SEETIYA
v.
UKKU AND ANOTHER

COURT OF APPEAL.
H. A. G. DE SILVA, J. AND DHEERARATNE, J.
C. A. 314/78–D. C. KULIYAPITIYA 258/P.
AUGUST 2 and 7, 1985.

Prescription among co-owners–Action for partition.

Nothing short of ouster or something equivalent to ouster is necessary to make possession adverse and end co-ownership. Although it is open to a court from lapse of time in conjunction with other circumstances of a case to presume that possession originally that of a co-owner had later become adverse, the fact of co-owners possessing different lots, fencing them and planting them with a plantation of coconut which is a common plantation in the area cannot make such possession adverse.

Cases referred to:

(1) *Corea v. Iseris Appuhamy (1911) 15 NLR 65.*
(2) *Tillekeratne v. Bastian (1918) 21 NLR 12.*
(3) *Sediris Appuhamy v. James Appuhamy (1958) 60 NLR 297, 302.*

APPEAL from judgment of the District Court of Kuliyapitiya.

T. B. Dissanayake, P.C. with *Eardley Ratwatte* for the 1st plaintiff-appellant.

D. R. P. Gunatileke for the 1st defendant-respondent.

Harsha Soza for the 4th defendant-respondent.

2nd, 3rd, 5th and 6th respondents absent and unrepresented.

Cur.adv. vult.

October 11, 1985.

DHEERARATNE, J.

The plaintiff sought to partition the land called Meegahawattahena alias Meegahawatta, depicted as lots A, B, C. and D in plan 1553, less an extent of 2 roods, 28 perches within lot A, which extent is a separate land covered by T. P. 374188. The plaintiffs conceded interests in the land to the 1st and 4th defendants. The contesting 1st defendant averred that only lots A and B formed the corpus and that lot C should be excluded as it was a different land called Kajugahamullawatta, exclusively possessed by him. The 1st defendant further averred that in consequence of an amicable division of the

corpus among the co-owners over 40 years ago, he had been in exclusive possession of lot B and that therefore the plaintiff's action should be dismissed. The contesting 4th defendant averred that only ots A and B formed the corpus. He further pleaded that lot D was exclusively possessed by him, as forming a part of a land called Kongahamullawatta and asked for the dismissal of the plaintiff's action. Although he averred that he should get interests from the corpus, at the trial he understandably abandoned his claims for interests in lots A and B. The contesting 5th and 6th defendants to whom the plaintiffs conceded no interests from the land, claimed the corpus on an entirely different pedigree.

The learned trial Judge, having considered the final village plan (P1) dated 12.02.1934 and other factors, came to the correct conclusion that lots A, B, C and D in plan 1553, less the extent covered by lot 47 within lot A, formed the corpus. This finding of fact was not canvassed before us.

The learned trial Judge accepted the pedigree set out by the plaintiffs and found no difficulty in rejecting the dispute raised by the 5th and 6th defendants. This finding of fact too was not canvassed before us.

On the acceptance of the pedigree as set out by the plaintiffs, the learned trial Judge concluded that the plaintiffs along with the 1st and the 4th defendants are co-owners of the corpus, but, however, he proceeded to dismiss the plaintiffs' action stating in brief as follows:

> "On consideration of the documentary and oral evidence, it seems to me, that although the co-owners had about the years 1933 to 1934 considered the corpus as one land, from the period between 1937 to 1939 they had planted the land, erected fences, and had possessed it dividedly without interruption and without acknowledging the rights of each other, as they do possess now. It had been proved from the evidence led that the co-ownership of the land ended from about the year 1939."

The 1st plaintiff has now appealed from this judgment.

Let me look at the factual possession of the corpus by the respective co-owners. Lot A, in the possession of the plaintiff, contains 54 coconut trees 25 years old and 18 coconut trees 1 year old. This lot A, as stated earlier, includes an extent of land outside the corpus, which belongs to the 1st plaintiff. Lot B in the possession of the 1st defendant, contains 160 coconut trees 28 years old. Lot C also in the possession of the 1st defendant, contains 35 coconut trees 28 years old. Lot D in the possession of the 4th defendant, contains 43 coconut trees 28 years old. These lots are separated by fences as old as the plantations raised in them. According to the extents covered by these separate lots forming the corpus, the plaintiffs who are entitled to a 1/2 share of the land, are in possession of an extent representing little over 1/4th share; the 1st defendant who is entitled to 3/8 shares of the land, is in possession of an extent representing little less than 5/8 shares; and the 4th defendant who is entitled to a 1/4th share of the land, is in possession of an extent representing little over 1/4th share. The reason for the 1st and the 4th defendants for resisting the partition of the land, is thus quite obvious.

It is contended on behalf of the 1st plaintiff-appellant that the common possession of the land had not terminated, while it is contended on behalf of the 1st and 4th defendants–respondents that the co-owners have-prescribed to their respective lots by long possession, adverse to each other.

Before examining these competing claims, let me turn to the law relating to prescription among co-owners. The substantive principle of law regarding this matter was authoritatively laid down in the case of *Corea v. Iseris Appuhamy* (1), that the possession of one co-owner is in law the possession of the other co-owners. It was also laid down in that case that it was not possible for one co-owner to put an end to that possession by any secret intention in his mind and that nothing short of an ouster or something equivalent could bring about that result. The principle of substantial law laid down in that case, was refined in the case of *Tillekeratne v. Bastian* (2), by the application from the field of the law of evidence, a presumption, that it was open to court from the lapse of time, in conjunction with other circumstances of a case, to presume that possession originally that of a co-owner, had since become adverse.

The facts of the instant case find no room for invoking the presumption of ouster referred to in *Tillekeratne's case*. The co-owners, who separately planted the land from about 1939, with the exception of the 2nd plaintiff, who died during the pendancy of the case, are all alive and all of them gave evidence at the trial. Direct evidence from these co-owners being available in this case, the only matter we have to consider is whether the 1st and 4th defendant–respondents have, by their direct evidence proved ouster or something equivalent thereof so as to make their possession adverse. There is no evidence in this case of an amicable division of the property with the common consent of all co-owners. The area in which the corpus is situated, being an area falling within what is popularly known as "the coconut triangle," the co-owners, naturally planted coconuts in this common land in separate portions. This manner of possession, according to the rights of co-owners, which commonly takes place in the country, was referred to by Sinnetamby, J. in the case of *Sediris Appuhamy v. James Appuhamy*, (3) at page 302, in the following words:

> "Every co-owner is in law entitled to his fractional share of everything in the co-owned property including the soil as well as the plantations, but in practice it is not possible for every co-owner to enjoy his fractional share or every particle of sand that constitutes the common property; and every blade of grass and every fruit from the trees growing on the land without much convenience to himself as well as other co-owners. To avoid this, for the sake of convenience, co-owners possess different portions of the common land, often out of proportion to their fractional shares, merely because of improvements they have effected."

The only evidence which found acceptance by the learned trial Judge in this case is mere long possession by the co-owners in separate lots, having planted them. To say that the possession of the 1st and 4th defendant–respondents was adverse, I would have expected some additional circumstances. The presence of old fences, apparently erected to protect the plantations, are not in my mind such an additional circumstance, which would make the possession of the co-owners adverse to each other.

For the reasons stated, I would allow the appeal, set aside the judgment of the learned trial Judge and answer the issues as follows:–

Issue No. (1) Yes, as lots A, B, C and D in plan 1553, less the extent within lot A covered by lot 47.

(2) Yes.

(3) Yes, in the following shares.

1st Plantiff/2A Plaintiff	7/24	shares
2 B to 2 F Plaintiffs	5/24	shares
1st Defendant	9/24	shares
4th Defendant	3/24	shares

3/24 shares of the 1st Defendant and 3/24 shares of the 4th Defendant will be subject to the life interest of the 10th Defendant.

(4) Does not arise.

(5) Does not arise.

(6) No,

(7) Plaintiff can maintain the action.

(8) No,

(9) Does not arise.

(10) Does not arise.

(11) No,

(12) No,

The improvements will go according to the report to plan No. 1553 and the parties will be entitled to pro-rata costs. I direct that the Interlocutory Decree for partition be entered accordingly. The 1st plaintiff-appellant will be entitled to the costs of this appeal.

H. A. G. DE SILVA, J. – I agree.

Appeal allowed.