

1956 *Present* : Sansoni, J., and H. N. G. Fernando, J.

M. KANAPATHIPILLAI, Appellant, and
M. MEERASAIBO *et al.*, Respondents

S. C. 168—D. C. Batticaloa, 753/L

Co-owners—Prescription—Transfer of entire land by a co-owner—Transferee's right to prescribe against the other co-owners—Ouster.

When a co-owner conveys the entire land held in common to a stranger and the latter is aware, at the time he obtains the conveyance, that his vendor is only a co-owner and not the sole owner of the land, prescription will begin to run in the purchaser's favour against the other co-owners only if there has been an ouster or its equivalent.

APPEAL from a judgment of the District Court, Batticaloa.

C. Ranganathan, with *P. Naguleswaram*, for the plaintiff appellant.

G. F. Sethukavalar, for the defendants respondents.

Cur. adv. vult.

February 27, 1956. SANSONI, J.—

The land in dispute in this case formerly belonged to Sinnaver Kanapathi who died about the year 1934. She had two sons Kannappan and Eliathamby. Kannappan pre-deceased his mother and his $\frac{1}{2}$ share devolved on his four children Ponnamma, Purannam, Nagamma and Katpagam, each of whom became entitled to $\frac{1}{4}$ share. Katpagam died leaving her husband Arulanantham and two children, the 2nd and 3rd defendants. Arulanantham transferred his share to the 5th defendant who thus became entitled to $\frac{1}{16}$ th share. Ponnamma, Nagamma and Purannam transferred their interests to the plaintiff who thus became entitled to $\frac{6}{16}$ th share.

The other $\frac{1}{2}$ share owner Eliathamby mortgaged his $\frac{1}{2}$ share to one Thambiyah by deed ID3 of 1938. The mortgagee put the bond in suit, and according to the mortgage decree which was entered in 1940, that $\frac{1}{2}$ share became liable to be sold in default of payment of the debt. In 1941 by deed P5 Eliathamby purported to sell the entire land to Thambiyah for Rs. 100, out of which Rs. 70 was set off against the debt due under the mortgage decree. In 1944 by deed P6 Thambiyah purported to sell the entire land for a sum of Rs. 500 to the 1st defendant.

The 1st defendant claimed the entire land and denied that the plaintiff had any right to bring this partition action.

The learned District Judge held that Eliathamby possessed the entire land exclusively after the death of Kanapathi and that the 1st defendant had acquired a prescriptive title to the entire land as the heirs of Kannappan did not exercise any rights of possession. Seeing that Eliathamby and the heirs of Kannappan were co-heirs in respect of this land, something very much more than mere possession by Eliathamby was necessary to give him a starting point for acquiring a prescriptive title to this land. In any event, he had only seven years possession at the time he transferred the entire land to Thambiyah. But for one circumstance, it might have been argued that since Thambiyah was a stranger who entered into possession of the entire land upon a deed which purported to convey to him the entirety, although his vendor had title only to half-share, Thambiyah's possession of the entire land was adverse to the other co-owners; and since ten years had elapsed between the date of his purchase and the bringing of this action, the 1st defendant by tacking on Thambiyah's possession to his own acquired a prescriptive title to the entire land. The circumstance which precludes the 1st defendant from relying on the possession of Thambiyah is that Thambiyah was aware, when he bought the entire land in 1941, that he was buying from one who owned only a half-share.

The rule is well settled that when a co-owner conveys the entire land held in common to a stranger, and the latter enters into possession of the entire land under the conveyance, he can, by possession adverse to all the co-owners for ten years, acquire a prescriptive title. But where such a stranger is aware, at the time he obtains the conveyance, that his vendor was only a co-owner and was not the sole owner of the land, ten years possession by him will not give him a prescriptive title. Such a purchaser cannot be said to have entered into possession as sole owner, for he had knowledge that there were others who owned shares in the land, and he will be presumed to have possessed the land as a co-owner. The ordinary rule which applies to possession by co-owners will then apply, viz., that before one can prescribe against the others there must be an ouster or something equivalent to an ouster. Hence prescriptive possession will begin to run in his favour against those others only if there has been an ouster or its equivalent, such as notice to those other co-owners that he was setting up a title adverse to them.

This qualification in the rule which I have earlier referred to has always been referred to in cases where a stranger who purchased the entire land has claimed a prescriptive title. One of the earliest of such cases is *Punchi*

*v. Bandi Menika*¹. In that case one Dissanayake claimed to have purchased and entered into possession of an entire field although his vendor was entitled to only $\frac{1}{2}$ share. Jayatileke, J. held that as Dissanayake had purchased and possessed the field upon an assumption that his vendor was the sole owner and that the deed of purchase gave him a sound title to the entirety, he had acquired a prescriptive title to the whole field. Similarly, in *Sellappa v. Simmedurai*², Nagalingam, J. held that where a person purchased the entirety of a land and she and her successors in title possessed the entirety without any knowledge or belief of the existence of another party entitled to any interest in the land, a prescriptive title enures to their benefit.

Observations to the same effect are to be found in the decisions in *Kobbekaduwa v. Seneviratne*³, and *Fernando v. Podi Noua*⁴.

The distinction drawn between a stranger who purchases the entire property in the belief that it belongs solely to his vendor, and a stranger who purchases the entire property knowing that his vendor is only a co-owner is based, I think, on the principle that "no man is allowed to take advantage of his wrong: far less of his wrong intention which is not expressed", as Willes, J. said in *Rumsey v. The North Eastern Railway Co.*⁵. Jessel, M.R., expressed the principle in his judgment in *In re Hallett's Estate*⁶, where he said:

"Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law."

There is a well-established rule that the law will presume in favour of honesty and against fraud, but the circumstances under which Thambiayah took a mortgage of $\frac{1}{2}$ share from Eliathamby show that he was aware that Eliathamby was entitled to only a $\frac{1}{2}$ share. There is no proof of an ouster or its equivalent. It follows that the 1st defendant's claim to have acquired a prescriptive title to the entire land must fail. He is entitled only to a $\frac{1}{2}$ share and the house which he admittedly built on the land.

¹ (1942) 43 N. L. R. 547.

² (1951) 53 N. L. R. 121.

³ (1951) 53 N. L. R. 351, at page 357.

⁴ (1955) 56 N. L. R. 491, at page 493.

⁵ (1863) 143 E. R. 596.

⁶ (1880) 13 Ch. Div. 696.

I would therefore set aside the decree appealed against and direct that a decree for partition be entered on the basis of the findings in this judgment. The plaintiff is entitled to his costs of the trial in the District Court and of this appeal against the 1st defendant.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

