

1966 Present : H. N. G. Fernando, S.P.J., and Abeyesundere, J.

A. P. GUNASEKERA, Appellant, and R. A. LEWIS APPUHAMY,
Respondent

S. C. 123/1964—D. C. Gampaha, 9559/DT

Prescription—Donation—Reservation of life interest in donor—Subsequent transfer by donor's heirs—Prior registration of his deed by the transferee—Anterior exclusive possession by donor and donee—Rights of donee as against the subsequent transferee—Contractual character of donor's possession—Registration of Documents Ordinance, s. 7.

Where an owner of a land transfers it by gift to a person, reserving to himself a life interest, the donee becomes the true owner from the date of the gift. The donor's right of usufruct is, from that time, a contractual one arising from the contract of donation, and his possession enures to the benefit of the donee for the purpose of enabling the donee to acquire prescriptive title to the land as against a third party.

Where A gifts a land to B reserving to himself a right to possess a half-share of the land during his life time, his possession of the entirety of the land from the date of the gift enures to the benefit of B for purposes of prescription. If the deed of gift is unregistered and A's heirs subsequently transfer a portion of the land to C, who registers the deed of transfer, B can still claim prescriptive title to the land as against C, if the transfer to C was executed ten years after A and, after A's death, B had been in exclusive possession of the land.

APPEAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *Eric Amerasinghe* and *C. A. Amerasinghe*, for the defendant-appellant.

H. V. Perera, Q.C., with *F. A. Abeywardene*, for the plaintiff-respondent.

Cur. adv. vult.

October 22, 1966. H. N. G. FERNANDO, S.P.J.—

One Carolis, who was the owner of the land to which this action relates, gifted the land in 1947 to his son the Appellant. The gift was subject to the condition that Carolis was to possess half-share of the land during his life time. Carolis died in 1953. The learned Judge has held on the evidence that Carolis possessed the entirety of the land until then, and that the Appellant possessed the land thereafter. The transfer of 1947 to the Appellant was not registered.

In 1961, another son of Carolis, who had left 7 children in all, purchased from one of his sisters a one-seventh share of the land, and then transferred to the Plaintiff a two-seventh share. These deeds were duly registered, and the Plaintiff soon thereafter instituted this action for partition, claiming for himself a two-seventh share.

It was not disputed that the transfer to the Appellant was void as against the Plaintiff who claimed an adverse interest on the registered transfer to himself in 1961.

To meet this claim, the Appellant put forward a plea of prescription, which when properly understood was on the basis :—

- (a) that, from 1947, the possession of Carolis was that of an usufructuary and must enure to the benefit of the true owner, and was not adverse to the true owner ; and
- (b) that from the time of Carolis's death and until the time of the action, the Appellant had himself been in exclusive possession of the land.

The point at (a) above was rejected by the trial Judge on the ground that Carolis's right to possess was not a contractual one, and Mr. Perera has also relied on this ground in appeal. When an owner of land wishes both to transfer by gift the title to some other and to reserve to himself an interest for life, it can at first sight appear that the subject of the transfer is the dominium, less the right to possess for a period of unspecified duration, and that in that way the right of possession does not arise from contract, but is a right which the former owner continues to enjoy despite the contract of donation. To accept such a proposition is to recognise that there is a distinction between a case where a donor reserves the usufruct for himself from a case where, for instance, he reserves the usufruct for his wife or some other third party. In the latter case, the wife's right is purely contractual depending on an agreement between herself and the donee—and it seems to me that equally the donor's own right of continued possession in principle depends on agreement. Let me take also a case where a donor reserves to himself a right to possess the land for a specified period. At the end of that period, he will be under a contractual duty to yield up possession to the donee. If then the right to possess becomes terminated by operation of the contract, it seems clear that the right of possession itself arose from the same contract. The position would be different in principle only in a case where a person already holding an usufruct agrees to transfer his right at the end of a specified period.

I hold that Carolis's right of usufruct arose from the contract of donation. That being so, his possession was referable to that right and must enure to the benefit of the Appellant, who was acknowledged by the deed of donation to be the true owner of the land. The Appellant would be

entitled to that benefit even if there had been a reservation of a life interest to Carolis in the entirety of the land. *A fortiori* will the benefit enure when as here Carolis had an usufruct only in a half-share. Had the Judge not misdirected himself on this point, there was nothing in the evidence to counter the presumption which arose in favour of the Appellant.

But Mr. Perera advanced also another argument based on Section 7 of the Registration of Documents Ordinance. That Section he said declares (in the present context) that the donation to the Appellant "shall be void" as against the plaintiff, who claims an adverse interest on his duly registered transfer of 1961. The deed of donation is therefore void "for all relevant purposes". That being so, the Appellant cannot rely on any of the legal implications of the deed for any relevant purpose; therefore the Appellant cannot (as against the plaintiff) claim that the deed gave Carolis a legal right of possession and that Carolis possessed the land in virtue of that right; it must follow that the Appellant cannot have the benefit of the implication of law that Carolis's possession was his possession.

Mr. Perera's argument has in my opinion been answered in the judgment in *Banda v. Alitamby*¹. The land in that case had been subject to an usufructuary mortgage, and the mortgagee was in possession. On 9th August 1927, the land was sold by A (the owner) to B; this transfer was not registered until 22nd August 1927. But on the 10th August A sold the land to X, who registered his deed on 15th August. In terms of Section 7, X's deed gained priority over that of B by prior registration. The usufructuary mortgagee nevertheless continued in possession for well over ten years from 1927, and the heirs of X only claimed the land after that period had expired. In discussing the effect of Section 7, Gratiaen, J., made the following observations:—

"It is clear enough that, in any competition arising between the appellant's claim to paper title under 1 D 1 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* (18 N. L. R. 469), '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.'

¹ (1952) 54 N. L. R. 249.

“ The legal title to 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 relationships 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 mentioned 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 one of the methods recognised by the common law as sufficient to terminate a mutual relationship of that kind. ”

In describing B (the appellant in that case) as “ the cessionary of the corresponding rights of the original mortgagor under the contract ”, Gratiaen J. clearly thought that the unregistered transfer to B was effective in law to create a contractual relationship between B and the usufructuary mortgagee. The transfer could not have been thus effective if (as is argued by Mr. Perera) the transfer became void “ for all relevant purposes ” as against X. Before the transfer, the possession of the usufructuary had been in law the possession of the owner-mortgagor. But possession after the transfer was in law the possession of the transferee because, in the contractual relationship between the usufructuary and mortgagor the transferee took the place of the mortgagor. This substitution was a consequence of the transfer, which to that extent could be relied on, despite the operation of Section 7.

On a parity of reasoning, the Appellant in the present case, although he cannot rely on the donation of 1947 to assert title as against the plaintiff, can nevertheless rely on the donation as establishing, between himself and Carolis, the contractual relationship of owner and usufructuary. Since the Appellant himself possessed after the death of Carolis in 1953, that possession together with the possession of Carolis from 1947 (which must enure to his benefit) resulted in the Appellant acquiring a prescriptive title before the plaintiff claimed his rights by virtue of priority of registration.

Mr. Perera also argued that if an unregistered transfer is not regarded, as against a subsequent registered instrument, as void "for all relevant purposes", the benefit accruing from prior registration could be quite valueless. He took an example like the following:—A has possessed a land for nine years and some months prior to 1st January 1950; on that day, he transfers the land to B by an instrument which is not registered; again, on 1st January 1951, A transfers to C, who promptly registers his deed and claims the land from B in an action. If in that action the transfer of 1950 to B is not regarded as void for all relevant purposes, then (it was argued) B can claim a decree on the ground of prescription by adding his possession of one year to A's earlier possession of nine plus years. It seems to me however that in such a case B's attempt is to rely on the unregistered transfer *as being a transfer to him of A's title*, and consequently to rely on A's earlier possession as that of *his predecessor in title*. That attempt must fail because Section 7 prevents B from asserting against C that he has or had title under the unregistered instrument. But in a case like the present one, or that decided by Gratiaen J., the unregistered instrument is not relied on as an assertion of the devolution of title; it is relied on only to establish a contractual relationship by virtue of which actual possession, *after* an unregistered transfer, enures to the benefit of a party to the contract.

The correctness of this view is borne out by a consideration of another case, different in fact, but not different in principle. Suppose B has no title at all, but purports to transfer the usufruct of the land to C for twelve years by an unregistered instrument, and that C does possess the land for twelve years. If X after that obtains a transfer from the true owner, B can meet X's claim by relying on C's possession as usufructuary under him. The facts of the present case differ only in that the unregistered instrument, which created the contract of usufruct, in addition purported also to convey Carolis's title to the Appellant. While the unregistered instrument is void *qua* conveyance, it can nevertheless be relied upon as establishing the contractual relationship.

The learned trial Judge erred in my opinion in holding that the possession of Carolis did not enure to the benefit of the Appellant. On the ground that the Appellant acquired a prescriptive title before the plaintiff made his claim, I would allow this appeal and dismiss the plaintiff's action with costs in both Courts.

ABEYESUNDEBE, J.—I agree.

Appeal allowed.