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YAKUB ALI AND OTHERS

v.

RAM SINGH AND OTHERS

B [SUPREME COURT, 1967 (Mills-Owens C.J.), 24th October 1966, 25th, 26th
January, 2nd February, 6th April 1967]

Civil Jurisdiction

C Land—prescription—claim by co-owners to title by adverse possession against remaining
co-owners—undivided interests—absence of positive acts of dispossession—equivocal
nature of possession relied upon—Real Property Limitation Act 1833 (3 & 4 Will.4, c.27)
(Imperial) s.12—Real Property Limitation Act 1874 (37 & 38 Vict., c.57)—Supreme
Court Ordinance (Cap. 4) s.35—Land (Transfer and Registration) Ordinance (Cap. 136)
ss.10, 29, 33, 34.

D Prescription—claim by co-owners against remaining co-owners—no act of dispossession
—equivocal nature of possession relied upon—Real Property Limitation Act 1833 (3 &
4 Will.4, c.27) (Imperial) s.12—Real Property Limitation Act 1874 (37 & 38 Vict., c.57)
(Imperial)—Supreme Court Ordinance (Cap. 4) s.35—Land (Transfer and Registration)
Ordinance (Cap. 136) ss.10, 29, 33, 34.

E The plaintiffs claimed to have acquired (by adverse possession for up-
wards of twelve years) a prescriptive title to freehold land comprising
the greater portion of a larger whole, the title to which was vested as to
an undivided one quarter share in the plaintiffs and as to the other un-
divided three quarters share in the defendants. The defendants, or their
predecessors in title, had occupied the small portion of the area (which
was not included in the plaintiffs' claim) for the purposes of a store, and
at different times had exercised through various persons acts of apparent
proprietaryship over portions of the area claimed in the proceedings. The
first plaintiff occupied a house on the portion claimed, but the territorial
limits of the areas of the land said to have been used by him for cultivation
or grazing cattle were, on the evidence, entirely uncertain; furthermore
F the first plaintiff was an employee for many years at the defendants'
store.

G *Held:* The evidence showed no positive act of dispossession by the
plaintiffs; the user by the first plaintiff was equivocal in its nature and
not a continuous and exclusive possession, for the statutory period, of
the area claimed. The claim could not succeed.

Semble: Uncertainty as to the territorial limits of the area occupied
appears of itself to be fatal to a claim to title by adverse possession.

H Cases referred to: *Glyn v. Howell* [1909] 1 Ch.666; 100 L.T.324; *San-
ders v. Sanders* (1881) 19 Ch.D.373; 45 L.T. 637; *Lee Bow Yiu v. Patel*
(1957) 5 F.L.R.62; *West Bank Estates Ltd. v. Arthur* [1967] A.C.665;
[1966] 3 W.L.R.750.

Action in the Supreme Court claiming a prescriptive title to freehold
land.

H. A. L. Marquardt-Gray and M. A. Maqbool for the plaintiffs.

R. L. Munro and B. March for the defendants. A

The facts are sufficiently set out in the judgment.

MILLS-OWENS C.J. [6th April 1967]—

The plaintiffs claim to have acquired a prescriptive title to an area of land comprising 15 acres. This land forms part of a larger area known as "Yadra Yawa" in the District of Rewa. "Yadra Yawa" originally comprised some 19 acres and was the subject of Crown Grant No. 219. Due to erosion by adjacent waters the 19 acres has now been reduced to 16 acres and 19 perches, according to a survey plan (Ex. C) prepared on behalf of the plaintiffs and put in as an agreed document. This plan, prepared for the purpose of these proceedings, subdivides the area of 16 acres 19 perches into two lots, namely the area claimed which is marked as Lot 1, and the remainder, 1 acre 19 perches, which is marked as Lot 2. The whole area, the 16 acres 19 perches, is bounded on the west by an old fence or hedge; on the north, east and south it is bounded by a river or creek. On the 1 acre 19 perches, namely Lot 2, is a Chinese shop or store, with its outbuildings, known as the Wing Sun Wah store. Lot 2, according to the plan, forms a square of land set into the 16 acres 19 perches on its southern boundary; the river or creek forming the southern boundary of the square and the remaining boundaries of the square being wholly within the area of 16 acres 19 perches. B
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The case for the plaintiffs is that since 1951 they have occupied Lot 1, the 15 acres, exclusively and without payment of rent or other acknowledgment of title and have therefore acquired a title by adverse possession extinguishing the title of the defendants. The plaintiffs are themselves registered proprietors of an undivided one-fourth share in the whole area (Lots 1 and 2); the defendants being the registered proprietors of the remaining three-fourths. Thus the plaintiffs are claiming against their co-owners. It is agreed that the statutory prescriptive period is 12 years under the (Eng.) Real Property Limitation Act 1833 as amended by the Act of 1874, which enactments are in force in Fiji by virtue of section 35 of the Supreme Court Ordinance (Cap. 4). Under section 12 of the Act of 1833 it is possible for a co-owner to acquire a prescriptive title against his co-owners without having, as formerly at common law, to prove an ouster. The question arising in the case is whether the plaintiffs prove exclusive and continuous possession for the statutory period. E
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It is agreed that the Crown grant was of a freehold title. So far as the documentary exhibits extend, the registered title was dealt with as follows: On the 7th May 1949 Certificate of Title No. 7485 was issued to one Fong Kim Sin denoting his proprietorship of an undivided one-half share in the land "Yadra Yawa", then comprising over 19 acres. On the 11th July 1951 Certificate of Title No. 7805 was issued to Fong Kim Sin denoting his proprietorship of an undivided one-fourth share in the same land. By transfers registered in July 1965 these undivided shares were transferred first to one Joe Sang and then to the defendants. On the 4th September 1951 Certificate of Title No. 7825 was issued to the plaintiffs denoting their proprietorship of the remaining undivided one-fourth share in the same land, "Yadra Yawa". G
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Earlier there had been a lease (Ex. D) in favour of the plaintiffs' father Makbul (otherwise known as Maqbool). It was dated the 19th October 1939 and purported to demise "15 acres situate at Yadra Yawa" to Maqbool for the term of 10 years from the 1st January 1940 at a rent of £15 per annum, with a right of renewal. The lease was never registered but that appears to be immaterial for the purposes of this case. Maqbool entered on the land and occupied it until his sons, the plaintiffs, acquired their one-fourth share in July 1951 shortly after the expiry of the lease. Maqbool appears to be mistaken in saying that he exercised the right of renewal granted by that lease; no dispute arises as to that. He says that the Chinese store was erected some two years or so after the grant of the lease. It is at least clear on the evidence that the store had been in existence for some years prior to the acquisition by the plaintiffs of their one-fourth share. Maqbool says, and I see no reason to think otherwise, that when he entered on the land in 1940 it was 'bush' and that he made some clearance of the bush, formed a track across the land (from approximately the centre of the eastern boundary to the Chinese store), and erected the house which was occupied first by himself and then by his son, the first plaintiff, who still lives there. That house is situate at approximately the central point of the land. The track appears to have served a dual purpose, to the present day, in enabling the plaintiffs and their father before them to proceed to the creek and thence over land owned by Fijians to the neighbouring township of Nausori; in return the Fijians of the neighbourhood use the track to go from their land on the other side of the creek across the land in dispute to the Chinese store. Maqbool says he cultivated the land but the extent of his cultivation, in terms of territorial limits, remains uncertain. It has by no means been proved that he cultivated, or otherwise farmed, the whole or indeed any substantial part of the area leased to him.

Maqbool also says that a certain house formerly erected on the land, referred to as Ben's house, was erected by him and let by him to Ben at a rent. Ben was Ben Chang, who until his death in 1951 was a partner in the Wing Sun Wah firm (the proprietors of the Chinese store). Whether or not rent was paid to Maqbool in respect of this house prior to Ben's death in 1951 appears to be immaterial. Originally, there can be little doubt, Ben's house was within the boundaries of Lot 1, not Lot 2. It is common ground that the house, a wood and iron structure, was moved to a new position at some time before Ben's death and was ultimately sold (as a chattel) in 1957 or 1958 to one Ratu Emosi who demolished it. It is also clear that, having been moved to its new position and having been vacant since Ben's death, it was, in the last year or so before it was demolished, used as living quarters by Government officers concerned with the eradication of the coconut pest in the area. The significance of the evidence regarding Ben's house is that if when it was moved it was re-erected within the boundaries of Lot 1, and if subsequently the Government officers occupied it without the permission of the plaintiffs, that might be a point against the plaintiffs' claim to have been in continuous and exclusive possession of Lot 1 since 1951. In my view of the evidence it is established that Ben's house was re-erected within the boundaries of Lot 1. Fong Kim Sin was not called as a witness and I have no direct evidence that the occupation was by his permission. No presumption either way appears to arise. In my view, the plaintiffs have not proved, by credible evidence, that the occupation was by their permission.

Another important feature of the evidence concerns the erection of a fence in 1957 or 1958. This fence was erected in a line commencing at the junction of the northern and eastern boundaries of Lot 2, proceeding across Lot 1 to a point on the eastern boundary of Lot 1. It enclosed an area which has been described as between one and two acres of Lot 1, and it is common ground that it was so erected (although the precise line of the fence may not be agreed) for the purpose of enabling one Fong Jack Yuen, an employee at the Chinese store, to graze cattle for his own domestic purposes. It appears to be accepted that at that time the proprietor of the business at the store was the plaintiffs' then co-owner Fong Kim Sin. On the evidence I find that the area thus enclosed was approximately 2 acres of Lot 1. The period of user of this area of approx. 2 acres by Fong Jack Yuen is a point in dispute; on the evidence I find that his user thereof extended to a period of about 2 years. The question is whether such user was by permission of the plaintiffs. I do not accept the evidence of the first plaintiff that the fence was erected with his prior authority. At most, as I find, there was some discussion between him and Fong Jack Yuen during the course of the erection of the fence as to the line it should take. This I find on the evidence of the witness Ratu Timoci, a reliable witness in my opinion, who was the contractor employed by Fong Jack Yuen to do the work. On the evidence as a whole I accept that the fence was erected on Fong Jack Yuen's instructions and without prior consultation with or permission of the plaintiffs and that Fong's occupation of the approximate area of 2 acres was not by the authority of or with the permission of the plaintiffs. As it appears to me, Fong's occupation must be attributed to his employment and therefore be taken as possession by Fong Kim Sin. Such possession was clearly not a merely formal entry within the meaning of section 10 of the Act of 1833.

The nature of the plaintiffs' user of the land since 1951 is nebulous. No doubt the first plaintiff did follow his father in carrying on some cultivation of, and grazing of cattle on, some part of parts of Lot 1 after the father's lease expired and upon the acquisition by the plaintiffs of their one-fourth share. But the territorial limits of the part or parts thus occupied by the first plaintiff remain, on the evidence, entirely uncertain. On the authority of *West Bank Estates Ltd. v. Arthur* [1966] 3 W.L.R. 750 this alone appears to be fatal to the plaintiffs' claim. There is no presumption that the plaintiffs' user extended to the whole of the area of which they were co-owners, exclusive of the Chinese store (*Glyn v. Howell* [1909] 1 Ch. 666). The impression I gain from the evidence is that some small number of cattle were grazed by the first plaintiff and that portions only of the land were cultivated, mainly for rice, merely for the purpose of providing for the daily needs of the first plaintiff. There is no suggestion of farming having been carried on by him as a business, or on any extensive scale at all.

The plaintiffs' case is clouded also by the fact, which is not denied, that the first plaintiff worked as an employee at the store, on and off, for a period of 20 years up to 1964. That fact also must go far to destroy the plaintiffs' claim, in the absence of proof of some act of dispossession by him of his employer, of which there is none in my view.

There is no evidence as to the prices at which the various undivided shares were acquired, or as to the value of the land in the earlier years except that the lease was at the rate of £1 per acre per annum. Here the

A impression I gain is that the land was not, until recently, regarded as of any great value, being remote and difficult of access. Fong Kim Sin did not live at the store. He carried on the business through employees after Ben's death and recently went to live in Australia. The first plaintiff's residence on the land and his limited user thereof could well be attributed as much to his position as an employee as to his co-ownership. He says he repaired the fence along the western boundary of Lot 1. I doubt his evidence on the point. He proves at best in my view a very limited user of undefined portions of Lot 1, such user being consistent with his status either as a co-owner or as an employee.

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D Certain correspondence was put in evidence, consisting of letters written by the first plaintiff to Fong Kim Sin in 1964. After some equivocation in his evidence, the first plaintiff was obliged to admit that the offers to purchase Fong's shares made in those letters extended to both Lots 1 and 2. He was obliged to admit also that it was only after Fong Kim Sin refused to sell that the idea came to him, or he was advised, to lay a claim to a prescriptive title. If adverse possession were a matter of intention, these factors would weigh heavily against the plaintiffs' claim, in providing ex post facto evidence that in the mind of the first plaintiff he was not exercising sole dominion over the land during his period of residence there. But the Acts of 1833 and 1874 do not appear to require more than possession in fact, exclusive and continuous, for the statutory period as from the discontinuance of possession of the person entitled to possession or his dispossession. It is the case also that an acknowledgment given after the statutory period has run has no effect under section 14 of the Act of 1833 (*Sanders v. Sanders* (1881) 19 Ch.D. 373). The offers to purchase do not therefore have any bearing on the case, in my view.

E On the whole of the evidence I can perceive no single positive act of dispossession of Fong Kim Sin by the plaintiffs. Such evidence as there was as to the fencing of Lot 2 is vague, and in my view unreliable, and falls far short of proving a fencing-out of Fong Kim Sin from the remainder of the land by any act of the plaintiffs. If the case is one of discontinuance of possession then, I think, the evidence indicates that the first plaintiff's user was equivocal in its nature and not a continuous and exclusive possession for the statutory period of the area claimed.

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G But for the decision of the Fiji Court of Appeal in *Lee Bow Yiu v. Patel* (1956-7) Fiji L.R. 62 I would also have thought that on the transfer to Joe Sang, and the subsequent transfer to the defendants, time would have begun to run afresh, having regard to the provisions of the Land (Transfer and Registration) Ordinance (Cap. 136). The Ordinance makes no provision for over-riding interests; under section 29 a purchaser is not affected by unregistered interests; and under sections 33 and 34 the purchaser is in all cases entitled as of right to receive a certificate of title which has effect, by virtue of section 10, of conferring on him an indefeasible title. However, the decision is to the contrary and is binding on me.

For the reasons I have given I hold that the plaintiffs' case fails and accordingly I give judgment for the defendants with costs.

H *Judgment for the defendants.*