

Present: Pereira J.

1913.

AYANAHAMY v. SILVA.

417-418—C. R. Balapitiya, 9,394.

Undertaking to abide by the ruling of the Court—Restriction—Adverse possession.

An undertaking by a party to an action to abide by a ruling of the Court is of no avail, unless the opposite party is himself prepared to acquiesce in the decision.

A person who possesses land of another without being aware that it belongs to that other person may still acquire as against him prescriptive rights in respect of the land.

Observations on the term "adverse possession" as understood under our law.

THIS was an action for declaration of title. The learned Commissioner held that the defendant had acquired title to the land by prescription, but ordered him nevertheless to pay plaintiff Rs. 25. Both parties appealed.

A. St. V. Jayewardene, for the plaintiff.—The defendant consented to abide by the order of the Court. He has no right to appeal against the judgment of the Court. See *Babunhamy v. Andri's Appu*,¹ *Gooneratne v. Andradi*.²

The defendant possessed the land by mistake. He did not know that the land belonged to the plaintiff. He did not intend to possess it adversely to the plaintiff. Under these circumstances it could not be said that he had acquired title by prescription. See *Fernando v. Menika*,³ *Angel on Limitation* 399.

E. W. Jayewardene, for the defendant.—The defendant did not formally constitute the Judge an arbitrator. In answer to a question he said, "If I have even by mistake gone and planted the land, I am prepared to abide by the order of the Court." The plaintiff in this case did not himself consent to abide by the order of the Judge. On the other hand, the plaintiff himself has appealed. In the case cited both parties undertook to abide by the order of the Court. There was either tacit or express agreement to be bound by the order.

The fact that defendant did not know that it was plaintiff's land does not affect the question whether the possession was adverse or not.

¹ 5 *Bal.* 89.

² 3 *C. A. C.* 69.

³ 3 *Bal.* 115.

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In the passage cited from *Angell on Limitation* 399 the party in possession did not have an intention to claim title. It does not matter whether the possession is *bona fide* or *mala fide*. Adverse possession is defined in section 3 of the Prescription Ordinance, No. 22 of 1871. See also *Carrim v. Dholl*.¹

On the finding of the Commissioner the defendant has acquired title by prescription. The order to pay Rs. 25 to plaintiff is wrong and inconsistent with the finding.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

December 1, 1913. PEREIRA J.—

There are cross appeals in this case. The Commissioner declared the defendant entitled to lot A on figure of survey No. 141, and condemned him to pay the plaintiff Rs. 25. Each party has appealed against the part of the decree that is adverse to himself, and I shall deal with both the appeals in one judgment. The Commissioner has held that the defendant has had possession of the portion of land in claim for over the prescriptive period. I have read the evidence carefully, and on this point I need only say that the balance of testimony appears to me to support the Commissioner's finding. Two points have been urged by the plaintiff's counsel : (1) that the defendant had no right to appeal, inasmuch as he had consented to abide by the order of the Court on the question as to possession ; (2) that the defendant could not be said to have had adverse possession of the land in claim, inasmuch as he possessed the land by mistake, that is to say, in ignorance of the fact that it belonged to the plaintiff. It has been sought to support the first contention by a reference to the defendant's evidence, where he says, " If I have even by mistake gone and planted that land, I am prepared to abide by the order of the Court."

In the first place, an undertaking of this nature, to have a binding effect, should, in my opinion, be given in a more formal and solemn manner than in the shape of a casual answer to a question put by the Court in the course of the examination of a party as a witness. In this connection I may observe that the Commissioner in his judgment says that in spite of the defendant's undertaking his counsel urged the plea of prescription, and that plea the Commissioner has in effect upheld. In the next place, such an undertaking as that mentioned above can be of no avail, unless the opposite party is prepared to accept the decision of the Judge. The plaintiff, in the present instance, did not acquiesce in the decision. The above two conditions appear to have been fulfilled in the cases cited as authorities in support of the contention.

As regards the second point pressed, it seems to me that the fact that the defendant was not, at the time of his possession of the land in claim, aware that it belonged to the plaintiff, rather strengthens his claim based upon prescription. He was a *bona fide* possessor, and while a *mala fide* possessor might, just as well as a *bona fide* possessor, maintain a claim by prescription, it is manifest in the case of the latter, that the possession was a possession on his own account. It has been argued that the possession of a person possessing in the belief that the thing possessed is not the property of another is not adverse possession, and English authorities have been cited. We have nothing to do with the definition in English law of either the term "possession" or the term "adverse possession." Both these terms are fully discussed in the *Encyclopædia of Laws*, vol. I., p. 160, and vol. X., p. 229 (1st edition), and it will be found that there are points of essential difference in what is laid down there and our own conception of the terms. Possession under the Roman-Dutch law is either *possessio civilis* or *possessio naturalis*. *Possessio civilis* is *detentio animo domini*. It is this possession that is necessary to be proved where a person seeks either any of the possessory remedies or to establish a claim by prescription. Where a person is in occupation of property in the *bona fide* (albeit mistake) belief that the property is his own and belongs to nobody else, clearly he has the *detentio animo domini*. The next question is whether his possession is adverse. As to that we have to look for guidance within the four corners of our own Ordinance relating to prescription of actions. The words in section 3—"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"—have been held by this Court to contain not an illustration, but a definition of "adverse possession" (see *Daniel v. Markar*,¹ *Vand. Rep.* 44; *Carrim v. Dhol*²). The possession by the defendant in the present case manifestly answers to the description given in the definition mentioned above.

I set aside the judgment appealed from, dismiss the plaintiff's claim, and enter judgment for the defendant for lot A. The defendant will have his costs in both Courts.

Set aside.

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¹ *Ram.* 1843-55, 2.

² 2 C, L. R. 12.