1978 *Present* : Udalagama, J., Ismail, J. and Tittawella, J.

J. M. DON HANNY ALEXANDRA, Plaintiff-Appellant

and

J. M. DON THOMAS JAYAMANNE, Defendant-Respondent

S. C. 21/73 (Inty.)—D. C. Negombo 1143/P

Prescription—Co-owners—Family arrangement whereby property of deceased given to one of the heirs by the others—Ouster—Evidence of adverse possession thereafter by such heir—Acquisition of title by prescription.

Where the heirs to the estate of a deceased person agree that certain property of the deceased be given to one of the heirs such decision amounts to an ouster of the rights of the other heirs. Accordingly such a person acquires prescriptive title where the evidence shows that he has possessed the property for over 10 years adverse to and independent of all the other heirs.

Case referred to:

Mailvaganam v. Kandaiya, 1 C.W.R. 175.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *Miss Sriyangani Fernando*, for the plaintiff-appellant.

C. Ranganathan, for the defendant-respondent.

Cur. adv. vult.

May 25, 1978. UDALAGAMA, J.

The plaintiff-appellant in this case sought to partition the land called Madangahawatta *alias* Suriyagahawatta depicted in Plan 1961 of 18.9.71 and 5.11.71 filed of record marked X and comprising of Lots 1 to 13. It was common ground that Marthelis Saparamadu *alias* Appuhamy was the original owner of the said land and that he died leaving as his heirs, his nine children Thomas Jayamanne the 1st Defendant, J. M. Jayamanne, David, Hannie Alexandra the plaintiff, Agnes, Josephine, Charlotte, Lily and Matilda. J. M. Jayamanne, David, Agnes, Josephine, Charlotte, Lily and Matilda donated their rights to their brother Thomas Jayamanne the 1st defendant who thus became entitled to a 8/9 share of the said land. In respect of the 1/9 share of the plaintiff, the 1st defendan's case was that immediately after the death of his father Marthelis Saparamadu *alias* Appuhamy in 1955, there was a family arrangement among all the 9 heirs of the deceased, where it was agreed that the undispersed properties of the deceased, including the land in suit, should go to the 1st defendant, and by virtue of this agreement the 1st defendant entered into possession of the land in suit and possessed the same adversely and independently of the other owners of the said land, and acquired a prescriptive title to the same. The case went to trial on the question whether the 1st defendant had acquired a prescriptive right to the plaintiff's 1/9 share of the land in suit. The learned District Judge after trial, held that the 1st defendant had prescribed to the 1/9 share of the plaintiff-appellant and dismissed the plaintiff-appellant's action with costs.

Learned counsel for the plaintiff-appellant has canvassed the findings of the learned District Judge in favour of the 1st defendant-respondent on several matters. It was contended that the fact that the deceased's other children, apart from the plaintiff, had donated their undivided rights to the 1st defendant and the 1st defendant had sold divided extents out of his undivided 8/9 share, negatived a family arrangement, whereby the 1st defendant was to get the entire land in suit. Further it was submitted that according to Charlottes' evidence, the plaintiff-appellant was not a consenting party to the 1st defendant getting

the undispersed lands. Finally it was argued, that according to Charlotte, the 1st defendant and the plaintiff were not on cordial terms from 1945 and it was highly improbable that she would have consented to the 1st defendant being given her rights of all the undispersed properties of the deceased. As against these submissions of learned counsel for the plaintiff-appellant, counsel for the 1st defendant-respondent, submitted, that it was common ground that after Marthelis Saparamadu's death on 14.11.1955 there was a conference among all the children of Marthelis and that after this conference, the 1st defendant possessed the undispersed properties of the deceased and took the income from them and paid the rates and taxes until the filing of the present action in March 1971. It was also submitted by Counsel for the 1st defendant-respondent, that at the conference held immediately after the death of Marthelis, on 14.11.1955, the heirs of Marthelis including the plaintiff-appellant, came to a family arrangement, whereby the 1st defendant-respondent, who had not been given any properties during the lifetime of the deceased, whereas all the others had been given deeds, should get all the undispersed properties of the deceased. On this family arrangement, the 1st defendant entered into possession of the land in dispute and possessed the same adversely and independently of all others, including the plaintiff-appellant, and acquired a prescriptive title to the same.

The important question that arises for our decision in this case is whether there was a family arrangement soon after the death of Marthelis, whereby the 1st defendant was to get, all the undispersed properties of the deceased including the land in suit, and pursuant to such an arrangement, the 1st defendant possessed the land to the exclusion of the other heirs, and acquired a prescriptive title. If one of the heirs of a common deceased owner, in pursuant of a family arrangement where all the other heirs agreed to his getting the entire property, enters into sole possession of the common property and possesses the same to the exclusion of all others for 10 years or more, such an arrangement would be an ouster of the rights of the others and he will be entitled to a prescriptive title in respect of the shares of the heirs. In *Muilvaganam v. Kandaiya,* 1 C.W.R. page 175, De Sampayo, J. stated :—

> "It seems to me that the Commissioner has misunderstood the nature of ouster required for the purpose of prescription among co-owners and of the evidence necessary to prove such ouster. There is no physical disturbance of possession necessary—*it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to*

possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among the heirs and the adverse character of exclusive possession may be inferred from circumstances."

The burden of establishing prescriptive title to the entire land was clearly on the 1st defendant. It is common ground that shortly after the death of Marthelis, there was a conference in the mulgedera of the heirs of the deceased, where certain decisions were taken in regard to the estate of the deceased. The plaintiff's position is that at this conference, at the suggestion of J. M. Jayamanne one of the children of the deceased and a leading Advocate, it was agreed by all the heirs, that the 1st defendant *look after the* undispersed properties of the deceased and pay all the debts and taxes. The position of the 1st defendant on the other hand was to quote his own words " I came to possess those lands because on the day of my father's burial a meeting was held at my father's house in a room and my brothers and sisters agreed *to hand over these lands to me because of the intention of my father to give these lands to me. Immediately then I entered into possession of all the lands and up to date I am in possession of these lands* ". In view of the two conflicting positions taken up by the plaintiff and the 1st defendant it becomes necessary to examine what exactly was decided upon, at the conference held soon after the death of their father on 14.11.1955.

Both the plaintiff and the 1st defendant relied to a large extent on the evidence of Charlotte, their youngest sister. Charlotte's evidence on the point as appearing in the English version of the proceedings is as follows :—

"All of my brothers and sisters got together and had a discussion in my father's house and gave the lands to him to be looked after.

Q. You were asked to look after the properties on whose behalf ?

A. On behalf of my brother the 1st defendant.

My father had prepared a deed to give over these lands to the 1st defendant and I am aware of it. He was asked to come and sign the deed, but he did not come to sign it. On the day of the discussion the other brothers and sisters also knew that my father had got prepared a deed in favour of the 1st defendant. The lands were given to me to be looked after and to be given to the 1st defendant. All of us discussed the matter and came to an understanding that we should give the lands to the 1st defendant, *but only the plaintiff*

did not consent to it. At that time the plaintiff consented to her share also being given to the 1st defendant, but later she did not sign the deed. 1st defendant paid the estate duty as he was possessing the lands."

The Sinhalese version of her evidence is as follows :—

"ඊට පසු සහෝදර සහෝදරියන් අතර සාකච්ඡාවක් ඇති වුනා මේ ඉඩම ගැන. පියා ඒ දවසේ 1 වෙනි විත්තිකරුට දීමට ඔප්පුවක් සදා තිබුණු බව අනෙක් අයත් දැන සිටියා. සාකච්ඡාවේදී ඉඩම අයියාට දෙන්නනා මට ඒක බලාගන්නනේ කිව්වා. මේ ඉඩම අයියාට දෙන්න තිබුණු ඉඩමක් නිසා සුදු කමන් වියදයන් අපි සියල්ලෝම අත්සන් කොට දෙන්න ඕනෑ කියා කිව්වා. අපි සියල්ලෝම අත්සන් කළා. පැමිණිලි කාරිය පමණක් අත්සන් නොකළේ".

It was also her evidence that the 1st defendant paid the estate duty as he was possessing the lands and that up to the date of her giving evidence, she was looking after the lands for the 1st defendant and she gave the income from the land in suit to the 1st defendant and the plaintiff never claimed her 1/9 share of the income from her. It was common ground that Charlotte looked after the land until the present action was filed. Charlotte's evidence was that she looked after the land for the 1st defendant. The plaintiff's position was that J. M. Jayamanne entrusted the land to the 1st defendant who got Charlotte to look after the land. Now this position of the plaintiff, as stated by learned counsel for the 1st defendant, looks highly artificial. After all, why should J. M. Jayamanne entrust the property to the 1st defendant, if Charlotte was to look after the property. The 1st defendant was living in Colombo and was employed in government service as an electrical engineer. J. M. Jayamanne could very well have entrusted the property to Charlotte straightaway instead of adopting a devious route. The only reasonable inference one could draw from the 1st defendant getting Charlotte to look after the land, is because the 1st defendant was given the land by all the heirs and the 1st defendant requested Charlotte to look after the land as she was living in the adjoining property. It was the evidence of the plaintiff that some time before the death of Marthelis, he gave deeds of gift to all the children except to the 1st defendant. She denied any knowledge of an intention on the part of Marthelis, to give the 1st defendant also a deed of gift. Charlotte on the other hand in her evidence quoted above categorically states that a deed was prepared to give the undispersed properties to the 1st defendant.

Learned counsel for the plaintiff-appellant strongly contended that it was highly improbable. that the plaintiff would have consented to her 1/9 share being given to the 1st defendant as she and the 1st defendant had not been on cordial terms since 1945. This is a circumstance that has to be considered in arriving

at a conclusion, whether the plaintiff would have consented to her share being given to 1st defendant. In the statement of claim filed by the 1st defendant, he had taken up the position that there was an agreement among the heirs of Marthelis Appuhamy after his death, that he (1st defendant) should enter into exclusive possession of the entirety of the land in suit and other undispersed lands and that he should pay the estate duty on the said lands. Accordingly he entered into possession of the land in suit and other lands on 15.11.55 and paid the estate duty on the said lands and acquired a prescriptive title thereto. At the trial the 1st defendant raised the point of contest, whether there was an agreement among the heirs of Marthelis in regard to the undispersed properties of the deceased, and in pursuant to such an agreement whether the 1st defendant had entered into exclusive possession of the land in suit. The plaintiff would have had no doubts in the face of the statement of claim of the 1st defendant about the position taken up by the 1st defendant. Still in the entirety of her evidence there is only this sentence elicited in cross-examination in regard to the ill-feeling between her and the plaintiff:—"I was not on good terms with the defendant from 1945 and I was not associating with him". The 1st defendant was cross-examined on this alleged ill-feeling and his evidence was:—

"*Q*. Was not there a very unhappy incident between the plaintiff's husband in 1943 to 1945 ?

A. No.

Plaintiff said that there was no cordiality between herself and myself from 1945 but that is not true.

Q. Was there not a threat of violence between yourself and her husband ?

A. That is absolutely untrue.

When the plaintiff came for the survey I spoke to her and to her son. I even asked about the motor race from her son."

Charlotte in her evidence under cross-examination stated:—

"I do not know the incident at which the plaintiff and 1st defendant fell out and whether it was an incident over which they were to come to court. From 1945 the plaintiff and the 1st defendant are angry". An examination of the evidence on this point given by the respective witnesses, at most shows that there had been some incident in 1945 but as to what exactly that incident was, is not very clear. Was it of such a serious nature that it disrupted the filial relations between brother and sister ? or was it some trivial incident which neither party took

account of ? There was a suggestion made to the 1st defendant by counsel for the plaintiff at the trial that the incident was a threat of violence by the 1st defendant to the husband of the plaintiff. The 1st defendant rejected the suggestion as "absolutely untrue". The plaintiff in her evidence did not elaborate this incident, although it was an important point in her case. Counsel for the plaintiff argued, why was the 1st defendant denying that his feelings with the plaintiff were not cordial, when Charlotte was admitting there was such ill-feeling. One explanation may be, that even if there was such an incident it was so trivial that the 1st defendant would not have harboured any ill-feeling against the plaintiff. Another explanation may be that whatever the feelings between the 1st defendant and the plaintiff's husband may have been, his feelings towards his sister the plaintiff were cordial. Plaintiff admitted she consented at the conference after the death of her father to the 1st defendant, managing the undispersed properties of the deceased. If the feelings between the parties were bad, would she have consented to such an arrangement ? The probabilities are she would not. Moreover it is significant she did not ask for the income from these lands up to the time of her coming to court in the present case. Surely would she not have at least asked for an accounting or the income from the immovable properties in the testamentary case ? It is our conclusion that this ill-feeling, even if there was such an ill-feeling, was not one which the plaintiff harboured, to withhold her agreeing to the 1st defendant getting the undispersed properties of the deceased.

Finally it was contended by counsel for the plaintiff, that the fact that the 1st defendant has accepted gifts of undivided shares from J. M. Jayamanne, David, Agnes, Josephine, Charlotte, Lily and Matilda show that the heirs of the deceased Marthelis had not parted with their rights at the meeting held after the death of Marathelis in November 1955. It will be noted that all these gifts have been given nearly three years after the death of Marathelis. If there was a family arrangement in 1955 and the 1st defendant entered into exclusive possession of the entire land, their gifts only strengthen the adverse possession of the

1st defendant to the entire, land. Moreover the evidence of the 1st defendant and Charlotte is that besides the agreement to give the undispersed lands to the 1st defendant after the death of Marathelis, there was also a promise by the heirs to transfer their shares to the 1st defendant. The deeds 1D1 to 1D5 bear this out. The fact that the plaintiff did not execute a deed of gift would not affect the 1st defendant's prescriptive title, if there was this family arrangement and the 1st defendant was in exclusive possession of the land in suit in pursuance of it. It was also submitted by counsel for the plaintiff-appellant, the fact that the 1st defendant had executed deeds 2D1, 3D, 4D1, 5D1 and 6D, in favour of 2 to 6 defendants of divided extents, out of an undivided 8/9 share, shows an acknowledgment by the 1st defendant of the plaintiff's 1/9 share. The 1st defendant's evidence in regard to those conveyances is "I had only paper title to 8/9 shares. It was at the request of the Proctor that these deeds were written, in that manner. The 1/9 share that the plaintiff claims was also possessed by me". An examination of these deeds shows that what has been conveyed are divided extents from the land called Madangahawatte *alias* Suriyagahewatta depicted in Plan 336411 dated 1.1.68 and made by A. C. S. Gooneratne, Licensed Surveyor. In the last para to the schedule the Notary has stated, these divided portions are from the undivided 8/9 share of Madangahawatta *alias* Suriyagahewatta. Why the Notary added this para does not appear to be clear from the deeds. But one explanation may be, as stated by the 1st defendant, as the 1st defendant had paper title to only 8/9th share, the Notary had thought he was safe-guarding the rights of the vendee by putting it that way. But what is significant is that the the 1st defendant has undertaken to warrant and defend the title conveyed on these deeds. We reject the contention that the manner in which these deeds have been executed amounts to an admission by the 1st defendant of the plaintiff's 1/9 share.

On a proper evaluation of the evidence of Charlotte and the other circumstances, like the 1st defendant being in sole possession of the undispersed properties of the deceased, taking the entire income from the same, paying all rates and taxes due on

the said properties and the fact that the sum of Rs. 30,000 left by the deceased was equally distributed among the heirs even before estate duty and debts of the estate were paid, and the fact that the 1st defendant paid all the estate duty, point to the clear inference that at the conference held after the death of Marathelis among the heirs, it was decided that the 1st defendant be given the undispersed properties of the deceased. This decision was a clear ouster of the rights of the other heirs. His possession thereafter was adverse and independent of all other co-owners. As 10 years had passed since this ouster, at the time the present action was brought the 1st defendant has discharged the burden cast on him of proving prescriptive title to the entire land.

We affirm the judgment of the learned District Judge and dismiss the plaintiff's appeal with costs.

ISMAIL, J.—I agree.

TITTAWELLA, J.—I agree.

Appeal dismissed.