

Present: Mr. Justice Middleton and Mr. Justice Grenier.

1907.
October 15.

LEBBE MARIKAR *v.* SAINU *et al.*

D. C., Batticaloa, 2,763.

*Agreement to purchase—Possession under such agreement—Prescription—
Licensee—Overt act of adverse possession—Ordinance No. 23 of 1871..*

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.

ACTION *rei vindicatio*. The facts are fully stated in the following judgment of the District Judge (W. G. Woodhouse, Esq.):—

“The property in dispute in this case is a field about 36 acres in extent. It is one-third part of a land which Sikkander Aliar and his wife Kadisa Umma purchased from the Crown in 1860 (p. 39).

“The plaintiff traces his title from one Meeralevvai Kalender Levvai, who entered into possession under the original purchasers under deed 1,394 of February 4, 1861 (p. 1); the defendants trace theirs direct from the children of Sikkander Aliar and Kadisa Umma.

¹ (1892) 1 *S. C. R.* 321.

² (1892) 2 *C. L. R.* 50. .

³ *S. C. Min.*, May 26, 1903.

⁴ *S. C. Min.*, Aug. 17, 1903.

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“ It is admitted for the defence that Meeralevvai Kalender Levvai and his representatives remained in possession till 1894; and the evidence shows that their possession was not disturbed till 1898, a period of thirty-seven years.

“ After 1898 neither party has had time to prescribe, so that that disposes of the second issue.

“ The simple question to be decided is whether Kalender Levvai's position at the beginning was merely that of a licensee under Aliar and his wife? If so, was his position altered at any time during those thirty-seven years to that of one who admitted no superior title in Aliar and his wife?

“ Everything depends on the construction we put upon the deed of 1861 (p. 1), by virtue of which Kalender Levvai obtained possession. It is nothing more than what it purports to be, namely, an agreement by the original purchasers to sell this land to Kalender Levvai.

“ Mr. Tisseveresinghe, who appeared for the plaintiff, admitted that that deed, standing alone, conferred no title on Kalender Levvai. If it was for a moment contended for the plaintiff that that deed did confer title, then the first issues in the case would have been whether the deed of 1861 conferred title on Kalender Levvai. All parties are agreed that the deed conferred no title on Kalender Levvai.

“ It follows therefore that in 1861, when Kalender Levvai entered into possession of this land, he did so as ‘ licensee ’ under Aliar and his wife. He may have had an intention of keeping the land to himself, but he knew his possession was precarious, otherwise there would be no virtue in the proviso appearing in the deed that if the original owners refused to execute a transfer, he (Kalender Levvai) could sue them for the purchase money plus £100.

“ In *Toussaint v. Sattorokelsingha*,¹ it was maintained by the Full Court in appeal that both by the English and the Roman-Dutch Law a person who enters into possession of property under an agreement by the owner to sell, and who obtained no transfer conveying the property to him, cannot resist owner's superior title, even if he (the proprietor) eject the person in possession without the intervention of the Courts (*vide* also 2 N. L. R. 255; 3 N. L. R. 213).

“ Mr. Tisseveresinghe argued that, although Kalender Levvai's title was not complete in 1861, there was the intention on the part of Aliar and his wife to sell and on the part of Kalender Levvai to buy; so that, even, if no transfer was executed, Kalender Levvai's exclusive possession for ten years would remedy all defects and perfect that title. Possibly that was what was in Kalender Levvai's mind when in 1863 he omitted to compel Kadisa Umma

¹ *Ram.* (1843-1855) 174.

and her children (Aliar being then dead) to execute a transfer and accept the balance of the purchase money; but the law is quite clear.

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" The authorities cited by Mr. Tambimuttu make it quite clear. In *Naguda Marikar v. Mohammodu*¹ it was held by the Judicial Committee of the Privy Council that where a person enters on another's land as his agent and possesses it he is not entitled to the benefits of section 3 of Ordinance No. 22 of 1871 until he has shown he has got rid of his character as agent.

" Here the plaintiff must prove that Kalender Levvai at some stage of his possession changed his position to that of one holding *ut dominus*. This he has failed to do. The mere fact that he possessed for ten years without paying rent or tithe to Aliar and Kadisa Umma could not alter his position, for that was the mode of possession stipulated for in, and entirely in conformity with, the deed of 1861. Thus, I think it is quite clear that no title was vested in Kalender Levvai or those who claim under him by reason of possession for ten years and more.

" I dismiss plaintiff's action with costs."

The plaintiff appealed.

Sampayo, K.C., for the plaintiff, appellant.

Van Langenberg (with him *G. E. Chitty*), for the defendants, respondents.

Cur. adv. vult.

October 15, 1907. GRENIER A.J.—

The District Judge has, in my opinion, come to a right conclusion on the question whether Meeralevvai Kalender Levvai acquired a title by prescriptive possession to the land in question. The action was one *rei vindicatio*, and the plaintiff traced his title from Meeralevvai Kalender Levvai, who entered into possession of the land under Sikkander Aliar and his wife Kadisa Umma, who had purchased the same from the Crown in 1860. The deed under which Meeralevvai Kalender Levvai entered is dated February 4, 1861, and an examination of it shows that it was not a conveyance of the land to Meeralevvai Kalender Levvai, but was simply an agreement to sell the land to him. It would appear that Sikkander Aliar and his wife Kadisa Umma had not, at the date of the execution of the deed of agreement, obtained a Crown grant in their favour; and so they agreed by the deed that when they obtained such a grant they would " make over a final transfer deed for the land."

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It is clear, therefore, that Meeralevvai Kalender Levvai was placed in possession, not as if he had purchased the land and was the owner of it, but, if I may so describe him, as a licensee under Sikkander Aliar and his wife. There is absolutely nothing to show that at any time, after the execution of the deed of agreement, Meeralevvai Kalender Levvai by any overt act changed his position from licensee to owner. As pointed out by the learned District Judge, the mere fact that he possessed for ten years without paying rent or tithe to the persons under whom he entered could not alter his position, for that was the mode of possession stipulated for in the deed of 1861.

The case is covered by authority. In *Nagudu Marikar v. Moham-madu*¹ the Judicial Committee of the Privy Council held that where a person enters on another's land as his agent he cannot claim a title by prescription, unless he can show that he has changed his character from agent to owner, and that he had possession as such owner for a period of ten years.

I must confess that my sympathies are with the plaintiff, but the law is clearly against him.

I would dismiss the appeal with costs.

MIDDLETON J.—

I agree to dismiss this appeal. Neither the certificate relied upon by the learned counsel for the appellant nor the failure to pay the instalments due to the Crown and to give title appears to me such overt acts of a change in the character of possession as would entitle the appellant to support a title by adverse possession.

Appeal dismissed.