

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

DECLARATION OF TITLE

In the matter of the Title to Land (Prescription and Limitation) Act, Chapter 60:02, Laws of Guyana.

-and-

In the matter of Sublot lettered Y being the southern portion of Sublot lettered A of the S $\frac{1}{2}$ lot numbered 58 (fifty-eight) Lime and Bent Street, North Freeburg, situate in the City of Georgetown in the county of Demerara and in the Republic of Guyana the said sublot containing an area of 0.0402 (nought decimal nought four nought two) of an acre being shown, laid down and defined on a plan by P.F. Murray, Sworn Land Surveyor, dated 11th day of November, 2009 and recorded in the Guyana Lands and Surveys Commission on the 4th day of November, 2009, as Plan No. 46582.

-and-

In the matter of a Petition by Jainandan Sukhnandan and Chandrawattie Sukhnandan of Sublot B of lot 59 Lime and Bent Streets, Georgetown, Demerara, for a Declaration of Title.

Before Ms. Nicola Pierre, Commissioner of Title:

June 22, July 4, August 18, September 22, 2017.

Appearances:

Mr. T. Lake for the Petitioners

Ms. D. Bailey/ Mr. C.A.N. Hughes for the Opposer

JUDGMENT

1. By petition dated June 27, 2013, Jainandan Sukhnandan and Chrawattie Sukhnandan sought a declaration of title to subplot lettered Y being the southern portion of Sublot lettered A of the S ½ lot numbered 58 (fifty-eight) Lime and Bent Street, North Freeburg, Georgetown, Demerara, as shown on plan numbered 46582, prepared by P.F. Murray, Sworn Land Surveyor, dated 11th day of November, 2009.
2. Terry Gittens on August 10, 2015, filed a Notice of Opposition.
3. The matter came on for trial on June 22, July 4, August 18, September 22, 2017. Jainandan Sukhnandan and Terry Gittens were the only persons testifying.
4. I found Terry Gittens to be a truthful witness. I found Jainandan Sukhnandan not to be truthful in statements nor honest in demeanor.
5. Terry Gittens is the owner by transport numbered 1060 of 2013 [Ex G] of Sublot lettered A of the South half of lot 58 Lime and Bent streets,

North Freeburg, Georgetown, Demerara. Terry Gittens purchased the property from Deryk Wilson who held it by transport numbered 72 of 2010 [Ex H]. Deryk Wilson had purchased it from Naresh Persaud who held it by transport numbered 2214 of 1977 [Ex H2].

6. Terry Gittens took a loan from Hand in Hand Trust Corporation Inc. which he secured by way of a mortgage [No. 674 of 2013] on Sublot A, as is evidenced by an annotation on the transport 1060 of 2013 [Ex G]. Terry claims the mortgage still subsists. Pursuant to an order of the court made on July 4, 2017, personal service of a copy of the petition was effected on the mortgagee on August 21, 2017, as is endorsed on the courts file by Marshal K. Henry. The mortgagee did not appear at any time in these proceedings.

7. Jainandan and Chandrawattie Sukhnandan claim that in 1990 they saw subplot Y of Sublot A was abandoned and that they cleared the land, restored the dilapidated building on it making it suitable for residential purposes and then resided there from 1990 to present time uninterrupted. They claim that during their occupation they renovated the building, filled the land, and concreted a walkway.

8. The petitioners have paid rates for 2012 [Ex C], were resident at the property in 1992 as evidenced by their children's clinic cards [Ex D1-3], have had a contract with the Guyana Electricity Corporation to supply power to the premises since the year 2000 [Ex E1-3], a contract with Guyana Water Inc. for a supply of water since at least 2011 [Ex 6-7]; and a telephone service at the premises since at least 2011 [Ex E4].

9. Jainandan Sukhnandan claims that he did not have permission to enter into possession nor occupy, not from any of the transported owners Naresh Persaud, Deryk Wilson nor Terry Gittens. He claims to have lived on the Essequibo Coast up to 1989 when he moved to Georgetown with his wife and stayed at his sister Minwattie Sukhnandan's residence in Norton Street nearby the property now claimed. He denied that he or his wife are related to Naresh Persaud, the transported owner of Sublot A from 1977 to 2010 and testified that he often passed by the property now claimed, saw it abandoned and took possession of it in 1990 and has remained in possession since, without permission, consent, agreement or interruption.

10. Jainandan Sukhnandan further said that he rented half of the bottom flat the building on Sublot Y of Sublot A to the opposer Terry Gittens from 2007 until 2013 and was paid by him rent in the sum of

\$15,000.00 monthly initially, and then later \$20,000.00 monthly. He relies on receipt books with duplicate receipts [Ex F1 -2].

11. Terry Gittens claims he believes that Naresh Persaud, the transported owner from 1977 to 2010, is Chadrawattie Sukhnandan's brother and that the petitioners entered into possession and occupied with Naresh' permission. He further claims that he believed they would vacate when he purchased the property in 2013, but they did not and he himself had possession of only a small portion of the bottom flat, whilst the petitioners occupied a part of the bottom flat and the entire upper flat.

12. Terry presented proof of ownership by transport in Naresh Persaud [Ex H2], Deryk Wilson [Ex H1] and himself [Ex G]; proof of his payment of rates for the property for the years 2014 to 2016 [Ex L1-2].

13. Terry Gittens also relies on [Ex R] a letter dated May 28, 2010 from Naresh Persaud to Mr. Lawrence Harris, Attorney at Law in which Naresh said :

“Please note on all previous visits Mr. Sukkhanandan volunteered to leave the premises by verbal agreement also numerous letter were mailed asking him to leave but he kept asking for more time and would ignore the letters.

I received a letter from Mr. Sukhanandan dated June 4, 1999 stating that he was leaving the house and I must come take my house. Unfortunately he never left.

In July 1999 we were visiting, when Mr. Sukhnandan and his wife told their kids to bring some boxes from downstairs so they can start packing to move out, I left them packing. The next day I went back and to my surprise they were still there and he was once again pleading for more time.

After all this pleading and extension of time I decided the only way to get him out of my house was to sell the premises. At this point there wasn't much left to sell, it was destroyed a lot inside and outside including furniture and household items."

14. In his evidence in chief Terry Gittens said that he runs a bar at 59 Lime and Bent Street opposite Sublot Y and that " After being there I asked Jainandan Sukhnandan for me to rent a space at the bottom of his building. I was told by him he cannot rent me the space or do a rental agreement with me but he could allow me to store my equipment and stuff there because the building is owned by a relative overseas. That is how I come to know that the building was owned by the relative overseas but I did not know the name of the relative but I could give Jainandan a small piece at the end of the month and that is how it started . . . After using the downstairs storage space in 2011/2012 I saw a court summons from the bank on the building. After reading it it say that Deryck Wilson is in arrears owing on the property and they about to take

judgment on it. A time before then Deryk Wilson told me he owned the property but I didn't pay him any mind because Sukhnandan had told me that his family overseas owned the property. After seeing the note on the building I went to Deryk ... I went with Deryk to the bank ... I paid off the 1.8 million . . . I took a loan from Hand in Hand Trust to purchase the property from Deryk Wilson. . . I am still servicing the loan. . . I bought the property and I was occupying a small piece downstairs. I still have my equipment there . . . I was locked out of the building by Jainandan Sukhnandan. . . his lock is over my lock.”

15. In cross-examination Terry Gittens admitted that he first went into the area and has personal knowledge of the property only since opening his bar in 2007; that from 2007 to 2012 he paid Jainandan Sukhnandan a sum of money at the end of every month for the use of a storage space in the bottom flat of the building subplot Y; that he was not aware whether Deryk Wilson had possession of Sublot Y; that he and Deryk had not gone together to speak to the Sukhnandan's about the sale by Deryk to Terry of the property; that he never spoke to the Sukhnandan's of his purchase until after he had entered into the agreement and only when Jainandan had “sent to ask for some money for the storage space I occupied . . . and I told him I was in the process

of buying the property.” ; and that Jainandan Sukhnandan placed a lock on the door to the storage space and denied him entry thereto since he stopped paying the monthly sum.

16. On the evidence led I make the following findings of fact:

(i) Jainandan Sukhanandan and Chandrawattie Sukhanandan occupied Sublot Y as licensees of Naresh Persaud.

(ii) In July 1999 Naresh Persaud terminated the license.

(iii) Jainandan Sukhanandan and Chandrawattie Sukhanandan remained in sole and exclusive possession of Sublot Y without consent or agreement of the legal title owners of Sublot Y from July 1999 to present.

(iv) In January 2010 Naresh Persaud sold Sublot Y to Deryk Wilson, and Deryk Wilson mortgaged the property to New Building Society Ltd.

(v) In May 2013 Deryk Wilson sold the property to Terry Gittens and Terry Gittens mortgaged it to Hand in Hand Trust Corporation.

(vi) Deryk Wilson was never in possession or occupation of Sublot Y.

(vii) Deryk Wilson never brought any legal or physical action to take possession and control of Sublot Y from Jainandan Sukhnandan.

(viii) Terry Gittens was in occupation of a portion of the building on subplot Y as a tenant, and with the consent, of Jainandan Sukhnandan, in the years 2007 to 2012.

(ix) Terry Gittens never brought any legal action to take possession and control of Sublot Y from Jainandan Sukhnandan.

17. The Title to Land (Limitation and Prescription) Act, Chapter 60:02, as amended by Act no. 6/2011 provides-

3. Where the Court is satisfied that the right of every other person to recover land or any undivided or other interest in land has expired or been barred and the title of every person to the land has been extinguished, title to the land may, subject to subsection (2), be acquired-

- a) *by sole and undisturbed possession, user or enjoyment for not less than 12 years;*
- b) *if possession, user or enjoyment is established to the satisfaction of the Court; and*
- c) *if possession, user or enjoyment was not taken or enjoyed by fraud or by some consent or agreement expressly given for that purpose.*

18. In *Toolsie Persaud Limited vs. Andrew James, Shivlochnie Singh and the Attorney General of Guyana* [2008] CCJ 5 (AJ) at paras 27 and 28 the Court explained the concept of possession-

“[27] We endorse the following remarks of Lord Browne-Wilkinson in the leading case, JA Pye (Oxford) Ltd v. Graham [2003] 1 AC 419 at [36]et seq ‘Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Act. The question is simply whether the defendant squatter has disposed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner . . . except in the case of joint possessors, possession is single and exclusive, therefore if the squatter is in possession the paper owner cannot be...’

[28] Thus, the position is that a claimant to land by adverse possession needs to show that for the requisite period he (and any necessary predecessor) had -

- (i) a sufficient degree of physical custody and control of the claimed land in the light of the land’s circumstances (“factual possession”), and*

(ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land (“intention to possess”). ”

19. The petitioners have had factual possession of Sublot Y since 1999 and occupied without consent or agreement made for that purpose. I find that they have also had an intention to possess, to exercise such custody and control of Sublot Y on their own behalf and for their own benefit. They have lived on the premises, excluded others from it, used it as an owner would, rented part of it to the opposer for five years and locked out the opposer when he failed to pay the rents demanded.

20. To be determined is whether the right of every other person to recover the property or any undivided or other interest in the property has expired or been barred and the title of every person to the land extinguished.

21. Section 10(1) of the Title to Land (Prescription and Limitation) Act, Chapter 60:02, provides that “No right of action to recover land shall be deemed to accrue unless the land is in possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”)…”

22. The Sukhnandan' s were licensees until July 1999. On their continued occupation after the termination of their license they became trespassers. They remained on the land after their permission to be there was withdrawn, they were "unjustifiably interfering with the possession of the land" , by Naresh Persaud.

23. Naresh Persaud' s right to recover subplot Y from the Sukhnandan' s accrued on his terminating their license to occupy. In his letter [Ex R] he said that he believed his recovery options to be limited - *"After all this pleading and extension of time I decided the only way to get him out of my house was to sell the premises. At this point there wasn' t much left to sell, it was destroyed a lot inside and outside including furniture and household items."*

24. He implemented his recovery plan just as he said he would, by way of selling the property to Deryk Wilson in January ,2010. Deryk Wilson himself resold it in May 2013 to Terry Gittens.

25. The first issue arising from these sales is whether the sale to Deryck Wilson stopped time running in favour of the Sukhanandans.

26. In *Abdool Rohomon Khan v Boodhan Maraj* (1930) LRBG 9, the question arose whether the failure of a person in possession for the statutory

period to oppose either a transport or mortgage caused them to lose their rights to a declaration of title. It was held that “(5.) The advertisement of an intended transport or mortgage is *not* equivalent to notice as regards a person in possession for the statutory period, and (6) That a person in possession of land for that period does not lose his rights if he does not oppose an intended sale or mortgage of which he has not had actual notice.

27. A person in possession of land for less than the statutory period also does not lose his rights or accumulated years if he does not oppose an intended sale of mortgage of which he has not had actual notice - *Vijay Kumar v. Sukhdeo et al* , Civil Appeal No. 95 of 2001, [2003-2004] GLR 111, cited with approval by the Caribbean Court of Justice in *Daniel Ramlagan v. Narine Singh* [2015] CCJ 7 (AJ) . Justice of Appeal Chang in *Vijay Kumar* said “*The right of action in the new owner is personal to him but his claim to possession, while not made on behalf of his predecessor in title but on his own behalf, derives from and comes through his predecessor in title to whom the right of action would have first accrued. Under section 5, time would begin to run for the purpose of prescription by adverse possession from the time the predecessor in title had the right of action to recover possession and would continue*”

to run against his successors in title. Thus, in the instant case, if the petitioner in his own right had begun to adversely possess the land while Mangru was the transported owner and before the expiry of twelve years, the respondents became the transported owners, the petitioner's adverse possession would not have been interrupted and cancelled but would have continued to run unless and until he had acknowledged the respondent's superior title to the land (section 18 of the Title to Land (Prescription and Limitation) Act or the respondents had made an effective entry upon the land in assertion of their superior title."

28. There has been no evidence led that the petitioners had actual notice of the conveyance from Naresh Persaud to Deryk Wilson in 2010, or that Deryk Wilson made any entry or any effective entry upon the land in assertion of his paper title. The evidence is in fact contrary, being that Jainandan Sukhnandan in 2010, 2011, and 2012 collected rent from Terry Gittens for a part of the premises and used the remainder of the property as his personal residence, without let or hindrance from Deryk Wilson.

29. I find that there was no actual notice to the petitioners of the conveyance of Sublot A to Deryk Wilson and that there was no effective entry by Deryk Wilson upon the land in assertion of his paper title. I

find that the petitioner's possession of Sublot Y of Sublot A was uninterrupted from 1999 through August, 2011, at minimum, at which date 12 years had elapsed from the time of the termination of their license to occupy.

30. As at August, 2011, the petitioners had been in sole and exclusive uninterrupted occupation of Sublot Y of Sublot A of the S1/2 of lot 58 for twelve years without the consent or agreement of either Naresh Persaud or Deryk Wilson.

31. Section 13 of the Title to Land (Prescription and Limitation) Act provides that "At the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

32. Twelve years 'adverse' possession extinguishes title AND gives positive title to the possessor. In *Toolsie Persaud v Andrew James Investments Limited et ors* [2008] CCJ 5 (AJ) at [36]

"It is noteworthy that Guyanese land law is an admixture of Roman Dutch law and English law. Thus sections 3 and 4 were added to the other sections of the Limitation Act which are based on the English Limitation Act 1939. The latter Act had only an extinctive negative effect, whilst sections 3 and 4 positively confer title where the requisite twelve or thirty years of undisturbed possession are established. Counsel and Guyanese case law have

assumed that sections 3 and 4 combine with the later sections of the Limitation Act to provide an integrated approach to the acquisition of title through twelve or thirty years undisturbed adverse possession of land by one or more successive possessors. We find this to be correct for the circumstances of this case, though difficult problems might, perhaps, arise if one adverse possessor dispossess another. ”

33. If title in Naresh Persaud and Deryk Wilson had been extinguished at August 2011, what did Deryk Wilson convey to Terry Gittens? In *Basir v. Goolcharran* (1961) LRBG 528 Adams J. addressed the nature and quality of the rights of a paper title holder who got title to land which had been in the possession of a squatter for the statutory period -

*The law is stated by the Federal Supreme Court in *Barrow v. Benjamin* (1961) WIR 511, (1960) LRBG 260, in which case the court cited with approval the decision in *Gondchi v. Hurril* (1931-1937) LRBG 509, where it was held that a transport did not confer on the holder thereof the right to enforce possession by way of an action that was barred under s.4(2) of the Civil Law of British Guiana Ordinance. As was stated by Rennie, F.J.: “A title gives one the right to possession but whether that right can be enforced in a court of law must depend on whether or not someone is in possession of the land and has been there sufficiently long to bar the claims of a person with title.”*

34. The advertisement of the conveyance and passing of transport to Terry Gittens therefore did not affect the rights or possessory title of the petitioners.

35. With regard to the subsisting mortgage, it follows that if Deryk's and his predecessors title was extinguished in 2011, he had no title to convey to Terry Gittens and Terry Gittens therefore had no interest in the property to subject to a mortgage to secure his loan.

36. The failure to oppose a mortgage was addressed in *Simpson And Another V. Yhap And Another*, October 15, 1960, Guyana High Court (CARILAW Citation Number GY 1960 HC 46), where Fraser J held that actual notice to a person in possession of land is essential and must be established upon the evidence led before the court-

*"There is no evidence that the persons in possession at that time ever had notice of the mortgage. It has been urged that the plaintiffs' ancestors in possession at the time must be presumed to have had notice of that mortgage and that the court should not presume that the persons in possession, whoever they were, did not have actual notice of the mortgage. That proposition is untenable. There can now be little doubt that notice is an important, vital and indispensable feature in cases where possessory rights or legal rights to land are being extinguished. It has been established, with regard to the extinction of possessory rights, that the person in possession must have had actual notice. In the case of *Abdool Rohoman Khan v. Boodhan Maraj*, 1930 L.R.B.G. 9, SAVORY, J., after reviewing several authorities said this at page 18: -*

"I prefer to follow the authorities first referred to and to hold (1) that the advertisement of the transport is not equivalent to actual notice, in case of a person in possession for the statutory period,

and (2) that a person in possession of land for that period does not lose his rights if he does not oppose an intended sale or mortgage of the same land of which he has not had actual notice. That person's rights may be negative in character, but in my opinion they are effective and can be asserted in a court."

Following that statement of the law I hold that actual notice to a person in possession of land is essential and must be established upon the evidence led before the court. It cannot be presumed from the negative circumstance that there is no direct evidence that actual notice was not given."

37. As regards the competing claims of a mortgagee and a person in possession Fraser J in *Simpson v. Yhap* held that because a Roman Dutch mortgage is a movable debt and the property pledged never passes out of the hands of the mortgagor to the mortgagee, then the legal right remains unimpaired and stays in the hand of the legal owner to be threatened by a competing possessory claim.

"Some comments should be made, however, on the effect of a mortgage of land upon which there is a competing possessory claim. In the passage quoted above from the judgment of SAVORY, J., it is stated:

"that a person in possession of land for that period does not lose his rights if he does not oppose an intended sale or mortgage of the same land of which he has not had actual notice...."

The passage may be taken inferentially as establishing that a claimant will lose his rights to the land if he failed to oppose a mortgage of which he has had actual notice. That proposition was

urged with some emphasis on behalf of the second defendant. I do not think that it is sound nor do I think that SAVORY, J., intended that construction. If, however, my rejection of that proposition is to be construed as a disagreement with a former judge of the Supreme Court whose erudition and experience were undoubtedly of a high order, I think that I should state fully my reasons.

By s. 3 (D) (b) of the Civil Law of British Guiana Ordinance, Cap. 2, the Roman-Dutch law and practice relating to conventional mortgages was retained. The conventional mortgage, which is the subject of express agreement between mortgagor and mortgagee embodied in a mortgage deed executed before the court, is the form mortgage habitually created in this country and continues to the present day. It is, however, a transaction of a different quality from the mortgage known to the English law of real property. The element of security is common to both the Roman-Dutch and the, English mortgage, but, unlike its English counterpart, the Roman-Dutch mortgage does not transfer to the mortgagee dominium over the property. There is no conveyance of the property as such; on the contrary the property is held in statu quo by the mortgagor but made subject to the payment of the mortgage debt.

It is for that reason that the concept of the equity of redemption does not arise in the Roman-Dutch mortgage. There is no property for the mortgagor to redeem. Likewise, the mortgagee has no power to foreclose in the strict sense because he is never seised of the property. By foreclosure in England a mortgagee, or any person claiming an interest in the mortgage under him, can compel the mortgagor, after breach of the condition, to elect either to redeem the pledge or that his equity of redemption be extinguished by an order of the court.

The true nature of the Roman-Dutch mortgage is reflected in the form of remedy available to the mortgagee. An informative and helpful review of the history of the Roman-Dutch mortgage is given by Dr. F. W. H. RAMSAHOYE in his treatise on "THE DEVELOPMENT OF THE LAND LAW IN BRITISH GUIANA" at pages 456-465. At page 459 the author writes as follows:

"In Mendonca v. Gonsalves (1883) (unreported) the Supreme Court of Civil Justice of British Guiana considered the nature of a mortgage under the Roman-Dutch system and made observations on the manner of recovery of the debt. The court, following VAN LEEUWEN and BURGE, was clearly of the opinion that a mortgage of real property was a movable debt, the thing pledged never becoming the property of the creditor but can only be sold after a previous decision of the court in order to realise from the proceeds the capital sum with the arrears of interest. The right of the mortgagee was always an action for the recovery of money, the real security being only subsidiary, the primary demand being personal. Their Honours CHALMERS, C. J., and ATKINSON, J., observed that even the sentence of foreclosure in the proceedings did not have the effect of passing property to the mortgagee for he then only required power to sell the property and apply the proceeds in liquidation of his debt."

There cannot be any doubt that the mortgage as known to the law of this country is substantially a different institution from the English mortgage; nor has it lent itself to the engraftment of equitable principles.

Where is in British Guiana no equitable mortgage by deposit of title deeds? There is no equity of redemption. The concept of consolidation is inapplicable for the reason that there is never a vesting of the property in the mortgagee.

If, therefore, the property does not pass out of the hand of the mortgagor, then the legal right remains unimpaired and stays in the hand of the legal owner to be threatened by a competing possessory claim. The notice contemplated in Khan v. Maraj (supra) is, I think, notice of a conveyance by which one party becomes divested of, and the other party, invested with, the legal ownership; the Roman-Dutch mortgage is not a conveyance of immovable property in that sense and I am of the opinion therefore that the principle of actual notice does not arise for consideration where the land which is mortgaged is at the same time subject to a possessory interest, for the reason that a mortgage does not transfer any rights to the property and therefore does not extinguish any burdens."

38. The advertisement of the mortgage to Hand in Hand Trust Corporation and the execution and passing of same therefore did not affect the rights or possessory title of the petitioners.

39. In the circumstances I hereby dismiss the opposition filed herein and make a declaration of title in favour of Jainandan Sukhnandan and Chandrawattie Sukhnandan jointly to Sublot lettered Y being a portion of Sublot lettered A of the S $\frac{1}{2}$ lot numbered 58 (fifty-eight) Lime and Bent Streets, North Freeburg, situate in the City of Georgetown in the county of Demerara and in the Republic of Guyana the said subplot Y containing an area of 0.0402 (nought decimal nought four nought two) of an acre being shown, laid down and defined on a plan by P.F. Murray, Sworn Land Surveyor, dated 11th day of November, 2009 and recorded in the Guyana Lands and Surveys Commission on the 4th day of November, 2009, as Plan No. 46582.

A handwritten signature in blue ink, appearing to read 'N. Pierre', is written over a light blue rectangular background.

Nicola Pierre,
Commissioner of Title,
November 24 , 2017.

