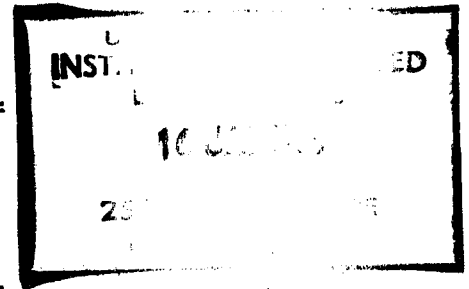


Judgment 12, 1968

1.

IN THE PRIVY COUNCIL

7 OF 1967



ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :-

A.M. SHERIFF
(2nd Defendant-Appellant) Appellant

- and -

MOHAMED NONA LAILA (wife
of Abdul Majeed Ahamed
Lameer)
(Plaintiff - Respondent) Respondent

C A S E F O R T H E A P P E L L A N T

1. This is an appeal from the order and decree dated the 13th of September 1965 of the Supreme Court of Ceylon (H.N.G. Fernando, S.P.J., and Alles, J.) dismissing without judgment or reasons the appeal of the Appellant from the judgment dated the 28th of April 1964 and the decree dated the 19th of June 1964 of the District Court of Colombo. The District Court had entered judgment for the Respondent granting her a declaration of title to the land and premises in suit, ordering the ejection of the Appellant and the other defendants therefrom, damages and costs.

p.41 L.25-
p.42 L.24

p.31 L.5-
p.37 L.17
p.40 L.1-
p.41 L.24
p.37 L1.11-
14

2. The Respondent filed plaint against one M. Abdul (the father of the Appellant), as 1st Defendant and the Appellant as 2nd Defendant, on the 11th of January 1961 claiming to be entitled to the land and premises in suit,

p.10 L.29
p.14 L.10

described in the Schedule B to the plaint, under and by virtue of certain deeds as well as by prescriptive possession. The Respondent set out her title as follows:-

p.11 L.10-36

"1. The land forming the subject matter of this action is described in schedule B hereto

P.3,
pp.52-56

2. Upon deed No. 466 dated 30th January 1930 one M.I. Mohamed was the owner of the premises described in schedule A hereto.

3. The said M.I. Mohamed had the land described in schedule A divided into three lots A, B and C according to Plans Nos. 784 785 and 786 all dated 7th October, 1931

P.2, p.56 A

4. The land described in schedule B hereto and referred to in paragraph 1 of this plaint is lot B in the said Plan No. 785 referred to in paragraph 3 above

P.4, p.57 A
L.1 - p.61
L.10

5. By deed No. 599 dated 13th October, 1931 the said M.I. Mohamed donated the land described in schedule B hereto to his daughter the plaintiff, subject to the reservation of an usufruct in favour of the donor, and subject to a right to sell the said premises by the donor, in his lifetime and further subject to a fidei commissum in favour of the donee's heirs, and subject to a power of appointment by the fiduciary donee in respect of the fidei commissaries.

P.5, p.61
L.11 - p.63
L.40

6. By deed No. 752 dated 28th July, 1933, the said M.I. Mohamed renounced in favour of the said donee the power to sell reserved by him under the said deed No. 599.

7. The said M.I. Mohamed died on or about the 12th day of March, 1955."

3. The Respondent averred that the 1st Defendant was a tenant of the premises in suit under her father, the said M.I. Mohamed, that the said tenancy had been determined, and that the 1st Defendant and the Appellant were jointly and in concert denying her title to the said premises and were in unlawful possession thereof. The Respondent prayed for the following:-

p.12 Ll.1--7

"(a) That she be declared entitled to the land described in schedule B.

p.12 Ll.17-24

(b) that the defendants be ejected therefrom.

(c) for damages in the said sum of Rs. 388/80 up to date of action and at the rate of Rs. 16/20 per mensem until the plaintiff is placed in possession and

(d) for costs "

4. The 1st Defendant and the Appellant filed answer on the 12th July 1961 denying the averments of the plaint inconsistent with the said answer, and averring that the Appellant had acquired a title by prescription to the land and premises in suit by prescriptive possession for well over 15 years. They averred further that the 1st Defendant was living with his son the Appellant, and prayed that the Appellant be declared entitled to the said land and premises.

p.14 L.11-
p.15 L.7

5. Thereafter, on or about the 7th of January 1962, before the trial date (19th February 1962) the 1st Defendant died intestate leaving an estate below the value of Rs. 2500/-. The Respondent thereafter took steps for the substitution of the 1st Defendant's widow and three surviving children, as Defendants in the place of the deceased 1st Defendant. The substitution was allowed and the caption of the plaint was accordingly amended on the 4th of March 1963, by the addition of the said widow and children as 3rd, 4th, 5th and 6th Defendants.

p.1 Ll.36-40

p.15 L.8-
p.18 L.43

p.4 Ll.12-20

6. The 3rd, 4th, 5th and 6th Defendants took

p.20 L.34

no part in the proceedings thereafter, and though Counsel is recorded as having appeared for the "defendants", it is clear from the issues that Counsel only raised issues as between the Respondent and the Appellant, and not as between the Respondent and the other Defendants. The said Defendants did not appeal against the judgment and decree of the District Court, and were not represented at the hearing of the Appeal to the Supreme Court, though they were made Respondents thereto. Accordingly they were not made Respondents to the Appellant's application for leave to appeal, nor have they obtained leave to appeal.

p.42 Ll.15-16

p.20 L.36-
p.21 L.8
p.37 Ll.2-10

7. At the commencement of the trial the following issues were raised, and at the conclusion of the trial were answered by the learned District Judge as follows:-

1. Is the plaintiff entitled to the land described in the schedule to the plaint and depicted as lot B in plan No. 446 filed of record of 7th October, 1931 upon the title pleaded in the plaint.

Ans: Yes

2. Is the plaintiff entitled to lot B in the said plan in the schedule by right of prescription.

Ans: Yes

3. Has the defendant been in prescriptive possession of the land described in the schedule B to the plaint.

Ans: No. The defendant used in the singular, is taken to mean the 2nd defendant.

4. If so has he obtained a prescriptive right thereto.

Ans: No.

5. Has the defendant been in wrongful possession of the said lot B.

Ans: Yes

6. If so what damages. (Damages agreed at Rs. 7/50 per month).

Ans: Damages at Rs. 7/50 viz., damages as claimed up to date of action and thereafter at Rs. 7/50 per month till plaintiff is restored to possession.

8. The learned District Judge accordingly entered judgment for the Respondent as prayed for in paragraphs (a) and (b) of the prayer of the plaint, and damages at the rate of Rs. 7/50 per month until the Respondent is restored to possession, and costs. The Appellant appealed to the Supreme Court against the judgment and decree of the District Court, by his petition of appeal dated the 5th of May 1964. The Supreme Court dismissed the said appeal with costs, and the Appellant obtained leave to appeal therefrom to Her Majesty in Council by Orders of the Supreme Court dated the 17th of November 1965 and the 3rd of March 1966

p.37 Ll.11-14

p.37 L.18-
p.39 L.35
p.41 L.25-
p.42 L.24

p.48 L.15-
p.49 L.20:p.51

9. The learned District Judge held that upon the deeds P.3, P.4, and P.5 (which are respectively Deeds Nos. 466, 599 and 752 referred to above in paragraph 2 hereof) and the plans P.1, and P.2. (P.2 being Plan No. 785 referred to in paragraph 2 hereof and P.1 being in substantial accordance with it) the Respondent had title to the land and premises in suit.

p.31 L.30-
p.32 L.1

In regard to the issue of prescription he held that the Appellant was in possession of the said land and premises independently of the 1st Defendant and adversely to the Respondent only from the 15th of February 1951, and had therefore not acquired a prescriptive title when the plaint was filed on the 11th of January 1961.

p.36 Ll.29-39

The learned District Judge's finding on this issue of prescription was based upon the terms of

(P.6) p.73
 L.23 -
 p.74 L.13
 (P.6) p.72
 L.38 - p.73
 L.22
 (P.6) p.71
 L.9 - p.72
 L.37
 p.36 Ll.18-
 20

settlement of a previous action (No. 30115) in the Court of Requests of Colombo in which the Respondent's father had sued the 1st Defendant for arrears of rent and ejection. Although the 1st Defendant had filed answer denying any contract of tenancy as alleged in the plaint in that action, the action was settled on the 15th of February 1951, on terms which, according to the learned District Judge, amount to an admission by the 1st Defendant that he was the tenant of the Respondent's father:

"The defendant admits that he had been in arrears of rent for a month after it became due.

The plaintiff waives all rents and damages up to 31.1.51 and will waive the subsequent damages if the vacant possession is given. Of consent judgment for Plaintiff in ejection and damages at Rs. 5/- a month from 1.2.51.

Writ of ejection not to issue till 31.12.51. At the expiry of this period, if the defendant has not secured alternative accommodation, an application for extension of time for another six months will be considered, provided the Municipality does not force the plaintiff's hands in the matter of providing sanitary conveniences.

The defendant undertakes to keep the premises clear so as not to become a nuisance within the meaning of the law."

(2D1) p.87
 L.17 -
 p.89 L.21
 p.94 Ll.24-32
 p.95 Ll.23-24

The learned District Judge also referred to a subsequent action (No. 72121) in the Court of Requests of Colombo, filed on the 28th of January 1959 by the Respondent's mother, as executrix of the last will of the Respondent's father, against the 1st Defendant. In this action too the 1st Defendant was sued on the basis of a tenancy, and it was held that the tenancy, if any, between the Respondent's father and the 1st Defendant ceased on the 31st of December 1949, or after the decree in case

No. 30115.

The learned District Judge has accordingly regarded the Appellant's possession, which admittedly dates back to 1942, as being adverse to and independent of the Respondent and her predecessors in title only from the 15th of February 1951.

p.23 Ll.38-
40

10. It is respectfully submitted that the Appellant was not a party to either of the aforesaid actions, and was not in any sense claiming through or representing the 1st Defendant, and that the answers filed by the 1st Defendant in both these cases are quite inconsistent with the Appellant's answer and evidence in this action.

The appellant's case was that the Respondent's father had agreed to give to the Appellant as dowry, inter alia, certain immovable property situated at Skinners Road, Colombo, in consideration for the Appellant's marriage to the Respondent's father's niece on the 18th of May 1941, and the said promise was recorded by the officiating priest in the Appellant's certificate of marriage 2D7A. The property promised to the Appellant was not given to him, but was sold, and instead the Respondent's father thereafter placed the Appellant in possession of the land and premises in suit in 1942. The Appellant paid the Municipal taxes in respect of the said land and premises from 1942 onwards, and produced receipts dating back to the 26th of July 1950 (2D9 for the 1st Quarter, 1950) and covering a period subsequent to the institution of this action as well (2D11-2D30), and 2D32-2D52, for the 1st and 2nd Quarters 1963). The Appellant was unable to produce the earlier receipts which were lost.

p.25 Ll.24-
39

p.64 L.1 -
p.66 L.21

p.69 L.33 -
p.70 L.8

pp.70-102

p.26 Ll.38-
40

11. It is respectfully submitted that the learned District Judge was wrong in holding that the Appellant's possession prior to the 15th of February 1951 was not adverse to or independent of the Respondent and her predecessors in title, and in treating the terms of settlement in case

No. 30115 as evidence which was admissible against the Appellant on the issue of prescription. Even if the said terms of settlement amounted to an admission by the 1st Defendant that he was the tenant of the Respondent's father, it could not be proved as against the Appellant who was not a party to the said action, and who is not a person claiming through or representing the 1st Defendant.

It is respectfully submitted that if not for this misdirection the learned District Judge would not have held against the Appellant on the issue of prescription:

p.36 Ll.18-
26

" . . . the 1st defendant admitted in 1951 that he was a tenant of Mohamed the plaintiff's father. It is difficult for the Court to accept the 2nd defendant's evidence that the 1st defendant who lived elsewhere . . . came . . . to reside with him when the evidence of P.6 shows that in 1951 it was the 1st defendant who was the tenant of the land in dispute and the 2nd defendant's evidence is that . . . he was placed in possession by Mohamed the plaintiff's father".

The Appellant has proved prescriptive possession within the meaning of section 3 of the Prescription Ordinance (Cap. 68) from 1942 to 1961, and the Respondent has failed to prove any acts of ownership in regard to the said land and premises.

In the respectful submission of the Appellant this appeal ought to be allowed with costs throughout, for the following among

R E A S O N S

1. BECAUSE the terms of settlement in case No. 30115 do not amount to an admission by the 1st Defendant that he was in possession under the Respondent's father.
2. BECAUSE the said terms of settlement

are not, in any event, admissible in evidence as against the Appellant.

3. BECAUSE the learned District Judge has misdirected himself in holding that the Appellant's possession of the land and premises in suit prior to the 15th of February 1951 was not adverse to or independent of the Respondent's predecessors in title.
4. BECAUSE the Appellant has acquired a prescriptive title to the land and premises in suit by virtue of his possession thereof for over ten years from 1942.
5. BECAUSE the Respondent and her predecessors in title have from 1942 onwards neither exercised rights of ownership in regard to the said land and premises nor disturbed or interrupted the possession of the Appellant.
6. BECAUSE the judgment of the learned District Judge is wrong and ought to be reversed.

MONTAGUE SOLOMON.

ALAVI S. MOHAMED.

No. 7 of 1967

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- and -

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Lameer)
(Plaintiff-Respondent)
Respondent

C A S E FOR THE APPELLANT

Lodged the 19 December 1967

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Solicitors and Agents for
Appellant