

Judgment 12, 1968

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

16 JAN 1969

25 RUSSELL SQUARE
LONDON, W.C.1.

1.

IN THE PRIVY COUNCIL

No. 7 of 1967

ON APPEAL FROM THE SUPREME COURT
OF CEYLON

B E T W E E N :

A.M. SHERIFF (2nd Defendant)
Appellant

- and -

MOHAMED NONA LAILA (Plaintiff)
Respondent

C A S E FOR THE RESPONDENT

Record

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1. This is an appeal against the Decree of the Supreme Court of Ceylon, dated the 13th September, 1965, dismissing, with costs, an appeal from the Judgment and Decree of the District Court of Colombo, dated, respectively, the 28th April 1964, and the 19th June 1964, whereby the Respondent (hereinafter also referred to as "the Plaintiff" or as "the donee") was declared entitled to certain land and premises in the District of Colombo and it was ordered and decreed, inter alia that the Appellant (hereinafter also referred to as "the 2nd Defendant") be ejected therefrom and that he pay certain sums as damages to the Respondent, together with costs.

pp.41-42

pp.31-37

pp.40-41

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2. The only question for determination on this appeal is whether or not the concurrent finding of fact of the Courts below that the title to the said land and premises was in the Respondent and not in the Appellant was, on the evidence produced by both sides at the trial, proper and correct.

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3. Relevant in particular to the Appellant's case on this appeal is Section 3 of the Prescription Ordinance (Cap. 68) which is as follows:-

"3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims,

Record
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for lands or
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of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, 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) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And, in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

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Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession of the property in dispute.

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4. The facts, briefly stated, are as follows:-

Ex.P4,
pp.57a-61

By Deed No. 599, dated the 13th October, 1931, and registered on the 9th November, 1931 (Ex.P4), one Mohamed Ibrahim Mohamed (hereinafter also referred to as "the donor"), the father of the Respondent, in consideration of love and affection and for other good causes and considerations, donated to the Respondent a certain divided allotment of land and premises described in the Schedule thereto and depicted in Plans Nos. 784,785 (Ex.P2) and 786. The donor's title to the land and premises so donated is not in dispute.

Ex.P2, p.56a

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The donation, valued by the donor at Rs. 3,000/- was made subject to the following conditions: (a) during the donor's lifetime he would be at liberty to receive the rents, profits and income of the land and premises and would be entitled to sell and dispose of the property; (b) the donee would not be entitled to sell, mortgage or alienate the property nor to lease it for a period exceeding three years at any one time nor to enter into a fresh lease during the subsistence of an earlier lease; (c) the donee would be entitled to donate the property or any part thereof to any, or all, of her lawful children, free from any restrictions; and (d) upon the donee's death the property, if not already donated by the donee to her children, would devolve upon her heirs according to the Muslim law of intestate succession. Further, the donor covenanted and agreed, for himself and his heirs and executors, that the property he had thus donated was free from encumbrances.

Record
p.57, 1.24
p.57, 1.23
to
p.58, 1.5

p.58,11.6-11

The Deed contained also the express acceptance of the gift on behalf of the donee by her mother, one Mohamed Ismail Balgis Umma.

p.58,11,
12-16

5. By Deed No. 752, dated the 28th July, 1933 (Ex.P5), the said donor, in consideration of love and affection and the approaching marriage of the donee (this Respondent) to one Abdul Majeed Ahamed Lameer, renounced in favour of the donee his right to sell and dispose of the said land and premises during his lifetime to the intent and purpose that the donee should hold and possess the said premises in terms of the other conditions then remaining in force in the said Deed No. 599.

Ex.P5,
pp.61-63

6. On a date prior to 1950, the donor let the said land and premises, on a monthly rental to one M. Abdul who, together with his son (the present Appellant) occupied the same under a tenancy agreement. The tenant (M. Abdul) paid all rent due up to and including October, 1949, but failed to pay any rent thereafter and the donor therefore served upon him a notice to quit the land and premises, dated the 30th November, 1949, and requested him to deliver vacant possession thereof on the 31st December, 1949. The tenant failed

Ex.P6,p.71,
11, 27-37

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to pay the arrears of rent due, to comply with the terms of the notice to quit, and to deliver vacant possession to the donor, who, thereupon, instituted against him C.R. Colombo Case No. 30115 (hereinafter also referred to as "the first action") stating the above facts in his Plaint, dated the 16th October, 1950.

Ex.P6,p.73,
11,7-15

In his Answer, dated the 28th November, 1950, the defendant (M. Abdul) denied that he had entered into any contract of tenancy with the donor. He alleged, inter alia, that the donor had agreed to give the premises in question to his son in consideration of the latter marrying the adopted daughter of the donor which marriage having taken place the newly married couple were in possession and awaited a deed of gift from the donor.

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7. The said Case No. 30115 ("the first action") was settled on the 15th February, 1951, on the following terms:

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Ex.P6,p.73,1,
28 to
P.74,1,3

"The defendant" \angle i.e. M. Abdul, the present Appellant's father \angle "admits that he had been in arrears of rent for a month after it became due.

"The plaintiff" \angle i.e. M.I. Mohamed, the donor, the present Respondent's father \angle "waives all rents and damages up to 31.1.51 and will waive the subsequent damages if vacant possession is given.

"Of consent Judgment for Plaintiff in ejectment and damages at Rs. 5/- a month from 1.2.51.

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"Writ of ejectment 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 or providing sanitary conveniences. The defendant undertakes to keep the premises clean so as not to become a nuisance within the meaning of the law.

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"Enter Decree".

It is instructive to note that in this settlement no mention whatever was made of the present Appellant's rights whether as tenant or otherwise.

10 8. Notwithstanding the terms of the said settlement of the first action the said defendant thereto and his son (the present Appellant) continued to occupy the premises in question and failed to deliver vacant possession of the same to the donor who died on the 12th March, 1955.

In 1959 the donor's executrix (his widow, - mother of the present Respondent) instituted C.R. Colombo Case No. 72121 (hereinafter also referred to as "the second action") against the said defendant (i.e. M. Abdul - father of the present Appellant), praying, by her Plaint, dated the 28th January, 1959, inter alia, as follows:

20 "(a) for an order to eject the defendant from the said premises and to have the plaintiff placed in quiet possession thereof;

Ex.2D1,
p.89,11,
1-12

"(b) for judgment against the defendant for the sum of Rs.180/- with further damages at Rs. 5/- per month from the 1st day of January, 1959, till the defendant is ejected from the said premises and the plaintiff is placed in quiet possession thereof".

30 9. In the said second action, the defendant (M. Abdul) - the present Appellant's father - by his Amended Answer, dated the 10th July, 1959, alleged, inter alia, that the plaintiff was not entitled to serve him with a notice to quit and that he was not liable to pay her any rent. He said, further, that he was living on the premises with his son A.M. Sheriff (the present Appellant) who "has been in undisturbed and uninterrupted possession of the said premises adverse to and independent of all others for a period of over
40 10 years and he has acquired a title thereto by prescription".

Ex.D2,
pp.89-91

p.90,11,
19-24

10. Issues in the said second action (C.R. Colombo Case 72121) were answered by the Court as follows:-

Ex.2D3,p.91,
11,18-19
p.33,11,
31-43

1. "Did the late M.I. Mohamed" / the Respondent's father / "let the premises in suit, No. 9 Manthri Road, Havelock Town, to the defendant?"

p.95,11,
23-24

Answer: "Yes, but the defendant ceased to be the tenant after the decree in Pl" / i.e. in the said first action, Ex.P6 in the present case / "and he is a trespasser".

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p.91,1,20

2. "If so, is the plaintiff entitled to a decree in ejectment?"

p.95,1,25

Answer: "No, in view of the answer I wish to give to No.3".

p.91,1,21

3. "What rent or damages?"

p.95,1,26

Answer: "Nil"

Ex.2D4,
pp.94-95

In his Judgment in the said second action, dated the 28th July 1959, incorporating the above Answers to Issues, the learned Commissioner of Requests expressed the view that "if there was any tenancy between Mohamed and the Defendants that tenancy ceased on the 31st December, 1949" - the date when, as stated in the Plaint in the first action, the defendant was required to

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p.94,1,
24-25

p.94,11,
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deliver up vacant possession to M.I. Mohamed (the present Respondents father). The learned Commissioner was of opinion that no new tenancy was created when the defendant was permitted to remain on the premises, especially as his tenancy had been terminated by process of the law. In his view, the defendant (the present Appellant's father) was a trespasser and he left it to the plaintiff (the testatrix of M.I. Mohammed's Will, mother of the present Respondent) to "take action in that respect" in any form she desired.

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p.94,11,
41-44

The learned Commissioner did not refer to the possibility of a tenancy at will under which the tenant was permitted to occupy the premises.

11. A Decree in accordance with the Judgment of the learned Commissioner of Requests was drawn up on the 28th July, 1959, and against the said Judgment and Decree the plaintiff appealed to the Supreme Court of Ceylon.

Ex.2D5,
pp.95-96

By its Decree, dated the 20th October, 1960, the Supreme Court dismissed the appeal without delivering any Judgment.

Ex.2D6,
pp.96-97

10 12. Anxious to secure her rights under the said Deeds No. 599 and No. 752 (see paragraphs 4 and 5 hereof), the Respondent to this appeal instituted

THE PRESENT ACTION

against the said M. Abdul (Defendant in the said first and second actions and now Defendant No.1) and his son A.M. Sheriff (Defendant No. 2 in this action - the present Appellant) in the District Court of Colombo.

20 By her Plaint, dated the 11th January, 1961, the Plaintiff, having referred to some of the events as hereinbefore stated, said:-

pp.10-14

"9. The 1st Defendant was a tenant of the said premises described in Schedule B hereto under the plaintiff's father the said M.I. Mohamed, but the said tenancy was determined.

p.12,11,1-15

30 "10. The 1st and 2nd Defendants are now acting jointly and in concert unlawfully denying the Plaintiff's title to the said premises described in Schedule B and are in unlawful possession thereof denying the Plaintiff's title thereto.

"11. The Plaintiff and her predecessors in title have been in prescriptive possession of the premises described in Schedule B and have acquired a prescriptive title thereto.

"12. The Plaintiff assesses damages up to date of action at Rs. 388.80 and continuing damages at Rs. 16.20 per mensem from date hereof until possession is delivered to the Plaintiff.

"13. The land described in Schedule B is reasonably worth Rs. 17,500/-"

The Plaintiff prayed -

p.12,11,
17-24

"(a) that she be declared entitled to the land described in Schedule B.

"(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 and all such other relief as to the Court may seem meet.

pp.14-15

13. By their Answer, dated the 12th July, 1961, the 1st and 2nd Defendants said inter alia that -

p.14,11.
28-33

"(a) The 1st Defendant" (M. Abdul)" is the father of the 2nd Defendant" (A.M. Sheriff, the present Appellant) and the 1st Defendant is living with the 2nd Defendant.

"(b) The 2nd Defendant has been in prescriptive possession of the land described in the Schedule to the Plaint for well over 15 years and he claims the benefit of such prescriptive possession."

pp.34-36

They prayed therefore for the dismissal of the action, with costs and "that the 2nd Defendant be declared entitled to the said property."

p.15-18
p.16,11,1-6
p.4

The 1st Defendant died on the 7th January, 1962 and subsequently his widow and three children were substituted in his place.

14. Issues framed in the present action were, after an examination of the oral and documentary evidence in the case which both sides had produced, were answered thus by the learned District Judge:-

"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 the 7th October, 1931, upon the title pleaded in the Plaint?" p.20,11. 36-38

Answer: "Yes " p.37,1.2

"2. Is the Plaintiff entitled to Lot B in the said Plan in the Schedule by right of prescription?" p.20,11 39-40

10 Answer: "Yes " p.37,1,3

"3. Has the Defendant been in prescriptive possession of the land described in Schedule B to the Plaint?" p.21,11, 2-3

Answer: "No. 'The Defendant' used in the singular is taken to mean the 2nd Defendant. p.37,11,4-5

"4. If so has he obtained a prescriptive right thereto?" p.21,1,4

Answer: "No " p.37,1,6

20 "5. Has the Defendant been in wrongful possession of the said Lot B?" p.21,11,5-6

Answer: "Yes " p.37,1,7

"6. If so, what damages?" p.21,1,7

Answer: "Damages at Rs. 7/50 viz. damages as claimed up to date of action, and thereafter at Rs. 7/50 per month until Plaintiff is restored to possession." p.37,11,8-10

30 15. By his Judgment in this action, dated the 28th April, 1964, incorporating his said Answers to Issues, the learned District Judge held as is stated in paragraph 1 hereof. pp.31-37

The learned District Judge was clear that on the deeds Exs.P3, P4 and P5 and the evidence of the Plans Exs.P1 and P2 the Plaintiff's title to the property in dispute had been established. Referring to the evidence before him and to the previous proceedings against the 1st Defendant, p.31,1,36 to p.32,1,1 Exp3,p.52 Ex.P4,p.57a Ex.P5,p.61

- Ex.P1,p.104 he drew particular attention to the following matters in re-inforcement of his views:-
- Exp2,p.56a
Exp6,pp.71-74
P.35.11
39-41
- (A) It was undeniable that in accordance with the settlement reached in the first action (C.R. 30015 Colombo - Ex.P6) on the 15th February, 1951 (see paragraph 7 hereof) the 1st Defendant (the present Appellant's father) in the present case was the contractual tenant until decree was entered in that case.
- p.35,1,42
to
p.36,1,2
- (B) The 1st Defendant continued to remain in occupation by leave of the Plaintiff in that case (the first action) as was provided for in the said settlement. 10
- p.36,11,
2-10
- (C) The 1st Defendant did not, when agreeing to the said settlement, make any reference to his son's rights or claims to the property in question, and yet his son (the 2nd Defendant in the present case - now the Appellant) claimed to have been in possession from the time of his marriage in 1941 and that since then, he being in possession, his father (the 1st Defendant) had lived with him and he had not lived with his father. 20
- p.36,11,
26-32
- (D) On the 15th February, 1951 (the date of the said settlement in the first action) the 1st Defendant had not made any claim to prescriptive possession as a trespasser. "It is highly improbable that about this time the 2nd Defendant who, according to the probabilities, was living with the 1st Defendant, was in independent possession so as to prescribe to the land in dispute. 30
- p.36,11,
33-37
- "If the date 15.2.51 is accepted as the date when the 1st Defendant was in terms of the settlement in possession of the land in dispute, the 2nd Defendant did not have ten years of possession before action in the instant case was filed on 11.1.61. to enable him to prescribe to the subject matter of this action."
16. Against the said Judgment of the District Court, dated the 28th April 1964, and the Decree drawn up in accordance therewith dated the 19th June, 1964, the 2nd Defendant (present Appellant) 40

appealed to the Supreme Court of Ceylon, the four persons substituted in place of the 1st Defendant (deceased) being added as respondents.

pp.37-39

10 17. The appeal in the Supreme Court was heard by a Bench consisting of H.N.G. Fernando, S.P.J. and Alles J., who, by their Decree dated the 13th September, 1965, dismissed it, with costs. The learned Judges of the Supreme Court did not think it necessary to deliver any Judgment setting out the reasons for their decision.

pp.41-42

18. Against the said Decree of the Supreme Court, dated the 13th September, 1965, this appeal is now preferred, the Appellant having been granted leave to Appeal by a Judgment and Orders of the Supreme Court, dated the 17th November, 1965, and the 3rd March, 1966.

pp.47-49

p.51

In the Respondent's respectful submission, the appeal should be dismissed, with costs throughout, for the following among other

20 REASONS

1. BECAUSE on the facts before them the concurrent finding of the Courts below that the title to the property in dispute is in the Respondent and not in the Appellant is correct and proper and in accordance with the law of Ceylon.
2. BECAUSE it is clear that the Appellant has failed completely to establish his title to the said property.

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E.F.N. GRATIAEN

R.K. HANDOO.

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