1928.

Present : Garvin and Drieberg JJ.

SELOHAMY *v.* GOONEWARDENE.

10—D. C. Negombo, 1,474.

Usufruct—Prescription—Acquisition of life interest—Roman-Dutch law.

A usufruct may be acquired by proof of prescriptive possession.

APPEAL from a judgment of the District Judge of Negombo.

De Zoysa, for defendant, appellant.

Rajapakse, for plaintiff, respondent.

June 5, 1928. GARVIN J.—

Don Davith Vedarala and his first wife were the owners of a portion of land called Harakkotulanda. Upon the death of his wife a half share devolved upon his children, two of whom are the first defendant and his sister Nono Hamy. He then contracted a second marriage with the present plaintiff. In the year 1903 Don Davith executed two deeds. By the first of these marked P 1, he conveyed an undivided two-third of the half share which remained to him of this land to the defendant reserving to himself and his wife a life interest. On the same day he also executed the deed D 1 conveying the remaining one-third of his half share to his daughter, Nono Hamy, again reserving a life interest to him and his wife. Then this land and several others which belonged to this family were made the subject of proceedings for partition. A decree was entered in the year 1911. So far as this land was concerned shares in severalty were allotted to the various co-owners, and in that apportionment lot marked B was assigned to the defendant, and the lot C to Nono Hamy. The decree, however, did not expressly reserve a life interest to the plaintiff. It must be taken that as at that date this life interest was legally determined, but there can be no doubt upon the evidence which has been placed before the Court, and which the Court has accepted, that in point of fact, so far as the plaintiff was concerned, there never was any denial of her right to take a share of the proceeds upon the footing that she was still the owner of the life interest. It is the case for the plaintiff that she had continued to be in active possession and enjoyment of this interest, and that despite the partition decree entered in the year 1911, she has by ten years' possession acquired a usufruct in eight-eleventh of lot B to which the defendant was decreed entitled in severalty. In regard to lot C, to which Nono Hamy was declared entitled, there is no dispute. The plaintiff's rights to a life interest in that lot have been fully and frankly acknowledged in a deed of lease executed in September, 1921,

1928.

GARVIN J.

Selohamy v. Goonewardene

by which she and Nono Hamy leased that lot reciting that the title to the lot was in Nono Hamy, but that the plaintiff was entitled to a life interest therein. The plaintiff has, therefore, established by her evidence that she had the full benefit of her life interest so far as the lot assigned to Nono Hamy was concerned. In respect of the lot assigned to the defendant she says that she has from time to time and at regular intervals received from the defendant, who has been permitted to remain in occupation thereof, sums of money sometimes amounting to Rs. 100 and at others to Rs. 50. Moreover, in the year 1915, it became necessary to raise some money to meet a certain emergency. The lot was accordingly leased and a premium paid in advance. The plaintiff is a party to the lease and she says that she insisted upon her rights and only consented to joining in the lease in consideration of a sum of Rs. 500 being paid to her, and there is evidence that she received this sum. In these circumstances I think the learned District Judge was correct in his view that the plaintiff has had possession and enjoyment in the assertion of a right to a life interest and that that interest is correctly estimated as extending to eight-eleventh of lot B. That a usufruct is a right capable of being acquired by prescription can hardly be denied. Lee in his *Introduction of Roman-Dutch Law* says a usufruct is constituted (1) by agreement, (2) last will, (3) prescription. Moreover, it has been decided by a decision of this Court that a right in the nature of an emphyteusis is capable of being acquired by prescription (see *Jayawardene v. Silva*[1]). If a right in the nature of an emphyteusis is capable of acquisition by prescription, *a fortiori* a usufruct may also be acquired by proof of prescriptive possession for the necessary period. A usufruct generally extends to the possession and enjoyment of the fruits and other rights of and in a piece of land and the inference ordinarily to be drawn from proof of such possession and enjoyment would be that the possession was with the intention of holding the land as owner. The plaintiff has, however, elected to claim something less, and upon the evidence which she has placed before the Court I think it would be fair to infer—indeed to accept what she has asserted—that her intention was not to acquire title to the land itself but merely to secure a right to possession and enjoyment during her lifetime. For these reasons the appeal must be dismissed with costs. It is necessary to invite attention to a defect in the decree. As it stands it declares the plaintiff entitled to eight-eleventh of the land. What she claimed and what she has acquired is a right to a usufructuary interest therein. She should therefore be merely declared entitled to a life interest in eight-eleventh.

DRIEBERG J.—I agree.

Appeal dismissed.

[1] *18 N. L. R. 269.*