Present : Ennis A.C.J. and De Sampayo and Dalton JJ. 1925.

HAMIDU LEBBE *v.* GANITHA.

418—D. C. Kegalla, 6,815.

Co-owners—Prescriptive title—Long-continued exclusive possession—Presumption of ouster.

Where a co-owner of land seeks to establish a prescriptive title against another by reason of long-continued exclusive possession, it depends on the circumstances of each case whether it is reasonable to presume an ouster from such exclusive possession.

Per DALTON J.—I see no reason to suppose that the law as laid down in *Tillekeratne v. Bastian*[1] is in any way inconsistent with the decision in *Brito v. Muttunayagam.*[2]

CASE referred to a Bench of three Judges by Ennis A.C.J. by the following judgment, which states the facts :—

ENNIS A.C.J.—

This was an action for a declaration of title to a half share of Kongahakumbura. The land originally belonged to one Kirihatana, and it appeared, in the course of the case, that Kirihatana died leaving two sons, the defendant—Ganitha and Suddana. Suddana had two children, Rankira and Ukku, who in 1921 sold to the plaintiff. The learned Judge in a very brief judgment has held in favour of the defendant, saying that it is too late in the day for the plaintiff to assert title through the children of Suddana, and that, therefore, the plaintiff's case must fail on the issue of prescription. Ganitha, the defendant, came into Court, saying in his answer that he was the sole heir of his father, Kirihatana, and an issue was framed as to whether Suddana was the son of Kirihatana. In the course of the trial, after the plaintiff had proved that Suddana was a son of Kirihatana, the defendant went into the box and himself gave evidence admitting that his father had two sons, himself and Suddana. He then proceeded to say that he held the land in dispute for the last forty or fifty years, and that Suddana had left long ago for the Gampola District, and never took any share and never performed any of the *rajakariya* services. Again the defendant's evidence is extremely brief. But in cross-examination he admitted that in 1923 he had mortgaged a half share of the land claimed, and in re-examination he explained merely that this was a usufructuary mortgage bond. I am unable to find in the defendant's evidence any starting point for prescription.

[1] *(1918) 21 N. L. R. 12.* [2] *(1918) A. C. 895; (1918) 20 N. L. R. 327.*

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He came into Court with a false assertion, and it then transpired that he had to prove a possession adverse to his brother, Suddana. In view of the relationship existing between the parties, the case of *Corea v. Appuhamy*[1] seems to be much in point in connection with this case. However, Mr. Keuneman for the defendant has called our attention to the case of *Tillekeratne v. Bastian* (*supra*), where the question as to whether an ouster could be presumed was gone into at some length. The case itself is not on all fours with the present case, inasmuch as the facts there show that the parties in possession of the land had been dealing with it for over forty years by means of leases, and that the land in question was a valuable mineral land, and that there had been no division of the proceeds during the entire period of the occupation by one co-owner and his predecessor in title. However, in the course of that case, Bertram C.J. expressed the opinion that "It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated."

In the present case, it seems to me, we are not called upon to do any such thing. I am unable to see in the evidence of the defendant anything in the defendant's behaviour which repudiates the character of his possession. His possession can be attributed to a lawful right which he had to possess as a co-owner, and in order to prescribe against his co-owners, some act of ouster would have to be proved or some definite facts from which one could infer a change in the character of the defendant's intention with regard to the holding of this land. I am unable to see in his evidence anything whatever which points to a change in his intention. On the contrary, it seems to me that the mortgage in 1923 shows that even at that date he was aware that only half the land belonged to him.

I am of opinion that the defendant's possession cannot in any way be said to be adverse to that of his brother, Suddana, notwithstanding that the defendant has taken the crops from the land for the last forty years and performed the services. My brother, however, is of a different opinion, and in the circumstances the case must be referred to a Court of three Judges.

R. L. Pereira (with him *Ranawake*), for the plaintiff, appellant.

Keuneman (with him *Jansz*), for the defendant, respondent.

July 8, 1925. ENNIS A.C.J.—

I have very little to add to what I have already said in the terms of reference. I am in accord with the conclusion arrived at in *Tillekeratne v. Bastian* (*supra*), but am of opinion that the evidence in the present case does not justify its application here, or support a presumption of something in the nature of an ouster so as to give

[1] *(1911) 15 N. L. R. 65; (1912) A. C. 230.*

the defendant a starting point for prescription. The defendant, upon whom the burden lay, gave evidence in chief which is contained in five lines of the typewritten record, and in cross-examination made admissions which militate against his claim to have prescribed. The defendant called no witnesses. He mentioned brothers and sisters as if acknowledging claims at some time in them, but he did not say more. He mentioned having performed service without saying what it was. The defendant and his brother, Suddana, were clearly co-parceners in the land, and as such the possession *per se* of one could not be held as adverse to the other. This is the rule laid down in *Corea v. Appuhamy* (*supra*) and re-enunciated in *Brito v. Muttunayagam* (*supra*). In my opinion the defendant has failed to establish any fact which could give rise to a presumption of ouster, and I would allow the appeal with costs.

DE SAMPAYO J.—I agree.

DALTON J.—

In view of the difficulty I felt and expressed when this appeal was argued before a Bench of two Judges, it is, I think, due to the parties and to this Court, now that the case has been argued again, to set out fully my views of the law as applicable to the facts of the case before us.

In this action the plaintiffs claimed a declaration that they are entitled to an undivided half share of the land named Kongahakumbura, an order to eject the defendant therefrom, and that they are entitled to damages in the sum of Rs. 80, and further damages until possession of the land was restored to them.

They set up in their plaint that the defendant, Ganitha, and one Suddana were by right of maternal inheritance each possessed of an undivided half share in the land in question; that Suddana died about eight years ago intestate, leaving as his heirs his children, Rankira and Ukku Amma, who became entitled to their father's undivided half share; that Rankira and Ukku Amma, by their deed No. 3,882 of June 2, 1921, sold all their undivided half share in the land to the plaintiffs, and that the plaintiffs and their predecessors in title have been in the undisturbed and uninterrupted possession of the said half share for more than ten years before the institution of this action by a title adverse to and independent of that of the defendant and all others.

To this the defendant answered that he was the sole heir of his father, Kirihatana, to whom the land belonged, that he died many years ago, and that he (the defendant) and his predecessors in title had been in the undisturbed and uninterrupted possession of the land for a period exceeding ten years prior to the institution of this action. He accordingly asked that the plaintiff's action be dismissed.

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The issues settled were—

(1) Was Suddana a son of Kirihatana ?

(2) Has defendant acquired prescriptive title ?

I would point out here that these issues do not appear to me to be sufficient to decide the matter in dispute. It is clear from the evidence subsequently led that neither the plaint nor the answer adequately set out the case of either party. The defendant, although he claimed to be sole heir of Kirihatana, admits that Suddana was a son of Kirihatana, whilst the plaintiffs set up a prescriptive title themselves, presumably in view of the fact that Suddana and the defendant had other brothers and sisters as they (the plaintiffs) sought to establish in the cross-examination of Ganitha. If they succeeded in establishing this, Suddana himself, through whom they claimed, had no right to half the property, hence their claim in their plaint to a prescriptive title on behalf of Suddana and his heirs.

The evidence is short, the second plaintiff and one other witness alone giving evidence in support of the claim. It is to me worthy of notice that they do not call either of their vendors. The second plaintiff states that he does not know how many children Kirihatana had, but that he died leaving two, defendant and Suddana. But, then, he causes confusion by saying he purchased from these two children of Kirihatana, which is clearly an error. He continues : " Suddana lived at Heracola beyond Gampola, and was married in *binna*." This is corroborated by the marriage certificate which is produced. He then states that he and the first plaintiff bought a half share in the land. " Kirihatana lived at Gampola, and died leaving two children, from whom we bought a half share about 2½ years ago on deed P 2." There seems an error here, for the deed purports to say the purchase was from the two children of Suddana. As regards the purchase he states that Rs. 300 was paid before the Notary which is confirmed by the deed, but he admits no possession of the land was obtained.

The witness called in support of the claim says nothing about the number of children born to Kirihatana, but states that defendant and Suddana were owners of the land, and cultivated it jointly until about thirty-eight or forty years ago, since when defendant alone cultivated it. He adds that Suddana left Gampola district after a quarrel with defendant, but that he used to come once a year to get his share of the produce, as did his two children (the plaintiff's vendors) after his death. The land was service tenure property, and defendant alone performed the *rajakariya* (" services") ; what these services were is not stated.

The defendant admits Suddana was his brother, and states he has been in sole possession of the land for forty or fifty years. The date when Suddana left Gampola may be fixed by the marriage certificate

which is dated 1876. He denies that Suddana ever took any share of the produce, and states he alone performed the services to the landlord. In 1923 he admits he mortgaged only half of the land, but this he purports to explain by saying it was a usufructuary mortgage. As these were paddy fields it was stated that he, by only mortgaging half in this way, retained possession of the other half to obtain paddy for his own use. It was suggested to him in cross-examination that he had other brothers and sisters besides Suddana, and he admitted he had some sisters, but states they are dead. He also admits that in 1923 he brought an action in respect of his maternal estate against one Kalu Banda. In that case the defence of Kalu Banda was based on the allegation that he (defendant) had five brothers and sisters, but he says the case was settled by Kalu Banda taking a deed for the whole property from defendant alone. Whether the sisters and brothers (if there were any brothers) left any heirs who might be entitled to an interest in the property does not appear.

He calls no witnesses, and hence it will be seen the evidence is somewhat meagre on both sides. The judgment is equally short. The learned trial Judge, however, comes to the conclusion that after leaving the Gampola district, Suddana never had any possession of the land. He would, therefore, appear to disbelieve the evidence that Suddana or his children took any share in the produce. He seems also to lay some stress on the performance of the services to the landlord by defendant alone. As regards the purchase by plaintiffs, he comes to the conclusion that it is a speculative one, on the ground that they have not called or apparently given any notice of these proceedings to their vendors. He concludes that the plaintiffs' case must fail on the issue of prescription (issue 2), and dismisses the action with costs. He does not refer to the plaintiffs' plea of prescription as against the defendant " and all others." If he had come to the conclusion that there were other brothers and sisters of defendant and Suddana, as urged for the plaintiffs in the cross-examination of defendant, it is certainly a matter which affects the plaintiffs' claim to half the property. In any case, however, before plaintiffs can succeed on their claim, even if defendant's plea be not upheld, it seems to me that on the case they put forward, that other brothers and sisters of Suddana do exist, they must satisfy the Court that they have succeeded on their plea of prescription, for admittedly their vendors would not be entitled by inheritance to half the land.

They appeal from the judgment shortly on the ground that defendant's plea of prescription could not be upheld, for " the mere possession even, if true, of one brother's share by another brother does not ripen into a title by prescription." The authority relied upon is *Corea v. Appuhamy* (*supra*). The circumstances of that case are certainly remarkable ; it has been my experience elsewhere that

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that fact is somewhat lost sight of when the authority is cited. For the respondent the law there laid down is not questioned, but it is urged that nowhere is it held that even against a co-owner may not an ouster be presumed from the circumstances of any particular case. In *Tillekeratne v. Bastian* (*supra*) decided in 1918, this question was answered after being dealt with at length. It was there held that the principle of " a presumption of ouster" is part of the law of the Colony, and that it is open to the Court from lapse of time taken in conjunction with the circumstances of the case to presume that the possession originally that of a co-owner has since become adverse. It has been suggested to us that that would, under local conditions, be a dangerous principle to apply to the Colony, but it is clear from that judgment that it has been applied in a series of judgments of this Court and has also been adopted in India (*Gangadhar v. Paraskram*).[1]

But the question arises whether the decision in *Tillekeratne v. Bastian* (*supra*) is not overruled by the decision of the Privy Council in *Brito v. Muttunayagam* (*supra*), the decision in which of the local Court (but not of the Privy Council) was referred to in *Tillekeratne v. Bastian* (*supra*). In this case between father and children it was held that as the children were co-owners with the father, his possession of the property was not adverse, although there were strained relations between father and children. In the course of the judgment it is stated—

> " It is the fact that no claim was made by the wife's next of kin after her death, and that the strained family relations made it likely that such a claim would have been preferred. From these circumstances the District Judge drew the conclusion that the possession was adverse. *This, however, depends on what was the character of C. Brito's possession as a matter of right.* The learned District Judge seemingly overlooked the case of *Corea v. Appuhamy* (*supra*) which the learned Judges of the Court of Appeal took as decisive of the question. *In that case it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parceners.* Lord Macnaughten, who delivered the judgment, cited the dictum of Wood V.C. in *Thomas v. Thomas*.[2] Possession is never considered adverse if it can be referred to a lawful title."

Is this an authority for the proposition that under no circumstance can the possession of one co-owner be held as adverse to another co-owner ? It has been so argued before us.

Reference to the judgments of the Court of Appeal in *Brito v. Muttunayagam* (*supra*), decided by Ennis and Shaw JJ., shows that neither of these learned Judges had any doubt that *Corea v. Appuhamy*

[1] *I. L. R. 29 Bom. 300.*

[2] *(1855) 2 K & J 79, 83.*

(*supra*) decided that an ouster, or something of the nature of, or equivalent to, an ouster, would result in the possession of a co-owner becoming adverse to the other co-owners. Ennis J. says—

> " In the case of *Corea v. Appuhamy* (*supra*) the Privy Council held that the possession of one co-owner enured to the benefit of the other co-owners, and that position could only be altered by an ouster or something in the nature of an ouster."

And Shaw J. says—

> " He was a co-owner with his children, and his possession is that of his co-owners unless something equivalent to an ouster by him of his co-owners can be shown. *Corea v. Appuhamy* (*supra*)."

It still remained, however, to be decided whether or not an ouster might be presumed from long-continued, undisturbed, and uninterrupted possession. And on that point all the Privy Council was prepared to say was that, whether or not it was still law that such a presumption might be drawn, in that particular case the circumstances would not justify any such presumption.

When *Brito v. Muttunayagam* (*supra*) came before the Privy Council, the question of presumption of ouster was not referred to or dealt with. All that the Privy Council decided on the question of prescription was that if the interest of Brito was, or was analogous to, the interest of co-ownership, then *Corea v. Appuhamy* (*supra*) applied. The dictum of Wood V.C., in *Thomas v. Thomas* (*supra*) that " possession is never considered adverse if it can be referred to a lawful title " is again cited with approval, and the possibility of any presumption of ouster is not mentioned. For that very reason it may be said that the extracts I have given above from the Privy Council's judgment do not decide that no question of presumption of ouster can arise as between co-owners, and hence I see no reason to suppose that the law as laid down in *Tillekeratne v. Bastian* (*supra*) is in any way inconsistent with the decision in *Brito v. Muttunayagam* (*supra*). This is not exhaustive of the reasons which can be put forward in support of this conclusion.

In the result it seems to me that the law of this Colony on this point is clearly laid down in *Tillekeratne v. Bastian* (*supra*). It is a question of fact where ever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought. The question is dealt with at length in the judgment of Bertram C.J. in that case. I would not do more here than refer to the very definite opinion on the point in English law as expressed by Lord Mansfield in *Doe v. Prosser*,[1] and cited by him.

[1] *Cowp. 217.*

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In appeal before this Court we have this question of fact answered by the trial Judge in favour of the defendant (respondent), and when the case was argued on the first occasion I was unable to say that that finding of fact was not justified by the evidence, and a just and reasonable one in all the circumstances of the case. The long-continued exclusive possession of the one brother from thirty-eight to forty years was proved. It was proved that they had quarrelled, and one had left the other in possession. Although Suddana went to live at a place, only eight or nine miles away, yet during all that time the trial Judge finds neither he nor his children exercised any right to possess the land. Lastly, the service to the landlord, it being service tenure land, was performed by defendant alone. The evidence which seemed to me to weigh very strongly in favour of the defendant was the fact that the brothers had quarrelled, taken together with the short distance which separated their residences. Is it not most likely that, with the existence of the quarrel, a claim would, under the circumstances, have been preferred by Suddana ? It certainly seemed so to me. But on that occasion the case of *Brito v. Muttunayagam* (*supra*) was not cited in the argument before us, and there the very matter which cause me the difficulty is dealt with. In that case there were strained relations between father and children, a condition of affairs which was duly considered by the Privy Council, for this was one of the chief circumstances in the case on which the trial Judge had come to the conclusion that the possession of the father had become " adverse" to his children. It was held that the trial Judge was wrong. It seems to me that it is a decision or an expression of opinion, however it be regarded, which must govern me in this appeal, however hard the result may be to the defendant. I feel that it comes very near to the border line of those " stale claims" to which Wood V.C. referred in *Thomas v. Thomas* (*supra*), to which the provisions of the Prescription Ordinance should be applied to the fullest extent, and which ought to be discouraged.

Under all the circumstances, therefore, for the reasons given above, applying the cases of *Corea v. Appuhamy* (*supra*) and *Brito v. Muttunayagam* (*supra*), and also the law as laid down in *Tillekeratne v. Bastian* (*supra*) I have, but I must state on the facts with some hesitation, come to the conclusion that the defendant did not discharge the onus laid upon him in his plea of prescription.

On the other hand, I am satisfied that the plaintiffs have also failed to substantiate their entire claim, although they are entitled to so much of the land as was inherited by Suddana and his heirs. They have failed in their plea of prescription against the other brothers and sisters of Ganitha and Suddana, who they allege still exist.

The question is whether under all the circumstances a new trial should be ordered, or whether the case be referred back for the trial

Judge to take further evidence and decide on this point, namely, the amount of the shares which fell to Suddana and his heirs, or whether, the action brought being against the defendant alone, it will be sufficient to make an order allowing the appeal. On consideration, the property being a very small one, and liable to be dissipated in costs, it will be sufficient to make the latter order.

I would accordingly allow the appeal. In the result the appellant would be entitled to the costs of appeal.

Appeal allowed.