1929

Present : Fisher C.J. and Garvin J.

GUNASEKERE *v.* RODRIGO *et al.*

249—D. C. Colombo, 24,167.

Prescription—Right of way over two lots—Extinction of portion by partition decree—Determination of right of way—Sale in execution in favour of Crown—The doctrine of relating back—Civil Procedure Code, s. 289.

Plaintiff claimed a right of way by prescription over two lots of land, C and B, belonging to the defendants. After adverse use for over thirty years a partition decree was entered in 1909 in respect of lot C without a reservation of the right of way. In 1918 lot B was sold in execution and purchased by the Crown. The Fiscal's conveyance was not issued in favour of the Crown till 1920.

Held, that the entire right of way was determined by the partition decree entered in respect of lot C, but that the plaintiff had, since the decree, re-acquired a right of way over C by prescription.

Held further, that the prescriptive title maturing in favour of the plaintiff since 1909 in respect of lot B was not extinguished by the conveyance in favour of the Crown.

Per GARVIN J.—The fiction that upon the confirmation of the sale and the execution of the Fiscal's conveyance the title is deemed to vest from the date of sale has for its object the protection of the purchaser at a sale in execution against the consequences of alienation of the property by the judgment-debtor in the interval. It does not affect the rights of persons claiming adversely to the judgment-debtor nor interfere with the operation of the law of prescription.

APPEAL from a judgment of the District Judge of Colombo. The facts are summarized in the headnote and are fully stated in the judgment of Garvin J.

H. V. Perera (with *Rajapakse*), for plaintiff, appellant.

Keuneman (with *Kocy* and *Canakaratne*), for first defendant, respondent.

February 22, 1929. FISHER C.J.—

I have had the advantage of reading the judgment of my brother Garvin, with which I agree.

I think it very probable that had the learned Judge taken the date of the decree in the partition action, namely, July 12, 1909, as the crucial date for consideration instead of the date of the certificate, March 24, 1910, he would have come to a decision in favour of the

plaintiff. In view of the fact that the right of way claimed is based on a grant and that it was in fact used for a period of something over forty years, and, to use the words of the learned Judge, " that this path that is claimed was used up till 1919 at the latest," I think there should have been very definite and specific evidence to show that the user was put an end to prior to July 12, 1919. In my opinion there was no such evidence, and I, therefore, agree that judgment should be entered as proposed by my brother Garvin.

GARVIN J.—

This was a claim for a declaration that the plaintiff was entitled to a right of way from his premises marked " A " in the plan " X " filed of record along the line shown on that plan over the lots marked C and B to the Alutmawata road.

The lots A, B, and C shown on the plan were originally held and possessed by the common predecessor in title of those who now claim these three lots.

This person conveyed the lot A to a predecessor of the present plaintiff reserving to the transferee a right of way over the rest of his premises to the Alutmawata road.

The learned District Judge has found, and there is ample material to support his finding, that subject to slight deviations which were doubtless made for the accommodation of the owners of lots B and C the owners for the time being of lot A have claimed and enjoyed a right of passage to the Alutmawata road for very many years.

It would seem that in the year 1909 there was a partition decree entered in respect of the southern portion of the lot C. Decree for sale was entered on July 12, 1909. There was no reservation of a right of way. It is, therefore, contended that the right of way claimed by the owners of lot A to pass over the lots B and C to Alutmawata road—a right which I shall hereafter refer to as the right of way A, C, B—must be deemed to have been determined as at that date.

The learned District Judge took the view that the crucial date was not the date of the decree but the date of the issue of the certificate of sale, that is, the 24th March, 1910. In this I think the learned District Judge was wrong. What is final and conclusive is the decree, and Counsel for the respondent did not dispute that the crucial date was the date of the decree. For the rest it seems to me that the learned District Judge was right in holding that inasmuch as there was a determination of a right of way over C the entire right of way A, C, B was necessarily determined.

It remains, therefore, to consider whether the plaintiff and his predecessors can claim to have acquired this right of way by adverse possession for the necessary period.

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Now the learned District Judge held that this long standing user continued uninterruptedly up to the year 1919. He did not however, proceed to fix the particular point of time in that year when the user ceased, if indeed it did cease. The reason for this is evident. Having taken the view that the termination of the right must be deemed to have taken place on the date of the issue of the certificate of sale, that is to say, from the 24th March, 1910, it was a matter of no importance at what date in the year 1919 possession came to an end, so long as it did come to an end in that year. But since the learned District Judge was wrong in his view as to the crucial date, and that this must be taken to be the 12th day of July, 1909, it becomes necessary to inquire whether the user which continued in fact uninterruptedly up to 1919 was terminated prior to the 12th day of July of that year, if indeed it be the fact that it came to an end in that year. It seems fair to presume that the user of the right of way A, C, B, the origin of which is traceable to the grant of 1860, and which continued uninterruptedly till some time in 1919, should be deemed to have continued as the plaintiff says unless there is clear evidence of some circumstance by which this user was determined.

It is evident that the learned District Judge was influenced in his decision by the admitted fact of the purchase by the Crown at a Fiscal's sale held in the year 1918 and the evidence of the Head Overseer, Wickremesinghe.

In point of fact the Crown did not obtain a Fiscal's conveyance till May, 1920, and there is nothing to fix the date upon which the Crown entered into possession of these premises except the somewhat general statement of this witness that he visited it for the first time in the year 1919.

Inasmuch as the learned District Judge has accepted Wickremesinghe's evidence, there is no doubt material which justifies the conclusion that the Crown entered into possession in the year 1919, but as a foundation for a finding that that entry took place prior to July, 1919, it is useless.

There is, therefore, no evidence on this record to rebut the evidence of the plaintiff's witnesses that the possession in fact continued thereafter, at least till the first defendant entered into possession.

Possession by the Crown commencing on some date in 1919 is not necessarily inconsistent with the claim of the plaintiff that the user continued thereafter.

It has been urged that the evidence of Wickremesinghe shows that after the Crown had entered into possession the user of this right of way became impossible. This witness admits that he only visited this land about once a month, and then remained on it only

for about ten minutes, and that his duties were limited only to the buildings. He was compelled to admit that there were gaps in the fences, and though there are passages in his evidence which seem to suggest that he did not think a user of the right of way claimed possible the impression left on his mind, having regard to the very limited opportunities for observation he possessed, is not, in my opinion, a sufficient basis for a decision that the user which continued uninterruptedly for so long was suddenly brought to a standstill by such repairs as he says were effected to the fence. It is certainly no basis for the conclusion that even if repairs of such a character were effected they were effected prior to July, 1919.

The evidence of one of the plaintiff's own witnesses, the witness Ferdinands, indicates very strongly that the wire fences which have now rendered the user of the way A, C, B impossible were erected after this action was brought. While he did not himself obtain access to the house of the plaintiff over the lots B and C, he says there was nothing in the condition of those lots to have prevented his crossing them if he wished.

The evidence of the first defendant, even if it be accepted in its entirety, does not prove any definite act by which the user was brought to a termination at any date prior to October, 1919.

Though a careful study of the evidence given both for the plaintiff and the defendant discloses ample grounds for entertaining a doubt as to the soundness of the Judge's findings that the user of this right of way terminated some time in the year 1919, it is unnecessary for me to express any dissent therefrom, or to consider the matter in further detail, for the reason that the evidence certainly does not justify the conclusion that if that user did terminate in the year 1919, it terminated at any time prior to July 12, 1919.

There is, therefore, in my judgment ample evidence to prove user by the plaintiff and his predecessors for a period of over ten years from the date of the decree in the partition action by which their right was legally determined, though in point of fact its user and enjoyment continued without any interruption.

To this right of way of which he was deprived as an effect of a decree for sale in a partition action of the pendency of which he was unaware, the plaintiff claims to have acquired a prescriptive title. It is sought, however, once again to deprive him of this right of which he and his predecessors had been in enjoyment for over half a century by recourse to a legal fiction. Lot B once belonged to one Nicholas and was sold in execution against him in the year 1918. At that sale the Crown was the highest bidder, but no conveyance in favour of the Crown was issued till May 30, 1920. This conveyance, it is urged, dates back to the date of the sale in 1918, and upon this is based the further argument that the Crown having acquired a title before the expiry of ten years from July 12, 1909,

the plaintiff can only succeed by proof of (*a*) thirty-three years' adverse possession from 1909 or proof of ten years' adverse possession from December 7, 1925, the date on which the Crown sold to Peter, the defendant's predecessor. This is impossible, and the plaintiff must fail if the defendant's contention is to be admitted.

This argument rests on the following words in section 289 of the Civil Procedure Code :—

> " But if the sale is confirmed by the Court and the conveyance is executed in pursuance of the sale the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale."

The opening paragraph of the same section states specifically that " The right and title of the judgment-debtor or of any person holding under him or deriving through him is not divested by the sale until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance." This is in accordance with the general law. Nicholas the judgment-debtor, was not therefore divested of title to these premises by the sale and was the owner thereof up to July 12, 1919, when the plaintiff as a fact completed ten years' adverse and uninterrupted possession, which by reason of the provisions of section 3 of Ordinance No. 22 of 1871 gave him a prescriptive title to the right of way A, C, B. The title thus acquired is independent of and adverse to the judgment-debtor and those claiming under or through him.

There is no indication in section 289, or of any of the series of sections of which it is one, of any intention to affect the rights of persons other than the judgment-debtor and those claiming under him or deriving title through him. It is in relation to the right and title of such persons, section 289, says that it is not divested by the sale but that upon confirmation by Court and the execution of the Fiscal's conveyance the grantee is deemed to be vested with the right and title of the judgment-debtor from the time of the sale. This fiction that upon confirmation of sale and the execution of the Fiscal's conveyance the title is deemed to vest from the date of the sale has for its object the protection of the purchaser at a sale in execution against the consequences of alienation of the property by the judgment-debtor in the interval, even as a judgment-creditor is protected from the consequences of private alienations of property under seizure, from the date of seizure till it is sold, by section 238 of the Code. It is inconceivable that it was intended or even contemplated that the provisions of section 289 should or would affect the operation of Ordinance No. 22 of 1871. Where the purchaser at a Fiscal's sale is any person other than the Crown, in no view of the section can the ordinary operation of Ordinance No. 22 of 1871 be affected. It is urged however that when the Crown is the purchaser it is a necessary though unintentional consequence of this fiction of dating back the vesting of title that a prescriptive

title which has matured in the interval is extinguished and all persons concerned placed in the respective positions occupied by them at the date of the sale. But, as has already been observed, there is no indication of any intention to affect the rights of persons claiming adversely to the judgment-debtor or to interfere with the operation of the law relating to prescription. In the absence of language which compels me to do so, I am not prepared to give to a fiction any wider operation or effect than that which was intended. The purpose in this case is manifest. The plaintiff is in my opinion entitled to the benefit of the prescriptive title he has acquired.

Finally, Counsel for the respondent pleaded that there had been a misjoinder. The plaintiff sued the first defendant, who is the owner of lot B as well as the owner of lot C, as second defendant. There is certainly no misjoinder disclosed in the plaint, inasmuch as the two defendants are alleged to have acted jointly in obstructing the plaintiff's enjoyment of the right of way claimed by him. Each defendant filed an answer denying the right of the plaintiff to the servitude claimed by him.

The second defendant at an early stage of the proceeding consented to judgment, and the trial which followed was between the plaintiff and the first defendant. The plea is based on the finding of the District Judge that the plaintiff's enjoyment of the right of way terminated in 1919. This, as has been observed, is a conclusion arrived at in a proceeding between the plaintiff and the first defendant after the second defendant had admitted the plaintiff's claim and consented to judgment.

Under the circumstances, even assuming that there was a misjoinder at the stage of institution, it is not a plea which should be permitted to defeat the action at this stage.

The claim of the right of way A, C, B, in so far as it related to B, depended upon the subsistence of the right in respect of C. The right was one and indivisible. If it was successfully attacked in respect of C, it was extinguished as a whole. Indeed, an important part of the defence set up by the first defendant, the owner of B, was that the right had been terminated in so far as it involved a passage over C and was consequently entirely extinguished. And yet it is contended that the joinder of the owner of C is a misjoinder.

While reserving my opinion as to whether or not there has been a misjoinder, there can, I think, be no doubt that this is a case in which the presence of the second defendant was both desirable and necessary " to enable the Court to deal effectually and completely to adjudicate upon and settle all the questions involved in the action."

For these reasons the judgment of the District Court must be set aside and judgment entered for plaintiff as against first defendant as prayed for, with costs in both Courts.

Appeal allowed.