

1945

Present: Keuneman J. and Jayatileke J.

PABILIS APPUHAMY *et al.* Applicants, and PEIRIS, Respondent.

201—D. C. Colombo, 2,531.

Prescription—Possession of property by usufructuary mortgagee—Possession enures for benefit of owner or successor—Prima facie presumption.

There is a prima facie presumption that the possession of a usufructuary mortgagee enures to the benefit of the true owner, whether it be the person who actually gave him the usufructuary mortgage or the successor of that person.

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

H. V. Perera, K.C. (with him *H. W. Jayawardene* and *V. Wijetunge*) for the defendants, appellants.

N. Nadarajah, K.C. (with *E. B. Wikremanayake* and *K. Herat*), for the plaintiff, respondent.

February 15, 1945. KEUNEMAN J.—

Although questions relating to registration of deeds and to *res adjudicata* have been raised in this appeal, I do not think it is necessary to discuss those matters. The whole of this case can be decided on the issue of prescription. The facts are as follows:—The plaintiff claims lot B in the plan on a transfer from Salonchiya in 1942. The defendants state that Salonchiya in 1925 had lot B, as well as lots A and C sold against him in execution and that these lots were purchased by Deonis Perera on Fiscal's transfer D2 of 1925. Deonis' rights passed on D7 of 1938 to Pabilis and from Pabilis on D11 of 1942 to the 1st and 2nd defendants. Salonchiya before he had entered into any of these transactions had executed a *usufructuary* mortgage bond in 1918, in favour of Elias who in point of fact possessed lot B until 1942. The question is as to whether the

possession of Elias enured to the benefit of Salonchiya or Deonis Perera I think there is a *prima facie* presumption that the possession of a *usufructuary* mortgagee enures to the benefit of the true owner whether it be the person who actually gave him the *usufructuary* mortgage or the successor of that person. Now in this case Deonis Perera was undoubtedly the true owner in 1925 and he continued to be the true owner till 1938. I think the possession of Elias during this period must be taken to have enured to the benefit of Deonis Perera. At any rate there are no circumstances in this case which appear to rebut the presumption which I have already mentioned. I think one must take it therefore that apart from his paper title Deonis Perera had added to himself a title by prescription and that that title by prescription has now descended to the 1st and 2nd defendants. It is immaterial therefore, to consider whether the deed P1 by prior registration is superior to D2 or other muniments of title of the defendants and it is also unnecessary to consider whether the decree in favour of Deonis against Salonchiya obtained in 1935 is binding between the parties and operates as a *res adjudicata*. In any event the title has now passed to the 1st and 2nd defendants in respect of lots A, B and C.

In the circumstances I set aside the judgment of the learned District Judge, I allow the appeal with costs and dismiss the plaintiff's action with costs.

JAYATILEKE J.—I agree.

Appeal allowed.