

[IN REVIEW.]

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Present: Mr. Justice Wendt, Mr. Justice Wood Renton, and  
Mr. Justice Grenier.

GOVERNMENT AGENT, WESTERN PROVINCE, v.  
FREDERICK PERERA *et al.*

D. C., Colombo, 2,234.

*Prescription—Usufructuary mortgagees—Purchase under subsequent mortgage—Change of character of possession—"Adverse possession"—Possession ut domini—Ordinance No. 22 of 1871.*

Where the usufructuary mortgagees of a land purchased the same at a sale by the Fiscal under a subsequent mortgage, and claimed to set off the amount due on their mortgage against the purchase-money, and did not obtain any Fiscal's transfer, but possessed the land for over ten years,—

*Held*, that the usufructuary mortgagees had acquired title by prescription to the land, inasmuch as after their purchase at the Fiscal's sale the character of their possession changed, and thereafter they must be considered to have possessed *ut domini* and not *quod* mortgagees.

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**A**PPEAL by the second and third claimants from a decree in a land acquisition case. The facts are fully stated in the following judgment of the District Judge, F. R. Dias, Esq. (April 12, 1907):—

“ This is a reference by the Government Agent under the Land Acquisition Ordinance for the settlement of the claims of two rival sets of claimants to a portion of land acquired by the Crown, viz. a small strip of  $12\frac{3}{4}$  perches out of a larger land at Panchikawatta, which was admittedly in the possession of the first claimant. The amount of compensation tendered by the Government Agent was Rs. 4,900, and its sufficiency is not disputed.

“ Counsel agreed at the trial that the portion acquired was a strip along the southern end of the two lots marked A and B in Fonseka's plan (marked F) annexed to one of the first claimant's title deeds, viz., No. 5,643. This plan shows the entire land (whose name was Ambagahawatta) divided into four lots A, B, C, D, in the year 1887. Portions have also been acquired from the lots C and D, but they form the subjects of inquiry in two other cases, those lots having been sold to and possessed by third parties. The contest in the present case is between the first claimant on the one side, who claims the whole of lots A and B under a string of deeds from one Thangatchy Umma and one Nagooda Marikar, and the second and third claimants on the other, who claim the entire garden as the only children of one Cader Marikar, who died many years ago. Even if it be the fact that Cader Marikar was at any time the owner of the whole garden, it is quite clear that since 1878 neither he nor any of his children has had a day's possession; while, on the other hand, there is abundant testimony that since 1884 the land was possessed and built upon, rightly or wrongly, as their absolute property, by the first claimant and his predecessors in title, viz., Nagooda Marikar and Thangatchy Umma. And, so far as the first claimant is concerned, even the very existence of the second and third claimants seems to have been unknown, until they came on the scene last year, when they found the Crown acquiring lands in this locality and paying fabulous sums for them.

“ The first claimant put his opponents to the proof that they were the children of Cader Marikar, and some evidence of relatives and others has been placed before the Court. In the absence of any evidence to the contrary, we may take it as proved that the second and third claimants are the lawful issue of Cader Marikar.

“ The real point in the case after all is one of prescription, which I find no difficulty whatever in deciding. The history of this garden Ambagahawatta was this, so far as I can make it out from the evidence that has been led. It did not belong entirely to Cader Marikar, but to two persons, viz., Cader Marikar and one Aisa Natchia Umma. The latter is said to have owned and lived

on the western portion A, while Cader Marikar owned the eastern portion represented by B, C, D.

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“ Aisa Natchia Umma (who died about 1897) had four children, viz., Samsie Lebbe, Thangatchy Umma, Nagooda Marikar, and Colenda Marikar, and in the year 1878 it would appear that Cader Marikar mortgaged his land to the above-named Aisa Natchia Umma and her daughter Thangatchy Umma by the bond D 2 to secure a loan of Rs. 400 payable at the end of five years, and in the meantime it was stipulated that the mortgagees should possess the land in respect of interest.

“ The debtor never repaid that loan, nor offered to redeem the mortgage, but in 1882 he gave a secondary mortgage over his land to one Veerasamy Nayakar. That man put his bond in suit, and under his writ the Fiscal sold the mortgaged property and all the debtor's right, title, and interest therein on May 27, 1884 (*vide* Fiscal's Sale Report D 4). At that sale notice was given of the primary mortgage in favour of Aisa Natchia and Thangatchy, and the purchase was “ I. L. Nagooda Marikar for and on behalf of Aisa Natchia Umma,” that is, one of the mortgagees. The sale price was Rs. 400, of which the purchaser paid down the usual one-fourth, viz., Rs. 100. The balance Rs. 300 was never paid, nor did the purchaser obtain a conveyance from the Fiscal, nor did the debtor Cader Marikar ever make any attempt to pay his debt to the primary mortgagees or have the sale annulled. There was some correspondence shortly after that sale between the primary mortgagee's proctor, Cader Marikar's proctor, and the Fiscal (*vide* Exhibits A D 1 to A D 6), which shows beyond all question that Cader Marikar acquiesced in the sale, recognized its validity, and only wanted the Fiscal to recover from the purchaser the balance Rs. 300.

“ It is equally clear what the position was that was taken up by the purchaser, namely, that it was under a mistake that even the Rs. 100 were paid, because the sale was subject to the primary mortgage of Rs. 400, and that was the exact amount for which the land was knocked down by the Fiscal, so that the purchaser, being herself the primary mortgagee, was entitled to take credit for the full amount. In other words, the position was this. What was sold by the Fiscal was, if I may borrow an expression from the English Law, Cader Marikar's equity of redemption, that is to say, his whole bundle of rights in and over this land after payment of the Rs. 400 due to the primary mortgagees. But, as it turned out, the money value of that equity of redemption was nil, as the land only fetched the exact amount of the primary mortgage. Hence the primary mortgagee as purchaser was entitled to keep the land as owner free of encumbrances, and pay herself the whole sum of Rs. 400. At all events that was what Aisa Natchia and her co-mortgagee did, rightly or wrongly, though they foolishly paid the

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Rs. 100, which need not have been paid at all, and which by the way was drawn out of Court by the judgment-creditor Veerasamy.

“ In 1893, that is to say, just when the prescriptive period of ten years was expiring, Cader Marikar appears to have made another spasmodic attempt to get the Fiscal to recover from the purchaser the balance Rs. 300, and received the reply A D 4. This, too, shows that he was not disputing the validity of the sale, or of the purchaser's right to possession, and the reply he received was the same as before, viz., that the purchaser was the primary mortgagee, and so was entitled to take credit *pro tanto* on account of her mortgage instead of paying money. That was the last that was heard of Cader Marikar, and from that day till now even the very existence of any children of Cader Marikar or of any claim by them was unknown to the parties in possession.

“ There is no doubt whatever in my mind that, as alleged by the first claimant and his witnesses, since the Fiscal's sale in 1884 the primary mortgagee Aisa Natchia regarded herself as the lawful owner, and dealt with the land as her own. This is shown by something more than mere oral testimony, for we find her in 1887 employing the Surveyor Fonseka to divide the entire garden (including her own lot A) into four allotments for her four children. Of these four lots, it is said that she gave lot A to Thangatchy Umma, and lot B to her son Nagooda Marikar, who accordingly built upon them and possessed them as their own. In the year 1898 by the deed P 1 Thangatchy Umma and her husband sold their lot A to Nagooda Marikar, who by the deed P 2 sold it, plus his own lot B, to one Kana Packir. This man put up several buildings, and sold both lots by the deed P 4 to one I. L. M. Marikar Hadjar, through whom by a succession of deeds (P 5, P 6, and P 7) they were purchased by the first claimant, an utter stranger to all the previous owners. He put up several new buildings on the land, and it was in his sole possession when the Crown acquired the portion in claim.

“ The two great points on which the second and third claimants rely is the fact that their father Cader Marikar was never divested of his title by the issue of a Fiscal's transfer to the alleged purchaser in 1884, and the fact that the latter was a usufructuary mortgagee who had been let into possession by the owner. It is perfectly true that the legal title of an owner is not taken away from him by a Fiscal's sale until the Fiscal executes a transfer in favour of the purchaser, and it is equally true that a person in possession of land with the leave and license of the owner (such as a usufructuary mortgagee) cannot convert that possession into an adverse possession by a mere change of intention on his own part, so as to entitle him to the benefit of the laws of prescription. This, however, is not a simple case of that nature, as by more than one overt act on the part of the purchaser and of those acting on her behalf it was clearly indicated to Cader Marikar and the whole world what the

attitude adopted by her, rightly or wrongly, was in respect of the property theretofore in her possession as mortgagee.

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“ She did not fraudulently change her mind and convert herself into an independent and adverse possessor, but she bought the land at a public judicial sale, and regarded herself as owner from that date. The correspondence with the Fiscal, to which Cader Marikar was himself a party, shows clearly that from that time she intended to, and did in fact, put herself at arm's length with the old owner and constitute herself the new owner. Hence the fiduciary relationship between herself and her mortgagor ceased as from the date of the Fiscal's sale, and a new possession *ut dominus* commenced and continued till the date of the acquisition, that is to say, for twenty-two years. Clearly, therefore, in my opinion, the first claimant and those under whom he claims had acquired a valid title by prescription as against Cader Marikar and his descendants and all others.

“ An issue was raised as to when the second and third claimants attained majority, but I am unable to decide that, as they have placed no reliable evidence before me to show, even approximately, when they were born. This is, however, an irrelevant matter in view of my finding on the main issue, because as prescription began to run against Cader Marikar from 1884, and he was alive till so late as 1899, the minority of his sons in no way interfered with it.

“ I find that the second and third claimants have no right at all to the land in question, and that the first claimant alone is entitled to it, subject, however, to a mortgage in favour of the tenth added claimant for Rs. 3,000, with interest at 12 per cent. per annum from September 16, 1906, as per bond No. 211 dated March 16, 1906.

“ Enter decree accordingly, and order the second and third claimants to pay all the costs of the plaintiff and of the first claimant and tenth added claimant. ”

The second and third claimants appealed, and the case was heard before Mr. Justice Middleton and Mr. Justice Grenier, who affirmed the judgment of the District Judge (October 10, 1907).

On the application of the second and third claimants, the case was heard in review preparatory to appeal to His Majesty in Council.

*Bawa* (with him *F. M. de Saram*), for the appellants.

*A. St. V. Jayewardene* (with him *B. F. de Silva*), for the respondents.

*Cur. adv. vult.*

October 27, 1908. WOOD RENTON J.—

This is a proceeding under the Land Acquisition Ordinance, 1876 (No. 3 of 1876), on a reference made to the Court by the Government Agent of the Western Province for a decision as to the rights

1908. of several claimants to the compensation offered by Government for part of a land called Ambagahawatta, situated at Maradana, Colombo, and required for the purpose of railway extension. The land in dispute originally belonged under a deed of April 25, 1877 (No. 507, D 1), to one Cader Marikar. By deed of October 10, 1878 (No. 1,007, D 2), he mortgaged it to one Aisa Natchia Umma and her daughter Thangatchy to secure the repayment "on demand after five years" of a sum of Rs. 400. The mortgage was usufructuary, and was never redeemed or sued upon. The respondents Frederick Perera and Mrs. Dickson claimed under Thangatchy, one of the usufructuary mortgagees, and by prescription. The appellants Ismail Lebbe and Mohamado Hanifa are the children of Cader Marikar. Cader Marikar, by deed of September 23, 1882 (No. 1,369, D 3), created a secondary mortgage over the property in dispute in favour of Veerasamy Nayaker, who sued upon the bond in D. C. Colombo, No. 91,610, and obtained in May, 1884, a mortgage decree for Rs. 400, interest, and costs. The decree declared the land liable to be sold, subject to the primary mortgage. The Fiscal sold it, subject to that mortgage, on June 30, 1884, and it was then bought by Nagooda Marikar on behalf of Aisa Natchia Umma. The amount realized was Rs. 400, out of which one-fourth was paid by the purchaser to the Fiscal, and was subsequently drawn out by the judgment-creditor. The sale was not confirmed, nor was any Fiscal's transfer obtained. Aisa Natchia, however, afterwards divided the whole property, which consists of four lots, among her children, giving lot A to her daughter Thangatchy, lot B to Nagooda, who was her son, lot C to another child, Colenda, and lot D to a fourth, Samsie Lebbe. Lots A and B constitute the portion of Ambagahawatta in dispute in the present case. By a series of deeds Thangatchy's rights in lot A passed to the first respondent Frederick Perera, who by deed of March 16, 1906 (No. 211), mortgaged it to Mrs. Dickson, the second respondent. On the other hand, the appellants, as Cader Marikar's sons and heirs, allege that both the lots now in question are their property, and claim the entire compensation offered by Government (Rs. 4,900), except the sum of Rs. 400 due on the primary mortgage bond. On the hearing of the reference in the District Court the following issues were framed:—

- (1) Have the first respondent and his predecessors in title acquired a valid title of prescription or otherwise to lots A and B?
- (2) If not, what compensation, if any, is the first respondent entitled to for any buildings erected by him and acquired by the Crown?
- (3) When did Cader Marikar die, and are the appellants his lawful children?
- (4) When did the appellants attain their majority?

The learned District Judge answered the first issue in the affirmative. It was, therefore, unnecessary to answer the second. On the third he did not positively find the date of Cader Marikar's death, but held that the appellants were his lawful children. On the fourth issue the District Judge expressed himself as follows:—  
 " I am unable to decide that (issue), as they (the appellants) have placed no reliable evidence before me to show, even approximately, when they were born. This is, however, an irrelevant matter in view of my finding on the main issue, because as prescription began to run against Cader Marikar from 1884, and he was alive till so late as 1899, the minority of his sons in no way interfered with it."

Decree was, therefore, entered in favour of the first respondent, subject to the mortgage debt of the second, and the appellants' claim was dismissed with costs. The judgment of the District Court was affirmed on appeal, and the case comes before us now in review. The point on which our decision must turn is as stated by Grenier J. in his judgment on the appeal, the question whether, to the knowledge of Cader Marikar, the original predecessors in title of the first respondent when they purchased the property in question at the Fiscal's sale on June 30, 1884, dropped their character of usufructuary mortgagees and assumed that of purchasers. I agree with the learned District Judge and with Middleton J. and Grenier J. that this question must be answered in the affirmative. If it is so answered, the title of the first respondent is complete. For prescription had commenced to run against Cader Marikar in his lifetime, and after his death the minority of his children, if they were minors, would not interrupt it.

There is no controversy as to the law applicable to the decision of cases of this description. Where a person who has obtained possession of the land of another in a subordinate character, *e.g.* as tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by an overt act, known to the person under whom he possesses, he has got rid for this proposition, it will be found in such cases as *Maduanwala v. the property ut dominus*. If it is necessary to cite local authority for this proposition, it will be found in such cases as *Maduanwala v. Ekneligoda* <sup>1</sup>, *Orloff v. Grebe* <sup>2</sup>, and *Lebbe Marikar v. Sainu* <sup>3</sup>, I agree with Mr. Bawa that the principle enunciated in *Angohamy v. Appoo* <sup>4</sup> cannot apply here. In that case it was held that where a mortgage deed stipulated that the property should be redeemed within a given time, and redemption was not affected within the stipulated period, the mortgagee's possession became adverse from the date of the expiration of that period. But here the mortgage deed itself contemplated the postponement of redemption beyond the period of five years for which the loan was made. Even after

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<sup>1</sup> (1898) 3 N. L. R. 213.

<sup>2</sup> (1907) 10 N. L. R. 339.

<sup>3</sup> (1907) 10 N. L. R. 183.

<sup>4</sup> *Morgan's Dig.* 281.

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the five years had passed, the mortgage debt was only repayable " on demand." I am not prepared, however, to assent to Mr. Bawa's further contention that, inasmuch as the acts of user of the land proved to have been by Aisa Natchia, such as the erection of buildings on it, were within her rights as usufructuary mortgagee, Cader Marikar, even if he was aware of them, and, for that matter, of the fact that they were being done *ut dominus*, could do nothing to protect his ultimate proprietary rights. In support of this argument, Mr. Bawa referred to Pothier on *Obligations*, s. 451, and *Sturges v. Bridgman*<sup>1</sup>. Pothier, in the passage cited, merely lays down the rule, which cannot be disputed, that prescription runs only from the time when the creditor has a right to institute his demand. In *Sturges v. Bridgman*<sup>1</sup> it was held that the right to make a noise so as to annoy a neighbour cannot be supported by user, unless, during the period of user, the noise has amounted to an actionable nuisance. I do not think that *Sturges v. Bridgman*<sup>1</sup> is any authority for holding that; under our law it is not competent for the owner of the *dominium* to take some proceedings of a declaration or *quia timet* nature so as to make his position secure, when he is made aware that a tenant or mortgagee, with the intention of prescribing against him, is doing acts of an ambiguous character, which might afterwards be relied upon as evidence of possession *ut dominus*. There is no need, however, to decide that point formally, for the evidence discloses conduct on the part of Aisa Natchia going far beyond any user that could be justified under the mortgage deed. She purchased it at a Fiscal's sale. Although the sale purported to be subject to the primary mortgage, I think with Middleton J. that the correspondence (A D 1 and A D. 3) shows that the proctors for the purchasers and primary mortgagees were still construing the words " subject to the primary mortgage " in the sense pointed out and condemned by Burnside C.J. and Clarence J. in *Weeratunga Appuhamy v. Don Pedris*<sup>2</sup> although these words had already been interpreted by Phear C.J. in *Ludovici v. Perera*<sup>3</sup> in the sense now enacted in the proviso to section 352 of the Civil Procedure Code. The fact, therefore, that the sale was " subject to the primary mortgage " does not prove, under the circumstances, that Aisa Natchia had still retained her character of mortgagee in spite of it. Nor does the fact that the sale was never formally confirmed or followed by the execution of a Fiscal's conveyance prevent her purchase from being, as I think it was, an overt act inconsistent with her character as mortgagee, and adverse to the *dominium* of Cader Marikar. The subsequent division by her of the property among her children was an overt act of adverse possession of an even more distinctive kind. On the question of Cader Marikar's knowledge of these overt acts of adverse possession, I have nothing

<sup>1</sup> (1879) 11 Ch. D. 852, 858, 863.

<sup>2</sup> (1883) 5 S. C. C. 209.

<sup>3</sup> (1878) 1 S. C. C. 22.



to add to what has been said on the subject in the District Court and in the Supreme Court on appeal, except to call attention to the evidence of Abdul Careem, who bought one lot of the land in question from Colenda, one of Aisa Natchia's children, among whom the division was effected (*Record, p. 36*):—" I knew Cader Marikar. He was related to me. He was alive when I bought my lot, and saw me in occupation of it. He never inquired what my rights were."

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I would affirm the decree under review with costs.

WENDT J.—I agree, and do not desire to add anything.

GRENIER J.—I agree, and have nothing to add.

*Judgment in appeal affirmed.*

