1922.

Present : Ennis and Schneider JJ.

SILVA *v.* LETCHIMAN CHETTY.

386—D. C. Negombo, 14,106.

Agreement to sell land belonging to vendor and minor children—Consideration paid—Possession by vendee—Adverse possession—Prescription.

A agreed to sell to B by deed in 1893 his share (one-twelfth) and the share of his two minor children (one-twelfth) of a garden, and undertook to get the minors to convey when they came of age. The deed recited that the two shares of the garden were given over to B for possession and improvement from the date of the execution of the agreement, and that A had received the full consideration. B had possession ever since 1893 to date of action. The minors attained the age of majority, twenty-one and fifteen years, before date of action, but did not make any claim during these years.

Held, that B's possession was adverse, and that he had acquired title by prescription to the share of the minors.

THE facts are set out in the judgment. The deed of 1893 was as follows :—

No. 30,525.

Know all men by these presents that I, Warnakulesuria Alensokuttige Dominikko Fernando of Second Division of Kurana, Bolawalana, within Negombo gravets, as the first party, and I, Warnakulesuria Ichchampullige Mariano Fernando of Third Division of Kurana, Bolawalana, within said gravets, as the second party, bound ourselves and hereby declared that the Pokunabodewatta at Third Division of Kurana, Bolawalana, within Negombo gravets, Western Province, is bounded, &c., in extent about three roods of the one-sixth share of this land and plantations a just half share.

2. The Kosgahawatta at Third Division of Kurana, Bolawalana aforesaid, is bounded, &c., of this land and plantations a just half share of undivided one-sixth share.

And the said undivided two portions of garden belonging to the two minor children of me, the first party, and who are under my protection, named Warnakulesuria Alensokuttige Sopi Nona Fernando and ditto Anthony Fernando, I have agreed to sell for Rs. 22·50, Ceylon currency, to second party, and have received the said amounts in full from second party.

So, within sixteen years from this day, or when the two children reach the age of signing a deed when the second party executes a deed of transfer for the said property and gives notice, I, the first party, promise to get the two children sign it within eight days of that notice, and it is agreed that the two parties should bear the costs of execution; and if I, the first party, fail or neglect to do so, I promise to pay the second party as fine, at the rate of fifty cents for each day elapsing after the said eight days, and to get the said business done.

And the Madangahakumbura, now made into a garden at Second Division of Kurana, Bolawalana, within Negombo gravets, Western Province, is bounded, &c., in extent about one acre, and the undivided half share of me, the first party, of this land and the plantations thereof I bound as mortgagee and security to secure the fulfilment of the said agreement, and I promise not to lease the plantations of the said portion of garden until the settlement of this agreement; and the said two portions of garden are hereby given over to the second party for possession and improvements from this day; and for the due fulfilment of these conditions, we for ourselves, and our heirs and assigns or lawful representatives, bind ourselves, and in proof hereof we signed three writings as this on February 7, 1893.

H. V. Perera, for plaintiff, appellant.

Samarawickreme (with him *C. O. de Silva*), for respondents.

March 16, 1922. ENNIS J.—

This was a partition action. The land sought to be partitioned originally belonged to Manuel Dabrera and his wife Agida. Manuel died, whereupon his widow became entitled to a half, and each of his three children—Juana, Ana Maria, and Barbara—to a one-sixth. Juana married one Dominico, and died leaving two children, Sophia and Anthony. On her death her husband Dominico became entitled to one-twelfth, and each of the children to one-twelfth. Ana Maria married Bastian. Barbara married Mariano. Agida gifted her half to Barbara and Mariano in 1893 by the document D 4. Dominico agreed to sell to Mariano his one-twelfth share and the shares of his two children, Sophia and Anthony, who were then minors. He undertook to get Sophia and Anthony to convey when they came of age. The document recited that the two portions of garden were given over to Mariano for possession and improvement from the date of the execution of the agreement, and further recited

1922.

ENNIS J.

Silva v. Letchiman Chetty

that Dominico had received the full consideration. In 1904 Barbara and Mariano mortgaged five-sixths of the land reciting their title, Mariano saying that he had a one-sixth share on a deed which was not then at hand. It can only have been the deed of 1893. There was a later mortgage D 7 in 1915, by which Mariano, Barbara, and one Ladis Fernando mortgaged the whole of the land. This bond was put in suit, the property sold at auction, and the second added-defendant became the purchaser. He took out his Fiscal's transfer on March 15, 1920, the document D 3. The plaintiff claimed a third of the land by virtue of a conveyance to him P 1 in 1919 by Mariano, Ana Maria, Sophia, and Anthony. The learned Judge awarded the plaintiff a one-sixth, and the plaintiff appeals. On the appeal his claim to a one-twelfth share from Sophia and Anthony alone has been pressed. The learned Judge found that Barbara and Mariano had had possession ever since the document D 4 in 1893. There is no reason to disturb that finding of fact, but it was urged that at the date of the document Sophia and Anthony were minors, and it appears they were born in 1878 and 1884, respectively, and they, therefore, came of age in 1899 and 1905, respectively, that is, twenty-one and fifteen years, respectively, before the institution of the present action. The learned Judge held that the fact that they had made no claim during all these years established a prescriptive title in Mariano. Against this finding we have been referred to the case of *Lebbe Marikar v. Sainu.*[1] There it was held that a person who enters into possession of land under an agreement with the owners to sell the same to him cannot acquire title by prescription after the lapse of ten years, his possession not being adverse to the true owners. The ground of that finding was that a person so entering into possession was a mere licensee of the owner. It is not clear that both the Judges in that case were of the same opinion on this point, as Middleton J. agreed that the appeal should be dismissed, as no overt act of a change in the character of the possession had been proved. This case was referred to in the case of *Thaivanipillai v. Arumugam.*[2] There Lascelles C.J. referred to the case of *Lebbe Marikar v. Sainu* (*supra*), and said :—

> "On the facts reported I confess that I find it difficut to see how an intending purchaser who is given possession with an agreement that the vendors would convey the land to him when they had perfected their own title can be regarded as a licensee under the vendor."

Wood Renton J. looked up the record in *Lebbe Marikar v. Sainu* (*supra*), and said that he found the agreement referred to in the judgment one of a special character, in which the grantee was merely to possess and take the produce till the execution of the real transfer deed. I am in entire accord with the observations of Sir Alfred Lascelles in that case, and, looking at the agreement in the present

[1] (*1908*) *10 N. L. R. 339.* [2] (*1913*) *15 N. L. R. 358.*

case, I find that it is not merely an agreement that Mariano was to possess and take the produce till execution of the transfer deed. There was a delivery of possession to Mariano to enable him to improve the land and payment of the full consideration. The improvements could not be for the benefit of the vendors, and, therefore, his possession under that agreement was *ut dominus*, and, in fact, he exercised his rights as owner under the mortgage of 1904 and the later mortgage of 1915. As to whether his possession under those circumstances was adverse to the interests of Sophia and Anthony is a question of fact. This question was fully gone into in the case of *Tillekeratne v. Bastian*,[1] and the present Chief Justice there said, at page 20 :—

> " It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole of the property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners ; that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions."

So in this case I am of opinion that there is a counter-presumption, that Sophia and Anthony were well aware of Mariano's intention to hold *ut dominus*, and this counter-presumption in the present case receives considerable support from the plaintiff's own document P 1, wherein Mariano recites his own title as the deed of 1893. It is possible that Sophia and Anthony joined in that deed by way of ratification of the agreement that Mariano entered into with their father in 1893, and not by way of an assertion of an independent title.

In the circumstances, I see no reason to interfere with the judgment appealed from, and would dismiss the appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

[1] *(1921) 21 N. L. R. 12.*