KIRIHAMY MUHANDIRAMA *v.* DINGIRI APPU.

1903.
March 13 and 19.

D. C., Kandy, 13,746.

Prescriptive possession—Ordinance No. 22 of 1871, s. 3—Usufructuary mortgage.

In order that a person may avail himself of section 3 of Ordinance No. 22 of 1871—

(1) Possession must be shown from which a right in another person cannot be fairly or naturally inferred.

(2) Possession required by the section must be shown on the part of the party litigating or by " those under whom he claims."

(3) The possession of those under whom the party claims means possession by his predecessors in title.

(4) Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action.

R and M sued the administrator of D H and obtained judgment in their favour in 1884 as heirs of their adoptive father D H in respect of certain lands. R conveyed his half share to M, and M conveyed the whole to the plaintiff.

In an action *rei vindicatio* against the defendants, the first and second defendants, who had married the third and fourth defendants, claimed an undivided half share of the lands, as the children and heirs of P M, who was a daughter and heir of D H, and to whom the administrator of D H had conveyed a half share by deed dated 5th October, 1877; and the fourth defendant set up title under a usufructuary mortgage deed granted by P M and the administrator of D H in 1882. The first and second defendants pleaded the occupation of the fourth defendant in lieu of interest due by their mother P M since 1882 by way of prescriptive possession.

Held, that the conveyance of the administrator of D H to P M on the 5th October, 1877, was void as against the decree in favour of R and M; that P M's usufructuary mortgage of a moiety of the lands to the fourth defendant was also void; that the fourth defendant's occupation in lieu of interest due by the administrator of D H in respect of the other moiety of the lands was on behalf of persons who had not been made parties to the present action; and that their right of possession could not be used for the purpose of defeating the plaintiff's right to that extent.

THIS was an action to vindicate certain lands from the defendants. The plaintiff's case was that the lands belonged to one Hangidiya, the uncle of Ran Naide and the grand-uncle of one Muhandirama, and who adopted as his sons both Ran Naide and Muhandirama; that these two persons inherited the lands from Dingiri Appu Hangidiya; that they obtained a decree in their favour for these lands in suit No. 74,171 on the 13th August, 1884; that on the 18th December, 1876, Ran Naide conveyed an undivided half share of them to Muhandirama, who conveyed the entirety of them to the plaintiff on the 14th May, 1895; and that the defendants took forcible possession of the lands about a year before the present action was instituted.

1903.
March 13 and 19.

The defendants admitted that Dingiri Appu Hangidiya was the uncle of Ran Naide and the great-grand-uncle of Muhandirama, but they denied that he was their adoptive father. They further stated that the heirs of Dingiri Appu Hangidiya were Dingiri Appu and Punchi Menika, who had mortgaged the lands in dispute to the fourth defendant on the 1st December, 1882, and given him possession thereof in lieu of interest; that Punchi Menika died intestate leaving as her heirs the first and second defendants, who became entitled to a half share; and that they and the heirs of Dingiri Appu were in possession, the fourth defendant being in occupation as mortgagee.

The District Judge found that Dingiri Appu, as administrator of Dingiri Appu Hangidiya's estate, conveyed in 1877 a half share of these lands to Punchi Menika, the mother of the first and second defendants, and that five years afterwards Dingiri Appu and Punchi Menika executed a usufructuary mortgage of these lands in favour of the fourth defendant; that Ran Naide and Muhandirama were the adopted sons of Dingiri Appu Hangidiya; that there was no proof that Ran Naide and Muhandirama were ever placed in possession under the decree in their favour in suit No. 74,171; and that plaintiff and his predecessors had no prescriptive possession of the lands vindicated.

He therefore dismissed the plaintiff's action.

The plaintiff appealed.

Van Langenberg, for appellant.

Dornhorst, K.C., for respondent.

Cur. adv. vult.

19th March, 1903. MONCREIFF, J.—

Ran Naide and Muhandirama claimed the lands in question by inheritance from their adoptive father Dingiri Appu Hangidiya. In 1876 Ran Naide transferred an undivided half to Muhandirama. In 1877 they entered a suit against Dingiri Appu, the administrator of the estate of Dingiri Appu Hangidiya, their adoptive father; and in 1884, on the joint motion of the parties, judgment was entered in favour of them as heirs of the deceased Dingiri Appu Hangidiya for a declaration of title to the lands in question, and for possession of them. A year or two later a writ of possession issued, but there is no proof of its execution.

In 1895 Muhandirama conveyed all the lands to the plaintiff, who complains of an ouster in 1899.

The defendants dispute the title set out by the plaintiff. The fourth defendant says that he has long been in possession under a

usufructuary mortgage of the lands executed by Dingiri Appu, the administrator, and his sister Punchi Menika, who alleged they were the heirs of Dingiri Appu Hangidiya. The first and second defendants said they were entitled to half of the lands, as children and heirs of Punchi Menika; they also say that they and their predecessors in title, and the heirs of Dingiri Appu and their predecessors in title, have a right to the lands by prescriptive possession "through the fourth defendant." The third defendant disclaims.

Assume that Muhandirama conveyed a good title to the plaintiff; assume that Dingiri Appu and Punchi Menika had no interest to mortgage to the fourth defendant; assume that they and those claiming under them by the mortgage executed *pendente lite* are bound by the consent judgment of the 13th August, 1884, in No. 74,171] (see *8 S. C. C. 95* and *3 Browne, 82*). Still the Judge finds in favour of the defendants on the question of possession. What then is the position of the parties?

If it be said that the possession of the fourth defendant is that of the plaintiff's usufructuary mortgagee, and therefore not adverse to the plaintiff, the plaintiff should have proceeded to free the land from the mortgage and the usufructuary, and should not have sued for a declaration of tile. If the fourth defendant is not the plaintiff's mortgagee, his possession is that of one who professes to possess under a mortgage which is not valid. He has set up however a right by prescriptive possession, not on his own account but on account of his mortgagors and their heirs.

I do not understand that a defendant setting up his possession as usufructuary mortgagee for ten years previous to action can avail himself of section 3 of Ordinance No. 22 of 1871. He acknowledges the existence of a right in another person. Lawrie, J., in *Punchirala v. Andris Appuhamy* (*3 S. C. R. 151*), says: "Can the defendant plead his own possession as creating a title for his lessor, although the possession creates no title for himself? The Prescription Ordinance contemplates possession by a party getting judgment, his own possession or that of his predecessors in title. It is to be a judgment declaratory of the right of property in a party to the action, not of a stranger. Because it is proved that the defendant's lessor had no title when she leased, and when he entered into occupation, his possession, even if it has exceeded ten years, cannot be pleaded by him as creating title in a person who is not a party to the action, and against whom therefore no judgment can here be entered."

This decision was approved by Bonser C.J., and Withers and Browne, J.J., in *Terunanse v. Menika* (*1 N. L. R. 200*).

1903.
March 13 and 19.

MONCREIFF, J.

It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871—

(1) Possession must be shown from which a right in another person cannot be fairly or naturally inferred.

(2) Possession required by the section must be shown on the part of the party litigating or by those under whom he claims."

(3) The possession of those under whom the party claims means possession by his predecessors in title.

(4) Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action.

Now, it has not been shown that Dingiri Appu and Punchi Menika had any title to the land. Dingiri Appu was bound by No. 74,171. Punchi Menika was not a party to No. 74,171, but the conveyance to her by Dingiri Appu is dated 15th October, 1877, ten days later than the institution of No. 74,171. Her conveyance is therefore void as against the decree in No. 74,171. Both appear to have died intestate. From paragraph 3 of the plaint Dingiri Appu seems to have left heirs. They are not parties to this action, and the fourth defendant cannot make use of them for the purpose of defeating the action.

The first and second defendants, who married the third and fourth defendants, are the daughters and heirs of Punchi Menika, and as they are parties to the action, the fourth defendant's possession may enure to them for their undivided half. They claim an undivided half "under" the fourth defendant. Their mother, Punchi Menika, let the fourth defendant into the lands on the mortgage, which was void against the decree in No. 74,171. They and their mother had no more title to the land than strangers. Still a man claiming under them has been in possession for ten years; his possession is theirs; and, if his possession was adverse, they have a right to an undivided half by prescription. The fourth defendant's possession was I think adverse, but, inasmuch as his possession of the other undivided half was on behalf of persons who were not parties to the action, it seems to me that the plaintiff must succeed to that extent. I think the plaintiff is entitled to have his costs here and in the District Court.

LAYARD, C.J.—I agree.