchaser under section 286, the court shall order delivery thereof to be made by affixing a notice of the sale having taken place, both in English and in the vernacular language or languages prevailing within the district, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom, or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser, and the cost (to be fixed by the court) of such proclamation shall in every case be prepaid by the purchaser.”

On the Fiscal's own statement the property sold was not in the occupancy of anyone. A paddy field is never in the occupation of

¹ (1896) 1 N. L. R. 288.

² (1896) 2 N. L. R. 261 at 265.

anyone in the sense that a house or land is occupied. For if it was occupied, the Fiscal would have had no difficulty in meeting the occupying co-owners and the appellant. As the condition precedent to proceeding under section 288 did not exist, no legal consequences flow from the Fiscal's action which is a nullity. His action does not therefore in any event interrupt the appellant's possession.

In the case of *Mahadev Sakharam Parkar v. Janu Namji Hatley*¹ the Full Bench of Bombay held that symbolical possession of immovable property by a purchaser at a court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy it. Scott C.J. in answering the question referred to the Full Bench in the sense I have indicated above observes :

“Symbolical possession is not real possession nor is it equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.”

The case of *Muttu Karuppen et. al. v. Rankira et. al.*² is authority for the proposition 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.

Learned counsel for the appellant made the submission that the proceedings by the Fiscal under section 288 of the Civil Procedure Code were not properly proved. I agree with him that there is no provision of law under which the statements in an affidavit of a Fiscal's Officer can be admitted in evidence in the way it has been done in this case. The appellant seems to have raised no objection at the time to the course taken, and in the absence of a reasonable explanation of his acquiescence he is not entitled to object to the document at this stage. I wish however to state that in any suit other than that in which the Fiscal has made the return, proceedings by the Fiscal in execution of the orders of Court must be formally proved unless the parties agree otherwise.

The judgment of the learned District Judge is set aside and the appeal is allowed with costs. The plaintiff's action is dismissed with costs.

DIAS J.—I agree.

Appeal allowed.
