Michaelmas Term
[2021] UKPC 25
Privy Council Appeal No 0049 of 2018

JUDGMENT

Hurhangee (Appellant) *v* Ramsawhook and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Hodge
Lord Kitchin
Lord Sales
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON
4 October 2021

Heard on 9 June 2021

Appellant
Nandkishore Ramburn SC
Shaheena A Carrim
(Instructed by Omar I A Bahemia)

Respondents
Bertrand Cheung Kai Suet
(Instructed by S Bundhun Cheetoo)

Respondents:-
(1) Heeralall Ramsawhook
(2) Bhanubai Ganpatlall Ramsawhook
(3) Bhanumati Ramsawhook
(4) Veena Ramsawhook
(5) Rabindranath Ramsawhook
(6) Mira Ramsawhook
(7) Satcam Ramsawhook
(8) Satyan Ramsawhook
(9) Ajit Ramsawhook
(10) Mantee Ramsawhook
(11) Mahadeo Bickharry

Co-respondent:-
(1) Conservator of Mortgages

LORD SALES:

1. This appeal arises in proceedings concerned with a claim by the first respondent ("Mr Ramsawhook") to have acquired a portion of land by prescription. The claim is contested by the appellant ("Ms Hurhangee"), who received the relevant part of the land from her father, Dr Jugroo Seegobin ("Dr Seegobin"), by a division-in-kind in 1975. The land in issue is a plot of $7^1/_2$ arpents at La Mare, Flacq ("the contested land").

2. Under the law of Mauritius, by article 712 of the Civil Code a person can acquire immovable property by acquisitive prescription under conditions set out in article 2229. The law on acquisitive prescription was reviewed by the Board recently in its judgment in *Seebun v Domun* [2019] UKPC 39. Article 2229 provides:

> "Pour pouvoir prescrire, it faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire.
>
> Pour prescrire en matière immobilière, la possession doit, en outre, présenter un caractère apparent, manifesté par des signes matériels extérieurs, tels qu'une construction, un mur bâti servant de clôture, des plantations."
>
> ("In order to prescribe, possession should be continuous and uninterrupted, peaceful, public, unequivocal and as if one is owner.
>
> To prescribe immovable property, the possession must, further, be of an apparent character, manifested by overt material signs, such as a construction, a built wall serving as a fence, cultivation.")

3. By article 2261, the relevant period of occupation for the purposes of acquisitive prescription is 30 years.

Factual background and the judgments in the courts below

4. Mr Ramsawhook's case is that the contested land is part of a larger plot (11 arpents 13 perches) at Mare d'Australia in Flacq ("the larger plot") which he acquired

by acquisitive prescription by occupation from 1961. The other part of the larger plot had been owned by a Mr Beesony and his heirs. After he had been in occupation for more than 30 years, Mr Ramsawhook filed an affidavit of prescription in relation to the larger plot on 12 January 1995.

5. Mr Ramsawhook is the father of the second to tenth respondents and the father-in-law of the 11th respondent (together, "the other respondents"). On 6 August 1998 Mr Ramsawhook and the other respondents proceeded with a division-in-kind of the contested land. The other respondents say they have acquired their title in respect of the contested land in this way.

6. On 19 December 2000 Ms Hurhangee brought proceedings against Mr Ramsawhook, the other respondents and the Conservator of Mortgages in which she claimed a decree that the purported acquisition of the contested land by Mr Ramsawhook by prescription was null and void and the division-in-kind of 6 August 1998 was likewise null and void, an order that the Conservator of Mortgages make relevant entries in his books and registers recording the ownership of land and an order requiring Mr Ramsawhook and the other respondents to vacate the contested land and pay her a sum in respect of their unlawful occupation of the land. On the same date, Ms Hurhangee lodged an application before the Judge in Chambers for an order restraining Mr Ramsawhook and the other respondents from selling or dealing with the contested land; however, that application was later set aside after a hearing in 2002.

7. Mr Ramsawhook and the other respondents entered a defence denying Ms Hurhangee's title to the contested land and maintaining that Mr Ramsawhook had acquired title to it by acquisitive prescription by occupation since 1961.

8. Meanwhile, in 2002 one Hookoom Tulsi ("Mr Tulsi") brought proceedings against Mr Ramsawhook claiming possession of the larger plot. However, the Judge in Chambers held that Mr Ramsawhook had shown that he had a good defence and dismissed Mr Tulsi's claim. In the course of those proceedings Mr Ramsawhook swore an affidavit in which he said he had started occupying the contested land in 1967.

9. Ms Hurhangee's claim came on for trial in 2012. Ms Hurhangee's case was that, in so far as Mr Ramsawhook had occupied the contested land, he had not occupied it uninterruptedly nor for the period of 30 years as required by the Civil Code by the time he purported to prescribe title in 1995.

10. Ms Hurhangee did not give evidence, relying instead on evidence given by her son ("Dyanesh"). Dyanesh gave evidence, supported by documents, about the background and history of the contested land to explain how the title to it had been acquired by Dr Seegobin, who he said had cared for it up to 1989 (one year before his death in 1990), and from him had passed to Ms Hurhangee. Dyanesh's evidence was that Mr Ramsawhook had not occupied the contested land for more than about 20 years by 1995. However, Dyanesh had only visited the contested land on two or three occasions. None of Ms Hurhangee or her family lived on the contested land. It was in 1990 that they had first become aware of Mr Ramsawhook's occupation of it, when he erected a building on it.

11. Ms Hurhangee also called an associate of Dr Seegobin, Mr Harrycharan Ranoowah, to give evidence that they visited the contested land together in the period 1965 to 1989.

12. Mr Ramsawhook is a retired bus driver. His evidence was that in 1961, by a deed under private signatures, he had acquired all the undivided rights of one Jeebassea Beesony ("Mrs Beesony") in relation to the larger plot, believing that he had thereby become entitled to be owner of it. It was marshy land, but he filled it with soil and started to cultivate it. However, it had not proved possible to legalise the sale in proper form because Mrs Beesony did not acquire the other undivided rights pertaining to the larger plot. By a deed under private signatures dated 2 June 1967, signed by himself and one Seedeeal Jeetun ("Mr Jeetun"), which was before the court, Mr Ramsawhook said that he understood that he acquired all the undivided rights of Mrs Beesony pertaining to the larger plot. According to the deed, Mr Jeetun undertook to procure that Mrs Beesony would sell her land to Mr Ramsawhook. That transfer of property also was not implemented in proper legal form. So Mr Ramsawhook had instead had to acquire title to it by prescription by occupation for 30 years, which he had arranged to have recognised by filing his affidavit of prescription in 1995. Mr Ramsawhook denied that Dr Seegobin had anything to do with the contested land or that he was even known in the neighbourhood.

13. Mr Ramsawhook was cross-examined about the apparent inconsistency between his evidence at trial (that he had commenced occupation of the larger plot, including the contested land, in 1961) and his statement in his affidavit in the proceedings brought by Mr Tulsi that he had commenced his occupation in 1967: if his occupation only began in 1967, he would not have been in occupation for 30 years by the time he purported to prescribe title in 1995. His explanation was that he meant he had officially occupied the land since 1967 (ie from the time of the transaction set out in the 1967 deed), but he had in fact been in occupation since 1961.

14. Mr Ramsawhook called evidence from an official of the Sugar Insurance Fund Board to the effect that he had cultivated sugar at a plot of land at Mare d'Australia from 1982. He also called evidence from one Mohunlall Raghoa ("Mr Raghoa"), a planter at Mare d'Australia who had lived there since childhood, to the effect that Mr Ramsawhook came to live on the contested land in about 1961 (when Mr Raghoa was 11 years old) and that Mr Ramsawhook and his children had always occupied it since then. Mr Raghoa's evidence was that he had never seen Dr Seegobin on the contested land.

15. There was a dispute at trial regarding the location of the contested land, with evidence of surveyors called by each side, but that was resolved by the judge and there is no longer any issue about this.

16. Angoh J handed down his judgment on 9 September 2013, dismissing Ms Hurhangee's claim. The judge accepted part of her case, namely that title in the contested land had been passed to her by her father, Dr Seegobin. However, he held that Mr Ramsawhook had acquired title in the contested land by acquisitive prescription by occupying it without interruption since 1961.

17. The judge directed himself that the relevant question he had to decide was whether Mr Ramsawhook (and the other respondents, who claimed title through him) had been in occupation of the contested land for more than 30 years (that is, by the time Mr Ramsawhook purported to prescribe the land in 1995) "in a peaceful, public, quiet, continuous, unequivocal" manner with "uninterrupted 'animo domini' and 'à titre de propriétaire' and in an apparent manner", ie referring to the relevant provision in article 2229 of the Civil Code (set out above).

18. To decide that question, the judge weighed up the evidence on both sides. This was the essence of the task he had to perform as the first instance judge at trial. He found the evidence given by and on behalf of Mr Ramsawhook more persuasive than that given on behalf of Ms Hurhangee, as he was entitled to do. He found Mr Ramsawhook's evidence that he had been in peaceful and open occupation of the larger plot, including the contested land, from 1961 (ie from the time of his first transaction with Mrs Beesony), "very convincing" (p 18). His evidence was supported by that of Mr Raghoa, which the judge accepted.

19. The judge summed up his conclusion thus: "[Mr Ramsawhook] has been able to prove that he has acquired by acquisitive prescription [the contested land] for having been in occupation for more than 30 years as from 1961 in a peaceful, continuous,

public, unequivocal, uninterrupted, “animo domini” and in an apparent manner” (p 19).

20. Ms Hurhangee appealed to the Court of Appeal which, by a judgment dated 18 January 2017, dismissed her appeal. Although the grounds of appeal were somewhat lengthy, the basic point made in them was that the judge had been wrong to find on the facts that Mr Ramsawhook had been in uninterrupted, public and peaceful possession of the contested land since 1961 and hence for 30 years by the time he asserted his ownership of the land by prescription in 1995. The Court of Appeal dismissed that complaint. The judge had been entitled to come to the conclusion he did on the evidence before him. As the court said: “That in itself would have been sufficient to dispose of the appeal” (p 6).

21. The court went further, however, and reviewed the evidence given at trial. After that more intensive review of the material before the judge, the court again concluded that he had been entitled to reach the conclusion he did. As to other matters raised in the grounds of appeal, the court observed that “the issue that was before the learned judge in terms of the plaint was whether [Mr Ramsawhook] had been in occupation of the [contested land] for the period of 30 years with all the requisites of acquisitive prescription” (p 7). The judge had found that he had been, and that finding was open to him to make on the evidence at trial. That disposed of the appeal.

The appeal to the Board

22. Ms Hurhangee applied to the Court of Appeal for permission to appeal to the Board. Her grounds of appeal were, like her grounds of appeal to the Court of Appeal, directed to the question whether the judge was entitled to make the factual findings he did regarding Mr Ramsawhook’s public and uninterrupted occupation of the contested land from 1961 until he asserted his ownership of the land by prescription in 1995, more than 30 years after that. Permission was granted on 27 February 2017. Extensions of time were sought and granted thereafter. The Conservator of Mortgages has not been involved in this further appeal.

23. For the purposes of the appeal, Ms Hurhangee engaged Nandkishore Ramburn SC, who had not appeared below. The oral hearing proceeded in a surprising way. Mr Ramburn stated that he did not challenge the findings of fact made by the trial judge and upheld by the Court of Appeal. Instead, he made a variety of legal submissions about the requirements to be fulfilled for acquisition of title by prescription through occupation, focusing in particular on the requirement that possession should be “à titre de propriétaire” (“as if one is owner”). This requirement had not been a matter in

dispute in the courts below. Mr Ramburn submitted that, upon analysis of the transactions which Mr Ramsawhook entered into with Mrs Beesony and Mr Jeetun in 1961 and 1967 respectively, and pursuant to which he was in occupation of the contested land, he could not properly be said to have been in occupation as if he was an owner, with "animo domini", because his occupation was precarious or at any rate he could not have understood that he was outright owner of the contested land since he did not acquire rights of ownership from all those with shares in the land. Further or alternatively, he only took over Mrs Beesony's rights of ownership and in effect was in occupation on her behalf, or by exercise of her rights, rather than on his own behalf in exercise of rights of ownership being asserted by himself. Yet further, relying on an obiter passage in the first instance judgment by Domah J in *Société Civile Kamlaville v Harel* 2003 SCJ 209 (p 14: "[l]aw requires an 'animus' in a process for prescription. If a possessor sincerely but mistakenly believes that he is possessed of a property, he lacks the 'animus' required for acquisitive prescription and the time does not start running until he becomes aware [sc that he is not owner]"), Mr Ramburn submitted that time for prescription could not run while Mr Ramsawhook believed he was owner of the contested land, as on one interpretation of his evidence he believed to be the case for many years. Mr Ramburn also submitted that since Mr Ramsawhook had said in his evidence at trial that he had only occupied the contested land "officially" since 1967, his occupation before that could not be regarded as public. This also had not been a point raised in the courts below.

24. Mr Ramburn submitted, correctly, that neither the judge nor the Court of Appeal had embarked upon an analysis of these aspects of the case or any of these disparate points. He accepted that this was because none of these arguments was raised in the courts below. Mr Ramburn argued, however, that the judge had been subject to a duty to investigate these points even though they had not been raised by Ms Hurhangee, and sought to rely on another passage in the judgment of Domah J in the *Kamlaville* case, in which the following commentary from Rep civ Dalloz, *Prescription Acquisitive*, para 51, was cited:

> "Les juges du fond jouissent d'un pouvoir souverain pour apprécier les circonstances de chaque espèce, la nature, l'existence des actes de possession pour prescrire, les vices ou l'absence de vice de cette possession [citations omitted]."
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> ("Fact-finding [ie first instance] judges have the sovereign power to evaluate the species, nature, and existence of acts of prescriptive possession, and any defects or absence of defects of such possession.")

25. However, in the Board's view, this passage does not support Mr Ramburn's submission and his reliance on it is misplaced. This passage of commentary simply says that it is for the judge to determine whether the acts relied upon by the party claiming to have prescribed are sufficient in law to found a claim in prescriptive acquisition. Where there is a dispute about property rights and there is a claim of prescription of title, it is for the parties by their pleadings to frame the ambit of the dispute and the matters which require determination by the court. It is for the court to determine the dispute as so defined in accordance with standards of fairness. It would not be fair for a court to decide a case on a basis which has not been raised by either party. In some situations a court might, in the course of a hearing, raise questions for the parties to consider; but it would be obliged to ensure that each was given a fair opportunity to address such questions before it would be permissible for it to decide the case by reference to such matters. In the present case, neither the parties nor the judge raised the issues or mentioned the points of law on which Mr Ramburn now seeks to rely.

26. Further, the arguments which Mr Ramburn sought to introduce on the hearing of the appeal to the Board were all outside the scope of the grounds of appeal; and Ms Hurhangee has not sought, still less obtained, permission to raise them at this final stage of appeal.

27. In the Board's view, it is not appropriate for these new arguments to be introduced at this stage. This is for several reasons. No application has been made for permission to introduce these new arguments. Mr Ramsawhook and the other respondents have not been given fair notice that they were to be introduced on this appeal. The Board is not satisfied that these can be regarded as pure points of law; on the contrary, it seems likely that if these matters had been raised at the outset there would have been a need for evidence directed to these new aspects of the case to explore in greater detail Mr Ramsawhook's own understanding of the transactions in 1961 and 1967, whether the specific nature of those transactions had any impact on the appearance given to the public of the nature of his occupation of the contested land and, in particular, whether it undermined the appearance given that he occupied it as if he were owner of it, or not. (One might add that, if the obiter passage in the *Kamlaville* judgment referred to in para 23 above were correct, the precise state of mind of Mr Ramsawhook as to the true ownership of the land throughout the period of prescription would also have had to be investigated in evidence; however, the Board has grave doubts whether that part of the judgment in *Kamlaville* is correct). In any event, by proceeding in this way, Ms Hurhangee has deprived the Board of the advantage of having available to it the considered views of the local courts on a matter of some technicality in the land law of Mauritius.

28. The case as presented by Ms Hurhangee in the courts below was within a narrow compass. It involved a dispute regarding the facts of the case, namely whether Mr Ramsawhook had actually been in uninterrupted occupation of the contested land since 1961, as he maintained. The trial judge found that he had been. The Court of Appeal upheld that finding, stating (correctly) that this was sufficient to determine the appeal.

29. At the level of this further appeal to the Board, therefore, this is a case in which there are concurrent findings of fact by the courts below which are fatal to Ms Hurhangee's case. The established practice of the Board is not to uphold an appeal against concurrent findings of fact by the courts below in the absence of legal error which undermines those findings, other than in very limited circumstances in which it is satisfied that that which has occurred in the proceedings did not constitute judicial procedure in a proper sense: *Devi v Roy* [1946] AC 508, 521; *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, paras 4-7; *Alcide v Desir* [2015] UKPC 24, paras 24-26; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, paras 43-45; *Dass v Marchand* [2021] UKPC 2; [2021] 1 WLR 1788, paras 15-17; and *Pickle Properties Ltd v Plant* [2021] UKPC 6, para 3. This is far from being an exceptional case of that kind. The appeal therefore falls to be dismissed on this ground. The Board would go further, however, and observe that there are no good grounds to challenge the findings of fact made by the trial judge. It was plainly open to him to make those findings on the evidence adduced at trial.

Conclusion

30. For the reasons set out above, the Board dismisses this appeal.