*Privy Council Appeal No. 9 of 1937*

**I.L.M. Cadija Umma and another** - - - -

*v.*

**S. Don Manis Appu** - - - - - -

**Same** - - - - - - - -

*v.*

**S. Don Manis Appu and others** - - - -

(*Consolidated Appeals*)

FROM

## THE SUPREME COURT OF THE ISLAND OF CEYLON

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER, 1938.

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*Present at the Hearing*:

LORD ATKIN.
LORD MACMILLAN.
LORD PORTER.
SIR LANCELOT SANDERSON.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

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The appellants on 16th and 25th April, 1930, brought in the District Court of Colombo two actions to recover possession of two contiguous plots of land measuring in the aggregate 2 acres and 38 perches and forming a triangular area to the north of land which is admittedly theirs. The disputed land is known as Maha Ettambagaha Kumbura. In the first suit they impleaded four defendants as being in wrongful possession, S. Don Manis Appu being the first defendant. In the second suit he was the sole defendant. The District Judge dismissed both actions on 23rd March, 1933, finding against the appellants on the issue as to title and also on the question whether the first defendant had acquired a prescriptive title under Ordinance XXII of 1871. The Supreme Court on 22nd January, 1936, affirmed the decrees of the District Judge. Without pronouncing upon the issue as to the appellants' title the learned judges of the Supreme Court proceeded solely upon the ground of prescription under the Ordinance. The defendants have not appeared at the hearing of this appeal by the Board.

The two acres (or thereabouts) now in dispute are said by the District Judge to be to a great extent swamp on which lotus grows: he states that on the portion which is not

swampy there is a little wild grass, and buildings which have been put up from time to time. Akbar J. (with whose judgment Poyser J. agreed) says that the fact appears to be that the portion in dispute was at one time liable to be flooded and water-logged, but that now, owing to a bund built by the Government, the floods do not seem to affect the portion in dispute.

Section 3 of Ordinance No. XXII of 1871, so far as applicable to this case, is in the following terms:

> "Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, 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) for ten years previous to the bringing of such action, shall entitle the Defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs. Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Both Courts are in agreement on certain important facts affecting the applicability of this section. In particular both accept the evidence of a witness called Podi Singho who deposed that from 1911 he had grass from the disputed land cut by his own servants and paid the first defendant's mother (Getho Hamy) for it at the rate of ten cents for a bag of grass. This, according to his statements, continued for five or six years from 1911 until Getho Hamy was taken to the leper asylum; and thereafter he paid the money to the first defendant until 1930 or thereabouts when the land began to be more occupied and there was no grass to be cut. Both Courts have likewise accepted as true the evidence of the second defendant Abraham that for the last ten or eleven years (that is from 1922-3) he had been living on the disputed land with the permission of Getho Hamy and put up a house for himself thereon at a ground rent paid to her and afterwards to the first defendant. This witness further stated that besides his own there are eight houses on the land in suit of which three were put up by himself at Getho Hamy's request about 1925 and three by the first defendant about 1929-30. The District Judge has expressly accepted these statements as true.

On these facts the Supreme Court considered that it was impossible to say that the District Judge had come to a wrong conclusion in holding that the first defendant and his

mother had been in adverse possession for the period required by law. It has been argued before their Lordships that as the buildings are not shown to have come into existence before 1922 or 1923 the ten years before action are not covered by this part of the evidence, which to satisfy the Ordinance would require to extend so far back as 1920. Also that the mere taking of wild grass being conduct which an owner of swampy land would not necessarily be minded to resist is an insufficient foundation for a finding of possession in the earlier years, especially as grass cannot be cut all the year round but only (as the second defendant stated) for six or eight months according to the weather. Mr. de Silva for the appellants has sought very reasonably to lay stress upon the facts that his clients appear to have paid municipal rates upon the disputed land as part of their total holding until 1929, and that in 1912 they exercised their right of occupation in the disputed land by obtaining a consent decree against a third party in ejectment.

While recognising that the sufficiency of the defendants' evidence of possession for the first two or three years after 1920 is debateable, their Lordships are not of opinion that in this case the concurrent findings of the Courts below should be departed from. The evidence as to the cutting of grass is not merely that the first defendant and his mother were allowed to take some grass, but that they were allowed to sell it to the overseer in charge of the cattle segregation camp; and that this was continued over a number of years and at a time when the grass was the only, or at least the main, advantage accruing from the land. The evidence as to buildings put upon the land after 1923 is, if believed, very strong to show possession and is not without a bearing upon the earlier years as interpreting the acts of the first defendant and his mother with respect to the grass, even if these might otherwise be thought to be ambiguous.

Taking the evidence fairly and as a whole, their Lordships see no reason to think that the Courts in Ceylon have misinterpreted it: indeed the question of the value of the taking of the grass as evidence of possession is one on which the opinion of the local courts is entitled to some special weight owing to their familiarity with the conditions of life and the habits and ideas of the people. It cannot be held that the Courts in Ceylon were obliged to regard the evidence as establishing no more, in respect of the earlier years, than a permissive taking of grass by or on behalf of the first defendant and his mother. The finding of possession for ten years before suit must therefore be upheld. It follows, in their Lordships' opinion, that the appellants' suit must fail, since the character of the possession held by the first defendant and his mother was clearly adverse to the appellants and satisfies section 3 of the Ordinance.

Mr. de Silva contended, however, that the section should be construed as introducing the requirement known to the Roman law as *justus titulus* or *justa causa*—the words "by a title adverse to or independent of that of the claimant or plaintiff" being construed as requiring the defendant to

prove that his possession was on the footing of some title, however imperfect, and not wholly without right. Learned counsel had, however, to admit that the law of Ceylon recognised no such doctrine at the date of the passing of the Ordinance, and their Lordships find it impossible to interpret the section as introducing it.

This opinion does not rest solely upon the words enclosed in brackets by way of explanation or definition—" (that is to say, a possession . . . inferred) " but is supported also by the absence of any words calculated to define or assert the special doctrine of *justa causa*. There is a passage in the judgment of the Board delivered by Lord Macnaghten in *Corea* v. *Appuhamy* (L.R. [1912] A.C. 230) which supports (without discussion of the matter) the opinion that the parenthetical clause above mentioned is intended as an explanation of the words " undisturbed and uninterrupted possession " and not as a statement of what is meant by the full phrase previously employed " possession . . . by a title adverse to or independent of that of the claimant or plaintiff ". It appears that the late Mr. Justice Walter Pereira in his work on the " Laws of Ceylon " suggested as a possible view that the words in parenthesis were " intended to be explanatory of the expression ' possession ' only "; but that his own opinion was that they " do not contain an illustration but are by themselves a full and self-contained definition of the expression ' possession by a title adverse to and independent of that of others ' " [2 Ed., pp. 388, 390]. Departing widely from this learned author's opinion, Bertram C.J. (in *Tillekeratne* v. *Bastian,* 1918, 21 Ceylon New Law Reports 12, 17) relying on Lord Macnaghten's language in *Corea's* case, held that " the parenthesis has no bearing on the meaning of the words ' adverse title ': it may henceforth be left out of account in the discussion of the question ". Their Lordships cannot accept this dictum of the learned Chief Justice. The section in its second half discloses the standpoint of the draughtsman by a phrase to which Lord Macnaghten's words may perhaps be attributed—" proof of such undisturbed and uninterrupted possession as hereinbefore explained by such plaintiff . . . shall entitle such plaintiff . . . to a decree in his favour with costs ". The explanation thus pointed to includes not merely the requirement of adverse or independent title but also the period of ten years. The words " undisturbed and uninterrupted " are, however, repeated: indeed the parenthetical clause does not seem to contain any direct reference to acts other than acts of the possessor having a bearing upon the question of an acknowledgement by him. Their Lordships are unable to doubt that the purpose—perhaps the somewhat ambitious purpose—of the parenthetical clause is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription. While, however, the clause is no mere illustration, it is not so completely successful an attempt to achieve the " full and self-contained definition " as might be wished. A phrase having been introduced and then defined, the definition *prima facie* must entirely determine the application of

the phrase; but the definition must itself be interpreted before it is applied, and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment. Thus in a case where A's possession has been on behalf of B or has been the possession of B (whether by reason of agency or co-ownership) it seems impossible to apply this definition clause as between B and A so as to defeat the rights of B. It cannot be applied to defeat the rights of a person in possession. Under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer is a matter which need not here be examined. Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea's* case.

Their Lordships will humbly advise His Majesty that this consolidated appeal fails and should be dismissed. The respondents not having appeared there will be no order as to costs.

(13548—2) Wt. 8168—30 110 12/38 P. St. G. 338

In the Privy Council

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I.L.M. CADIJA UMMA AND ANOTHER

*v.*

S. DON MANIS APPU

SAME

*v.*

S. DON MANIS APPU AND OTHERS

*Consolidated Appeals*

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