1952 *Present :* **Gratiaen J. and Gunasekara J.**

R. M. BANDA, Appellant, *and* A. ALITAMBY, Respondent

S. C. 3—D. C. Kurunegala, 4,594

Prescription—Possession of property by usufructuary mortgagee—Prima facie *enures to benefit of cessionary of mortgagor's contractual rights—Evidence Ordinance, s. 116—Registration of Documents Ordinance (Cap. 101), s. 7 (1) and (4)—"Prior registration"—Limited scope of title acquired thereby—Prescription Ordinance, s. 3.*

The possession of a usufructuary mortgagee is presumed to enure to the benefit of the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded.

A. granted a usufructuary mortgage over certain property in favour of B. While the bond was still subsisting A. died and the mortgaged property devolved on C. C. sold his rights in the property to D. and again, subsequently, to E. E.'s deed, though later in point of time, was registered earlier than D.'s deed, but E. never possessed the property or even asserted any claim to it until very shortly before the present action was instituted by him. When the usufructuary mortgage bond was discharged by payment, D. was admitted to possession by the mortgagee on the footing that he was the person who had lawfully succeeded to the mortgagor's interests in the land.

Held, that, in the circumstances of the case, the earlier possession of the usufructuary mortgagee enured to the benefit of D. for the purpose of defeating by prescription the subsequent claim of E. to have acquired superior title to the property on the ground of prior registration.

APPEAL from a judgment of the District Court, Kurunegala.

C. Thiagalingam, Q.C., with *V. S. A. Pullenayagam* and *T. Parathalingam*, for the defendant appellant.

H. W. Tambiah, for the plaintiff respondent.

Cur. adv. vult.

June 17, 1952. GRATIAEN J.—

This is an appeal from a judgment and decree of the District Court of Kurunegala declaring the plaintiff entitled as against the appellant to an undivided half-share of the land described in the schedule to the plaint. The alleged rights, based on the same chain of title, of the 2nd to the 10th defendants to the outstanding half-share were conceded by the plaintiff but were also disputed by the appellant. The appellant's case is that he was the sole owner of the land by virtue of long prescriptive possession which had in the first instance commenced under a valid title derived by purchase. It is common ground that the appellant was in exclusive possession of the land at the time when this action was instituted on 22nd December, 1947.

The land admittedly belonged at one stage to a person named Lebuna Veda who had in 1905 granted a notarially attested usufructuary mortgage over the property in favour of Dingiri Appu Naide. The mortgagee was duly placed in possession under the agreement whereby he was to enjoy the produce in lieu of interest until the principal debt was liquidated. While the bond was still subsisting, Lebuna Veda died leaving a son Kiriya and also a daughter Pini who is alleged to have married out in *diga* and thereby lost her inheritance. There is a suggestion that Lebuna Veda had yet another legitimate child named Hapu, but for the purpose of adjudicating between the claims of the parties in the present action we are required to assume that on Lebuna Veda's death the property in dispute belonged solely to Kiriya by inheritance from his father. The decree in this action would, of course, not affect any rights which may hereafter be asserted by persons claiming through either Pini or Hapu.

On 9th August, 1927, Kiriya sold his rights in the property to the appellant under the conveyance 1D1. The plaintiff suggests, and the learned Judge seems to suspect, that no consideration had in fact been paid for the transfer, but that circumstance, even if established, cannot alter the legal consequences of the transaction. Kiriya's title clearly passed to the appellant upon the execution of the deed subject, of course, to Dingiri Appu Naide's prior rights under the subsisting usufructuary mortgage created in 1905.

The conveyance 1D1 in favour of the appellant was not registered until thirteen days later, namely on 22nd August, 1927. In the meantime, Kiriya had once again sold the same property for valuable consideration to the plaintiff and a man named Uduma Lebbe in equal shares by P1 of 10th August, 1927. This deed, though later in point of time, was duly registered seven days earlier than 1D1 had been. It follows that if the respective claims of the parties to the present dispute be determined solely by reference to their "paper title", the later deed P1 in favour of the plaintiff and Uduma Lebbe (whose rights have since passed by inheritance to the 2nd to the 10th defendants) must prevail over the earlier instrument 1D1 by virtue of prior registration. The appellant's case must therefore stand or fall on the issue of prescription. On that issue the learned Judge has held against him, but Mr. Thiagalingam argues that the judgment under appeal should be reversed even upon the basis of the learned Judge's findings of fact.

The plaintiff concedes that neither he nor his co-purchaser under P1 had possessed the property or even asserted any claim to it from the date of the execution of P1 until very shortly before the present action commenced twenty years later. The appellant, on the other hand, alleged that he had possessed the property continuously and exclusively in his own right from the time of his purchase. This version was, however, rejected by the learned Judge as grossly exaggerated. It was held on the contrary—

(1) that the person in actual occupation of the property from 9th August, 1927, until 30th November, 1939, had been Dingiri Appu Naide, who had in fact possessed it continuously since 1905 as the usufructuary mortgagee under the bond P2 ;
(2) that the bond in his favour was discharged by payment on 30th November, 1939;
(3) that the appellant was thereupon, or very shortly afterwards, admitted to possession by Dingiri Appu Naide on the footing that he was the person who had lawfully succeeded to Kiriya's interests in the land ;
(4) that the defendant had since then possessed the land adversely not only to the plaintiff and his alleged co-owners but also, it would appear, to persons claiming through Pini and Hapu.

Admittedly, the final period during which the appellant had personally possessed the property on his own account was by itself insufficient to support a claim to prescriptive title. The real matter for consideration therefore is whether he can claim the benefit of Dingiri Appu Naide's proved occupation during the earlier period as constituting in fact and in law possession on behalf of the appellant as the cessionary, by lawful purchase, of Kiriya's rights under the usufructuary mortgage bond. As against this contention, the learned Judge accepted the argument that, whatever may have been the character of Dingiri Appu Naide's occupation between 9th August, 1927, and 15th August, 1927, his occupation after the latter date (on which P1 was registered) enured by operation of law to the benefit of the plaintiff and his co-purchaser under the later deed which prevailed over 1D1 by virtue of its prior registration.

The learned District Judge did not enjoy the advantage of hearing any argument upon the interesting question of law which was raised before us, and the trial proceeded upon the assumption that Dingiri Appu Naide's occupation after 15th August, 1927, would, if established effectively, repel the plea of prescription. Hence, presumably, the appellant's distorted version of what actually occurred during the crucial period.

We have not been able to discover any earlier precedents which precisely cover every aspect of the problem, but, after giving my best consideration to the arguments of learned Counsel, I have taken the view that Mr. Thiagalingam's argument should be upheld.

It is implicit in the trial Judge's findings of fact that no privity of contract with Dingiri Appu Naide had been directly established at any point of time between 9th August, 1927, and 30th November, 1939, *either* by the appellant claiming under 1D1 on the one hand *or* by the plaintiff and Uduma Lebbe claiming jointly under P1 on the other. Admittedly, Dingiri Appu Naide had entered into occupation of the land under a contractual

agreement with his original mortgagor Lebuna Veda, and his continued occupation must therefore be regarded as a precarious occupation for the benefit, during the initial period, of his immediate mortgagor—and thereafter, for the benefit of those to whom the mortgagor's contractual rights had from time to time been lawfully transmitted or ceded. In *Pabilis Appuhamy v. Peries* [1] Keuneman J. (Jayetileke J. concurring) held that " there is a *prima facie* presumption that the possession of a usufructuary mortgagee enures to the true owner, whether it be the person who actually gave him the usufructuary mortgage *or the successor of that person* ". With respect, I would adopt this formula subject to the qualification that Keuneman J. could not, in this context, have intended that the identity of the " true owner " could legitimately be determined by a consideration of any issue as to *title*. For the rights of the parties (and of their successors in interest) to a usufructuary mortgage flow from contract and not from ownership. Having regard *inter alia* to the rule laid down in section 116 of the Evidence Ordinance, I venture to suggest that the principle which Keuneman J. did intend to formulate would be more precisely stated thus —

> " That the possession of a usufructuary mortgagee must be presumed to enure to the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded. "

The law relating to the cession of contractual rights is summarised in *Wille's Principles of South African Law* [2].

Assuming, as we must do for the purposes of this appeal, that Kiriya was the sole heir of Lebuna Veda, it follows that Lebuna Veda's rights under the mortgage were on his death transmitted to Kiriya and were in turn lawfully ceded by Kiriya to the appellant upon the execution of the conveyance 1D1 of 9th August, 1927. *After that date, Kiriya enjoyed no further contractual rights capable of transmission or cession under the common law.*

Had the situation not been complicated by the supervening circumstance of the prior registration on 15th August, 1927, of the plaintiff's later deed P1, the continued occupation of Dingiri Appu Naide until 30th November, 1939, would, quite apart from "paper title", have effectively conferred on the appellant an unassailable title by prescription. *Pabilis Appuhamy v. Peries* (supra). The real difficulty in this case arises from the question whether, by reason of this circumstance, the impact of the provisions of the Registration of Documents Ordinance (Cap. 101) altered the character of the previous legal relationship subsisting between the appellant and Dingiri Appu Naide.

The substance of Mr. Thambiah's argument is that the prior registration of P 1 on 15th August, 1927, not only destroyed the "paper title" of the appellant under the earlier deed but has also automatically operated by what he described as " a statutory legal fiction " to divert to the plaintiff and Uduma Lebbe the benefit which the appellant had previously enjoyed as the lawful cessionary of the rights under the usufructuary mortgage bond in terms of which the mortgagee occupied the property. In

[1] *(1945) 46 N. L. R. 116.*

[2] *(1937 Ed.), page 176.*

other words, it is argued that the bare fact of registration had substituted the plaintiff and Uduma Lebbe as the true cessionaries of the contractual rights which Kiriya had already ceded in fact and in law to the appellant.

In examining this proposition, one must pay regard to the limited scope and effect of the provisions of section 7 of the Registration of Documents Ordinance (Cap. 101). It is clear enough that, in any competition arising between the appellant's claim to paper title under 1D1 and the plaintiff's claim to paper title under the subsequent conveyance from the same source, the latter must prevail by reason of its prior registration. On the other hand, a person who has enjoyed adverse possession (either personally or through an agent or licensee) of the property is not precluded from relying on such possession, *both before and after the date of registration of the opponent's deed*, for purposes of acquiring prescriptive title to the land., For, as Sampayo J. explains in *Appuhamy v. Goonetilleke* [1], " the benefit of prior registration is given to an instrument only against (another) instrument. *Such registration only affects titles based on the instruments*, and has nothing to do with titles acquired otherwise than upon such instruments. The title by prescription is acquired by acts of possession, and I fail to see that the registration of the deed by the owner against whom prescription is running affects the provisions of the Prescription Ordinance. The registration of a deed cannot be regarded as the interruption of a possession which as a matter of fact continues. Prescription is a mode of acquisition independent of any documentary title which the possessor may at the same time have and although the one may be defeated by the operation of the Registration Ordinance, the other remains unaffected ". Wood Renton C.J. took the same view in his separate judgment.

Mr. Thambiah has invited us to hold that the *ratio decidendi* of *Appuhamy v. Goonetilleke* (supra) is in conflict with an earlier ruling of the Privy Council in *McVity v. Tranouth* [2] on an appeal from the Supreme Court of Canada, and that the authority of the local decision as a precedent should therefore be reconsidered. In his treatise on *The Law of the Registration of Deeds in Ceylon, page 120*, as Mr. Thambiah points out, the late Mr. A. St. V. Jayewardene did suggest many years ago that " if the same question is raised again it will have to be considered whether the judgment of the Privy Council did not lay down the sounder and more correct view ".

It would be dangerous to regard the ruling in *McVity's case* (supra) as applicable to the present issue without first examining the extent to which the Canadian law of prescription and of registration of deeds corresponds to the systems obtaining in this country. In any event, Lord Macnaghten's judgment was concerned with an entirely different problem to that which had engaged the attention of Wood Renton C.J. and Sampayo J. in *Appuhamy's case*. In each case the impact of a statute relating to registration on a statute relating to prescription arose for the Court's decision, but is is important to remind ourselves that the word " prescription " can be used in two senses, " *acquisitive prescription* which is a method of acquiring ownership or other real rights in property, and *extinctive prescription* or limitation of actions which deprives a person of

[1] *(1915) 18 N. L. R. 469.* [2] *(1908) A. C. 60.*

his right to bring an action ". *Wille* (supra) *page 129*. *Appuhamy's case* deals with the acquisitive, and *MacVity's case* with the extinctive species of prescription, so that the analogy and the suggested conflict between the precedents disappear. I therefore regard the *ratio decidendi* in *Appuhamy's case* (supra) as binding upon us. The statutory fiction enacted by section 7 of the Registration of Documents Ordinance is strictly limited by the language of that enactment and has no bearing on questions relating to the acquisition of title under section 3 of the Prescription Ordinance. Prescriptive possession is based not on fiction but on reality.

The principle underlying the doctrine of prior registration under the Registration of Documents Ordinance has been very clearly explained by Clarence J. in *Silva v. Sarah Appuhamy* [1] and by Lascelles C.J. in *Kanapathypillai v. Mohamadutamby* [2]. At the date of the second conveyance the vendor has in truth nothing left in him to convey, "but *by the operation of the Ordinance the second conveyance overrides the earlier deed if registered before it*". The prior unregistered deed, as Lascelles C.J. explains, " is deemed void as against the party *claiming* an adverse interest under a subsequent registered deed for reliable consideration. The natural and inevitable consequence is that instruments which would otherwise have become inoperative to pass title are clothed with validity". In other words, the earlier transferee was the person who had in truth succeeded under the common law to the interests of the original owner, but section 7 of the Ordinance confers on the transferee under the later deed, by reason of its prior registration, the right to supplant the earlier transferee by virtue of a superior "paper title" created by statute—*a right which must, however, be "claimed" before the benefit of priority can take effect*. Should the assertion of that right be postponed until the earlier transferee (or someone claiming under him) has acquired a prescriptive title, the statutory protection would be rendered valueless. As my brother Gunasekara pointed out during the argument, the Ordinance provides machinery for the registration of *documents* and not of *title*. The combined effect of section 7 (1) and (4) makes it clear that registration *by itself* confers no validity on an instrument unless and until a claim is based upon it.

The legal title to the property which admittedly became vested in the appellant on 9th August, 1927, was not invalidated merely because P1 was duly registered six days later, it only *became liable to be invalidated if and when a claim to the benefit of prior registration was asserted against him by the plaintiff and his co-purchaser*. For the same reasons, I conclude that the subsisting legal relationship between Dingiri Appu Naide (as the usufructuary mortgagee occupying the property in that subordinate position by virtue of his contractual rights) and the appellant (as the cessionary of the corresponding rights of the original mortgagor under the contract) was not automatically severed by the mere registration of P1 in the appropriate books maintained under the Ordinance. The character of Dingiri Appu Naide's occupation remained unaltered for a period exceeding 10 years after 9th August, 1927, and it continued throughout that period to enure to the appellant's benefit because it was not interrupted at any stage either physically or in any of the methods recognised by the common law

[1] *(1883) Wendt 383 at page 384.* [2] *(1912) 15 N. L. R. 177 at 179.*

as sufficient to terminate a mutual relationship of that kind—such as, for instance, (*a*) the institution of legal proceedings culminating in a decree compelling Dingiri Appu Naide to recognise the plaintiff as the true owner claiming superior title to that of the appellant, or (*b*) an overt act by Dingiri Appu Naide repudiating his earlier position *vis a vis* the appellant on the ground that the title to the property had subsequently become vested in a stranger who claimed to be the true owner. Nothing of this nature occurred during the relevant period. On the contrary, the presumption that Dingiri Appu Naide's occupation enured to the benefit of the appellant was strengthened and, indeed confirmed when the appellant was admitted to possession in his own right after the bond was discharged in 1939. That was conduct which could only be construed in the circumstances as an acknowledgment by Dingiri Appu Naide of the relationship which the law had previously imputed to them.

I take the view that, for the reasons which I have set out, the appellant was entitled to succeed on the issue of prescription. The plaintiff's claim in so far as it was based on a superior "paper title" (created not so much by succession as by statute) was only asserted after it had already been defeated by the operation of section 3 of the Prescription Ordinance. Nor can his belated claim to ownership be legitimately regarded as entitling him retrospectively to the benefit of Dingiri Appu Naide's precarious occupation which had long since terminated. I would set aside the judgment under appeal and make order dismissing the plaintiff's action with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.