1930

Present : **Maartensz and Jayewardene A.JJ.**

DANORIS *v.* BASNAYAKE *et al.*

149—D. C. Tangalla, 2,624.

Prescription—Agreement to sell share of land subject to partition action—Vendee placed in possession—Adverse title.

In 1917 A agreed with B to sell to him either the half share of a certain land or the whole of it, according to the share which would be allotted to him in a partition action which was pending.

The deed further recited that B was to possess the land and that he shall be entitled to all the right, title, and interest of A in the land. In 1918 the partition action was withdrawn. B and his successors in title possessed a half share of the land from the date of the agreement.

Held, that such possession was adverse to the title of A and his heirs.

APPEAL from a judgment of the District Judge of Tangalla.

Wickremanayake, for added defendant, appellant.

Weerasooria, for plaintiff, respondent.

October 8, 1930. MAARTENSZ A.J.—

The added defendants in this action appeal from a decsion of the District Judge of Tangalla that they are not entitled to an undivided half share of the land sought to be partitioned called Kadaweduweruppa. This land was the subject of the partition suit No. 1,581 of the District Court of Tangalla in 1917, brought by Don Deonis Abeygunasekere Basnaike, and he allotted half to himself and allotted one-fifth to Janise, the seventeenth defendant in that action. Janise claimed the whole land and by deed No. 1,091, AD 2, dated June 20, 1917, Janise agreed to sell to a man named Rodde either the whole or half of the land, the subject of that partition suit, as may be allotted to him. The deed recites that in the meantime Rodde was to hold and possess or do whatever he pleases with the property sold and that he shall also be entitled to all the grantor's right, title, and interest therein. The attestation clause recites that the consideration was acknowledged to have been received. Rodde transferred the interests he acquired under deed No. 1,091 to Don Deonis Abeygunasekere Basnaike by deed No. 441 dated November 8, 1917, AD 3. The action No. 1,581 was withdrawn in the year 1918. Janise died leaving two daughters, Karlina and Dukia. Karlina sold here interest to the plaintiff ; Dukia is the first defendant. The added defendants filed their answer on December 8, 1927, that is 10 years after deed No. 1,091 was executed.

The learned District Judge rightly held that Basnaike did not acquire title under deed AD 3. There was, however, a claim that Basnaike and his successors in title had acquired a title by prescription. As regards that claim the District Judge found, and in my opinion correctly found on the evidence, that the first added defendant and her deceased husband had been in possession of a half share of the land from November 8, 1917, but he rejected her claim to a prescriptive title on the ground that it was possession of a mere expectancy at least up till January, 1918, and that therefore Basnaike and his successors in title had not had adverse possession for over 10 years.

I am of opinion that the learned District Judge's decisions on the question of prescription cannot be supported. It is true that in the case of *Lebbe Marikar v. Sainu*[1] it was held that a person who enters into possession of a land under an agreement with the owners to sell the same to him cannot acquire a title by prescription after a lapse of 10 years, his possession not being adverse to the true owners, but this case has not been followed. In the case of *Theivanipillai v. Arumugam*[2] Lascelles C.J. said with reference to that case ; " On the facts reported I confess that I find it difficult

[1] (1910) 10 *N. L. R.* 339.
[2] (1912) 15 *N. L. R.* 368.

to see how an intending purchaser who is given possession under an agreement with the vendors to convey the land to him when they had perfected their own title can be regarded as a licensee under the vendors, but it is possible that there is something in the deed of agreement which may explain and justify the conclusion ". Wood Renton J. said that he had examined the deed considered in the case of *Lebbe Marikar v. Sainu* (*supra*) and found that the agreement referred to was one of special character in which the grantee was merely to possess and take the produce till the execution of the real transfer. The decision in that case must therefore be limited to agreements of that character. The latest case is the case of *Silva v. Letchiman Chetty*[1]. By the deed in that case A agreed to sell to B in 1893 his share (1/12) and the share of his minor children (1/12) of a garden and undertook to get the minors to convey when they came of age. The deed recited that the two shares in 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 full consideration. B had possession ever since 1893 to the date of the action. The minors attained the age of majority (21) 15 years before the date of the action but they did not make any claim during these years. It was held that B's possession was adverse and that he had acquired a title by prescription to the share of the minors.

The deeds AD 2 and AD 3 are much stronger than the deed considered in that case, for here the grantor of the deed not only agreed to covey the land but recited that the grantee had been placed in possession of the land and that he had transfered to the grantee all his (the vendor's) right, title, and interest.

I am, therefore, of opinion that the possession of Basnaike and Rodde and their successors in title under the deeds AD 2 and AD 3 was adverse to the title of Janise and all others and that the added defendants were, therefore, entitled to be declared entitled to an undivided half share of the land sought to be partitioned.

I would set aside the decree appealed from and declare the added defendants entitled to an undivided half share of the land with costs of appeal and costs of the contest in the Court below.

JAYEWARDENE A.J.—I agree.

Appeal allowed.

[1](1922) 23 *N. L. R.* 372.