1912.

Present : Lascelles C.J. and Wood Renton J.

THEIVANIPILLAI *v.* ARUMUGAM *et al.*

110—D. C. Batticaloa, 3,493.

Prescription—Adverse possession—Verbal dower—Possession for over ten years.

Where A made an informal grant of a land to B by way of dowry, and B entered into possession with the full intention of occupying it as owner and possessed it for over ten years—

Held, that the possession was adverse, and that he had acquired a prescriptive title to the land.

Lebbe Marikar v. Sainu [2] distinguished.

IN this action the plaintiff sought to set aside a deed of transfer of a land dated August 31, 1911, executed by the first and second defendants in favour of the third. The plaintiff claimed the land by virtue of a deed of gift dated July 9, 1897; executed by her parents in her favour and in favour of her husband, Kumaravelu Maarimuttu.

The second defendant is the daughter of the plaintiff, and first defendant is the husband of the second defendant. These defendants alleged that they were married about eighteen years before date of action, and that the land was dowried to them by the plaintiff's father Veeracutty by word of mouth, and they set up title thereto by prescription. The third defendant was the purchaser of the land from first and second defendants. The first defendant in giving

[1] (1894) *A. C. 670.*

[2] (1907) *10 N. L. R. 339.*

evidence said: " The land in dispute was given to us in dower. No deed was executed. The dowry was promised before our marriage. After I married I was let into possession the same year. I have been in possession ever since:..... Veeracutty, who gave the dower, put me off, saying: ' Why are you in such haste about a deed? You are in possession of the land. Has any one tried to disturb you? ' About six months before we sold to the third defendant we asked the plaintiff to make a deed in our favour. She said she had to make a pilgrimage and would come back and execute a deed. She finally refused. It was after that that I executed the deed in favour of the third defendant. "

The learned District Judge (G. W. Woodhouse, Esq.) dismissed plaintiff's action.

The plaintiff appealed.

Bawà, K. C., for the appellant.—The possession of the first and second defendants was not adverse. They were possessing the land as licensees or agents of Veeracutty. Their occupation was permissive and on sufferance. The first defendant asked for a conveyance from Veeracutty, and from the plaintiff after Veeracutty's death. That clearly shows that he acknowledged Veeracutty was the owner. Counsel referred to *Nagudu Marikar v. Mohamadu*,[1] *Orloff v. Grebe*,[2] *Joseph v. Annappillai and Raphael*,[3] *Lebbe Marikar v. Sainu*.[4]

J. W. de Silva, for the first and second defendants, respondents.—The defendants did not possess as agents. They possessed from the very beginning as owners. The plaintiff herself has admitted the ownership of the defendants by not including this land in the inventory of Veeracutty's estate.

In *Lebbe Marikar v. Sainu*[4] there was a notarial agreement to purchase. The possessor, moreover, was aware that the intending vendor was expecting to get a Crown grant.

Balasingham, for the third defendant, respondent.—The action is not maintainable in this form. According to the plaintiff she was the owner at the date of the action, and the defendants were in unlawful possession. Under these circumstances, an action *quia timet* does not lie. The action should have been one for declaration of title. The *Ceylon Land and Produce Co., Ltd., v. Sevaratna* [5] relied on by the District Judge, does not apply to the facts of this case; there the party in possession brought an action *quia timet* against a person who had obtained a mortgage decree against a third person with respect to the land which the plaintiff in the *quia timet* action claimed.

[1] *(1903) 7 N. L. R. 91.*
[2] *(1907) 10 N. L. R. 183.*
[3] *(1904) 5 Tamb. 20.*
[4] *(1907) 10 N. L. R. 339.*
[5] *(1908) 12 N. L. R. 16; 4 Bal. 33.*

1912.

Theivani-pillai v. Arumugam

The fact that the first and second defendants had asked for a transfer from Veeracutty does not show that the possession was not adverse. Where a person who had obtained a prescriptive title wants to get a paper title from the person who holds the paper title, he does not surrender his title by prescription. See observations of Middleton J. in *Odris v. Mendis.*[1]

The possession in this case was adverse from the very start. The first and second defendants possessed as owners from the date of the dowry. In *Lebbe Marikar v. Sainu*[2] the possession was that of an agent to commence with.

Bawa, in reply.

Cur. adv. vult.

June 18, 1912. LASCELLES C.J.—

This is an appeal from the decision of the District Judge of Batticaloa that the first and second defendants, who are the third defendant's vendors, have acquired title to the land in dispute by prescription. The question involved is whether the possession of the first and second defendants is adverse to or independent of the plaintiff's title. The learned District Judge has accepted the evidence that at the time of the marriage of the first and second defendants, about seventeen or eighteen years before the date of the action, the land was the property of the plaintiff's parents, the grandparents of the first defendant; that the grandparents informally granted the field in dispute to the first and second defendants as dower, and that the latter then entered into possession and continued in possession up to the date of the transfer to the third defendant. The appellant contends that the occupation of the first and second defendants was not of such a character as to enable them to acquire title by prescription. If it were the case that the first and second defendants entered the property as the agents or licensees of their grandparents or of the plaintiff, or that their occupation was merely permissive or on sufferance, their possession would not be adverse to and independent of the plaintiff's title in the absence of proof that the character of their occupation had been changed. But the District Judge has found, and I entirely accept his finding, that the grandparents intended to give the land to the first and second defendants, in the same way that they gave other lands in dower on the marriage of their other daughters, but for some reason they made the grant informally. On this footing it is difficult to see how the possession of the first and second defendants can be otherwise than adverse to and independent of the plaintiff's title. The land was given to them to keep it for themselves, and they entered it with that intention. How can their possession be otherwise than adverse to the title of the grantors and their heirs ?

[1] *(1910) 13 N. L. R. 309.*

[2] *(1907) 10 N. L. R. 339.*

Amongst other authorities we were referred to *Nagudu Marikar v. Mohamadu*,[1] *Orloff v. Grebe*,[2] *Odris v. Mendis*,[3] *Joseph v. Annappillai and Raphael*,[4] and *Lebbe Marikar v. Sainu*.[5] Of these, the last-named case is the only one the facts of which present any real analogy to the present case. In that case the question was whether one Meera Levvai Kalender Levvai had acquired title by prescriptive possession. This person had entered on the land under a deed which was held not to be a conveyance of the land, but merely an agreement to sell the land. He was, therefore, held to be a licensee under the grantors of the agreement.

On the facts reported, I confess that I find it difficult 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. But it is possible that there is something in the deed of agreement which may explain and justify that conclusion. Be that as it may, there is nothing in that decision which need force us to the unreasonable conclusion that where a bride and her husband have entered into possession of property which has been informally made over to them by their relations as dower, with the full intention that they should occupy it as their own, they merely possess the property as licensees or agents or on sufferance under the donors, and cannot acquire prescriptive title by possession. I find it impossible, on the findings of the District Judge, which are well supported by the evidence, to hold that the possession of the first and second defendants was that of agents or licensees, or that their possession was otherwise than adverse to and independent of the plaintiff's title. In view of my opinion on the title of the third defendant, it is unnecessary to consider whether the action can be justified as a *quia timet* action. On this ground I would dismiss the appeal with costs.

WOOD RENTON J.—

I entirely agree. I would only add that I have examined the original record in *Lebbe Marikar v. Sainu*[5] and find that the agreement referred to in the judgments was 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. The language used by the Supreme Court in *Lebbe Marikar v. Sainu*[5] must, I think, be regarded as limited by the particular circumstances.

Appeal dismissed.

[1] *(1903) 7 N. L. R. 91.*
[2] *(1907) 10 N. L. R. 183*
[3] *(1910) 13 N. L. R. 309.*
[4] *(1904) 5 Tamb. 20.*
[5] *(1907) 10 N. L. R. 339.*