GUNASEKERA
v.
TISSERA AND OTHERS

SUPREME COURT
M. D. H. FERNANDO, J.
WADUGODAPITIYA, J. AND
WIJETUNGE, J.
S.C. NO. 14/87
C.A. NO. (S.C.) 342/78 (F)
D.C. HOMAGAMA NO. 253/P
JULY 6, 7 AND OCTOBER 27, 1992.

Partition – Amicable partition – Adverse possession – Prescription – Identity of corpus – Exclusion of lots.

Plaintiff filed this action to partition Batadombagahawatta shown in totality as an extent of 12A-1R-37.4P in plan No.1053 dated 5.8.52 made for an amicable partition. At the preliminary survey a corpus of 13A-0R-24.7P was superimposed on it, Lots 5B, 5C, 5D and 6B of a total extent of 0A-3R-21P fell outside the corpus shown in plan No. 1053.

By right of purchase from five out of eight of the surviving heirs of the original owner, one H. P. Ratnayake and George Wijewardene acquired title to 5/8 shares of the entire corpus. Of the balance the plaintiff purchased 232/960 shares, 4/960 shares devolved on the 1st defendant and 124/960 shares on the 2nd defendant. To the heirs of Ratnayake (4th defendant) the plaintiff conceded 5/16 shares and to the heirs of Wijewardene (3rd defendant) another 5/16 shares.

However acting on the footing that Ratnayake and Wijewardene had become entitled to the whole land, the 4th defendant and her mother as heirs of Ratnayake and the heirs of Wijewardene purporting to make an amicable partition caused Plan No. 1053 of 5.8.1952 to be made and on the basis of this plan Lot 4 in extent 6A-0R-16.7P was possessed by the 3rd defendant and her heirs and Lot 5 was possessed by the 4th defendant and her mother who by deed No. 3853 dated 20.8.52 conveyed her interests also to the 4th defendant. By lease bond No. 1427 dated 29.10.53 the 4th defendant leased a portion of land 100 feet by 100 feet out of lot 5 to the plaintiff. The plaintiff 4th defendant claimed that the lots 5B, 5C, 5D and 6B contiguous on the north to lot 5 were part of a district land called Kendagahalanda which until the mid 1950's belonged to her husband on a different chain of title. Plan 1053 had been prepared to support an application made by 4th defendant's husband to the Rubber Control Department to plant an extent of 25 acres comprising Kendagahalanda (19A-1R-32.75P) to the north of lot 5. Rubber was in fact planted on Kendagahalanda and the greater part of lot 5.

Held:

(1) Amalgamation of lot 5 with Kendagahalanda was possible and the corpus (Batadombagahawatta) did not include lots 5B, 5C, 5D and 6B and should be excluded.

(2) The causes of the 3rd defendant and 4th defendant had to be considered separately. The deeds of the 3rd defendant referred to undivided interests in the whole land, while the deed by which Ratnayake's widow conveyed her interests to the 4th defendant referred to interests in a divided lot.

(3) The amicable partition on Plan 1053 with the amalgamation of lot 5 with Kendagahalanda in 1951, significant improvement of lot 5 by planting the entirety of lot 5 (except the paddy portion and a narrow slip adjoining the main road) and the 4th defendant's dealing with lot 5 as a distinct entity along with the continuous exclusive, undisturbed, adverse and uninterrupted possession by herself and her predecessors in title prove her claim to have prescribed to lot 5.

(4) The partition should be confined to lots 3, 4 and 7 as shown in the preliminary plan but 4th defendant will not be entitled to any shares.

(5) The interests of Tudor, one of the three children of the 3rd defendant, will remain unallotted if the 3rd defendant, on being given an opportunity, fails to prove that these rights passed to her.

Cases referred to:

1. *Kobbekadduwa v. Seneviratne* (1951) 53 NLR 354.
2. *Hamidu Lebbe v. Ganitha* (1925) 27 NLR 33.
3. *Ponnambalam v. Vaitialingam* (1978-79) 2 Sri LR 166, 168, 169, 171.
4. *Jayaneris v. Somawathie* (1968) 76 NLR 206, 208.
5. *Tillekaratne v. Bastian* (1918) 21 NLR 12, 18, 19, 20, 21, 23, 27, 28.
6. *Corea v. Iseris Appuhamy* (1911) 15 NLR 65 PC, 78.
7. *Brito v. Muthunayagam* (1918) 20 NLR 327 PC.
8. *Simpson v. Omeru Lebbe* (1947) 48 NLR 112.
9. *Abdul Majeed v. Zaneers Umma* (1959) 61 NLR 361, 372, 380, 382, 383.
10. *Rajapakse v. Hendrick Singho* (1959) 61 NLR 32.
11. *Obeysekera v. Endoris* (1962) 66 NLR 457.
12. *Punchi v. Bandi Menike* (1942) 43 NLR 547.
13. *Fernando v. Podi Nona* (1955) 56 NLR 491.
14. *Marshal Appuhamy v. Punchi Banda* (1986) 58 NLR 41.
15. *Kanapathipillai v. Meera Saibo* (1956) 58 NLR 41.
16. *Kirimenike v. Menikhamy* (1921) 22 NLR 510.
17. *Nonis v. Peththa* (1969) 73 NLR 1, 3.
18. *Githohamy v. Karanagoda* (1954) 56 NLR 250, 252.
19. *Sediris v. Simon* (1945) 46 NLR 273.

20. *Perera v. Thomas Sinno* (1948) 49 NLR 329.
21. *Sediris v. James* (1958) 60 NLR 297.
22. *Fernando v. Ganitha* (1982) 1 Sri LR 265.
23. *Perera v. Jayatunga* (1967) 71 NLR 338.
24. *Seetiva v. Ukku* (1986) 1 Sri LR 225, 228.
25. *Hussaima v. Zaneera* (1961) 65 NLR 125 PC.

APPEAL from judgment of Court of Appeal

R. K. W. Goonesekera with *L. C. M. Swarnadhipathy* and *K. A. P. Ranasinghe (Jr.)* for the 4th defendant-appellant.
P. A. D. Samarasekera, P.C. with *R. K. Suresh Chandra* for plaintiff-respondent.
E. D. Wickremanayake for the 5th and 6th respondents,
3rd defendant-respondent absent and unrepresented.

Cur. adv. vult.

March 15, 1993.
M. D. H. FERNANDO, J.

The Plaintiff-Appellant-Respondent ("the Plaintiff") instituted action on 4.6.69 to partition a land called Batadombagahawatta. In deeds and other documents relied on by the Plaintiff, and in the schedule to the plan, the land was described as being 12A-1R-37.4P in extent; according to the Preliminary Plan No.15 dated 18.11.69 ("X") the corpus consisted of lots 1 to 7, and was 13A-0R-24.7P in extent. There was no dispute regarding the paper title. The original owner was A. P. W. Gunawardena, who died leaving as his heirs his widow and ten children. Two children died intestate, unmarried and issueless, and their shares devolved on their mother, brothers and sisters. The mother died intestate and each of her eight surviving children thereupon became entitled to a 1/8 share. The shares of five children were, at various times, purchased by one Coranasia Perera, who thus became entitled, to an undivided 5/8 share, which she transferred in 1935 to Robert Tissera; who in 1936 sold this undivided 5/8 share to H. P. Ratnayake and George Wijewardene jointly. The shares of the other three children devolved on a series of heirs; the Plaintiff purchased the shares (232/960) of some of these heirs by deed No. 1806 dated 17.1.62; and the remaining shares devolved on the 1st and 2nd Defendants-Respondents-Respondents ("the 1st and 2nd defendants") – 4/960 and 124/960 respectively. The Plaintiff conceded to the 3rd Defendant-Respondent-Respondent ("the 3rd

Defendant") and the 4th Defendant-Respondent-Appellant ("the 4th Defendant") a 5/16 share each, as heirs of Ratnayake and Wijewardena.

The position of the 4th Defendant was that Ratnayake and Wijewardena had been in exclusive possession of the entirety of the said land; that both Ratnayake and Wijewardena died in 1938; that the interests of Ratnayake devolved on the 4th Defendant and her mother; that the 4th Defendant and the heirs of Wijewardena caused the said land to be surveyed and partitioned in or about 1951, as shown in Plan 1053 dated 5.8.52 (4D2), into two lots (lot 4, 6A-0R-16.7P in extent, and lot 5, 6A-1R-20.7 in extent); that Plan does not show any fence or other physical feature separating lot 4 from lot 5, or lot 5 from the land to the north; that the 4th Defendant and her mother entered into exclusive possession of (the northern) lot 5, while the heirs of the 3rd Defendant entered into possession of (the southern) lot 4; that her mother transferred her interests in lot 5 to the 4th Defendant by deed No. 3853 dated 20.8.52 (4D3); and that by lease bond No. 1427 dated 29.10.63 (4D1) she leased to the Plaintiff a portion of land 100 feet by 100 feet from and out of the said lot 5 (and that the Plaintiff was accordingly estopped from denying her title to that portion as well as to the entirety of lot 5). A superimposition (4D12) of the Plan 4D2 on the Preliminary Plan revealed that four small allotments (lots 5B, 5C, 5D and 6B, 3R-21P in extent) were outside lots 4 and 5 in plan 4D2; that there was a wire fence between the land (lot 5) claimed by the 4th defendant and the land (lot 4) claimed by the 3rd Defendant along the line of demarcation shown in Plan 4D2; and that the extent of lot 4 in Plan 4D2; was approximately the same as the extent of lots 3, 4 and 7 in the Preliminary Plan: 6A-0R-16.7P. The discrepancies revealed by the superimposition were all in relation to the northern boundary of lot 5: the Preliminary Plan included, four allotments which, according to the 4th Defendant, were outside the corpus dealt with by the deeds, and formed part of a distinct land (Kendagahalanda) which until the mid-1950's had belonged to the 4th Defendant's husband on a different chain of title. The 4th Defendant accordingly sought the exclusion of those allotments.

The learned District Judge held that the aforesaid four allotments did not form part of the corpus, and should be excluded; that the 3rd

and 4th Defendants had acquired a prescriptive title to lots 4 and 5 respectively; that the Plaintiff was estopped from denying the 4th Defendant's title; and dismissed the Plaintiff's action. The Court of Appeal held on appeal that the Plaintiff would be estopped only in respect of the portion leased to him; learned counsel for the 4th Defendant does not question that finding in this appeal. The Court of Appeal further held that the learned District Judge was wrong both in regard to the exclusion of the four small allotments, and in regard to prescription, and directed that interlocutory decree for partition be entered in respect of the entirety of the land depicted in the Preliminary Plan, on that basis. From that judgment, the 4th Defendant appealed to this Court with special leave; the 3rd Defendant did not appeal, filed no written submissions, and was absent and unrepresented at the hearing.

After oral submissions had been made on 6.7.92 and 7.7.92 on behalf of the 4th Defendant and the Plaintiff, and judgment was reserved, it was discovered that notices had not been issued on the 5th and 6th Respondents in respect of orders for substitution in place of the deceased 1st and 2nd Defendants. Thereafter the 5th and 6th Respondents were duly substituted and given time to retain counsel. Counsel appeared on their behalf on 27.10.92, and all counsel agreed that further oral submissions were unnecessary, and that counsel for the 5th and 6th Respondents would make written submissions; these were filed on 12.1.93, and other counsel did not seek to make further submissions in reply. It is in these circumstances that this judgment is being delivered eight months after the oral argument.

The Plan 4D2 contains an endorsement by the surveyor that it was surveyed and partitioned on 21.5.61, 8.6.51 and 28.6.51. That plan had obviously been prepared to support an application dated 12.3.51, made by the 4th Defendant's husband to the Rubber Control Department, to plant an extent of 25 acres, which was made up of Kendagahalanda (19A-1R-32.75P) to the north of lot 5, as well as lot 5. There was ample evidence to show that the greater part of lot 5 (other than an extent of 2 roods adjacent to the Colombo Hanwella road, and a paddy field of 2 1/2 roods) had in fact been planted with

rubber. If therefore the entire land (originally owned by A. P. W. Gunawardena) was 12A-1R-37.4P in extent, the corpus depicted in the Preliminary Plan did include other land as well. There were only two possibilities. In Plan 4D2 the northern boundary of lot 5 might have been deliberately adjusted so as to make the extent of lots 4 and 5 conform to the extent stated in the deeds; this is supported by the fact that the extent is identical. Alternatively, lot 5 had been amalgamated with Kendagahalanda at or before the preparation of Plan 4D2, and a fence thereafter put up in a manner convenient for possession; this seems more probable, as the discrepancy was almost three roods, and as the fence appears (from the Preliminary Plan itself) to have been erected to the north of the true line of demarcation so as to avoid bisecting a paddy field which otherwise would have been only partly in lot 5. While the 4th defendant dealt with that portion as comprising only 6A-1R-20.7P in extent, no one at any time treated that portion as consisting of over seven acres. The fact that the portion claimed by the 3rd Defendant, both according to the Preliminary Plan as well as the Plan 4D2, was 6A-0R-16.7P, tends to confirm the position that the disputed allotments were part of Kendagahalanda. If the land was over 13 acres in extent, upon its division into two lots the 3rd defendant would have been entitled to over 6 1/2 acres, and there seems to have been no reason for lot 4 to have been half an acre less. The Court of Appeal, however, observed that "these lots are clearly within the corpus as shown [in the Preliminary Plan] and apart from [the 4th Defendant's] claim to that effect there is ... nothing to show that they are portions of [Kendagahalanda]" and upheld the Plaintiff's contention that "Plan 4D2 did not depict any division of the corpus ... but had been prepared ... merely for the purpose of rubber replanting." The Court of Appeal thus assumed that which had to be proved, namely that the Preliminary Plan correctly depicted the corpus; completely failed to consider the significant difference in extent, and the possibility that amalgamation had resulted in the obliteration or variation of the boundary between the two lands. There was no evidence, apart from the Preliminary Plan, that the corpus included the four small allotments. I therefore hold that the Court of Appeal was in error in concluding that the corpus included those four allotments.

In regard to prescription, there was some evidence, on behalf of the 3rd and 4th Defendants, that between 1936 and 1938 Ratnayake and Wijewardena had fenced the entire land, divided it into two portions by constructing a ditch, and thereafter possessed the divided portions separately. However, in her statement of claim the 4th Defendant refers to Ratnayake and Wijewardena having possessed the entirety, and not in divided portions; and she refers to separate possession of divided portions by the 3rd and 4th Defendants only **after** Plan 4D2 had been prepared; further, that Plan does not show any ditch or other separation of the two lots, or even the remnants of a fence. It is therefore probable that separate possession commenced only in or after 1951, when the 4th Defendant's husband contemplated planting the land with rubber, and the surveyor partitioned the land.

In determining the question of prescriptive possession, the Court of Appeal considered the cases of the 3rd and 4th Defendants together, as if they had to stand or fall together. Two deeds had been executed by the heirs of Wijewardena, P15 in 1954 and P16 in 1957, dealing not with their interests in lot 4, but with interests in an undivided 5/16 share. By contract, Ratnayake's widow by deed 4D3 in 1952 transferred her interests in the divided lot 5 to the 4th Defendant. Further the 3rd Defendant, in her statement of claim, claimed prescriptive title to the entire land, making no reference to the Plan 4D2 of 1952, or to separate possession of lot 4; it was only after the 4th Defendant's statement of claim was filed, that the 3rd defendant filed an amended statement on the same lines. Undoubtedly, therefore, this change in position made the truth of the 3rd Defendant's claim to prescriptive possession of divided allotment open to serious doubt; but there was no similar infirmity in regard to the 4th Defendant's case. But the Court of Appeal failed to perceive that distinction:

> "Apart from [4D8] all [other documents] are consistent with the pedigree filed by the Plaintiff. Indeed it is noteworthy that on the 3rd Defendant's side of the claim both P15 and P16 ... respectively dealt with interests out of half of 5/8 shares ... These two documents cannot then be reconciled with the case

> of the 3rd defendant ... Apart from 4D8 therefore, in the chain of title there are no documents (of title) supporting the case set up by the 3rd and 4th defendants,"

thus treating them as setting up one common "case", with the result that deficiencies in the 3rd Defendant's case were treated as undermining the 4th Defendant's position. Although the 4th Defendant had dealt with the land as being exclusively possessed and owned by her, the deed 4D8 (although not conclusive; *Kobbekadduwa v. Seneviratne* [1]) was not added on to her side of the scale, simply because P15 and P16 were regarded (on the basis of *Hamidu Lebbe v. Ganitha* [2],) as weighing heavily against the 3rd Defendant's claim to prescription; and this was without any consideration of the several decisions cited in *Ponnambalam v. Vaitialingam* [3], to the effect that dealing with undivided shares does not always militate against a claim to possession of a divided allotment.

I have therefore to consider separately the case of the 4th Defendant in relation to the other parties. There was no satisfactory evidence of possession, from and after 1936, by the Plaintiff and the 1st and 2nd Defendants, and their predecessors in title. The 1st Defendant admitted that he had visited the land only once, and did not even know its boundaries. The 2nd Defendant was born in 1934, and did not give evidence. The Plaintiff came into occupation of the small portion leased to him in 1953; by letter dated 28.8.61 (P24) the 4th Defendant pointed out that he had encroached onto the adjoining portion; the Plaintiff replied on 3.9.61 (P25) that he had not encroached on her property, that the portion of land referred to belonged to one James de Alwis, and that she should settle her dispute with him. He did not claim in his reply that he was in possession under James de Alwis, and, quite inconsistently, added that he had installed fixtures in the portion "as the land she has already leased to him was not enough ... also I did so on her instructions and guidance in 1954 at the time of building my petrol station". In effect therefore he was relying on her leave and licence, and so his possession could not have been adverse to her. The learned District Judge quite justifiably observed that his evidence was evasive:

> "He first said that [that portion] was possessed by the 4th Defendant. Later that it was possessed by the 3rd Defendant, and still later [that it] was possessed in common, and finally ... by Mr. Alwis".

The Plaintiff then purchased undivided shares from James de Alwis and the heirs of the children of the original owner, on 17.1.62, keeping this a secret from the 4th Defendant until his letter dated 28.8.68, by which he asserted that he was a co-owner of Batadombagahawatta and inquired whether she would agree to an amicable partition. Upon her rejection of this request this partition action was filed. There was evidence that the Plaintiff's predecessors in title had included Batadombagahawatta in last wills, and inventories in testamentary proceedings, and this was relied on as establishing prescription. The Court of Appeal observed:

> "... the several documents relating to the testamentary cases of the various parties figuring in the Plaintiff's pedigree show that through the years there had been dealings with rights in the property in furtherance and manifestation of their legal title which while negativing any suggestion of any abandonment of such title was on the contrary a pointer to possession and supportive of their prescriptive title as well".

However, there were no such documents after about 1941 and in any event such documents, by themselves, constitute slender evidence of **possession** (insufficient of their own force to establish prescriptive possession: *Jayaneris v. Somawathie* [4], even though they might negative abandonment of **title.**

On the other hand, there was evidence of possession by Ratnayake and Wijewardena from 1936 to 1938, and thereafter by their heirs. However, their entry into possession was as co-owners, and hence could not *per se* be regarded as adverse, particularly as (up to 1951) possession consisted in nothing more than taking the natural produce of a few old coconut trees. So far as the 4th Defendant is concerned, the following additional matters have been established:

(a) a survey and partition of the land, followed by the amalgamation of lot 5 with Kendegahalanda, in 1951;

(b) significant improvement of lot 5 by planting the entirety with rubber (other than a paddy field, and a narrow strip adjoining the main road, which obviously had commercial value); and

(c) the 4th Defendant dealt with lot 5 as a distinct entity of which she was the full owner, as evidenced by the deed 4DB, the lease bond 4D1, and, to some extent, the letter P24, and, at some point of time after 1951, erected a wire fence separating lot 5 from lot 4.

The 4th Defendant thus established **joint** possession of lots 4 and 5 for 15 years (up to 1951) by Ratnayake and Wijewardena, and their heirs; as well as exclusive, undisturbed and uninterrupted possession of lot 5 for 18 years (from 1951 to 1969) by herself, independent of the Plaintiff, his predecessors in title, and the 3rd Defendant. This the Court of Appeal failed to consider. Since the 3rd Defendant did not appeal, it is unnecessary to consider whether the Court of Appeal was wrong in setting aside the finding that she had acquired prescriptive title to lot 4.

The Court of Appeal also notes that there was nothing to possess on certain portions of the corpus and holds that:

> "the mere fact that portions had been separated off and possessed in the manner indicated by the surveyor's report is no basis of exclusive possession of the entire land. The significance of this ... is that there was then no overt act demonstrating to the other co-owners the commencement of adverse possession with respect to the whole land. No doubt portions had been separated off and possessed on that basis but that does not detract from the fact that certain other portions did not appear to have been possessed and thus there was no possession of the entire land as claimed by the 3rd and 4th Defendants".

With respect, I cannot agree. If within a large land there are a few relatively small (and defined) portions on which there is nothing to

use or enjoy, it cannot generally be said that a person who possessed exclusively whatever there was to possess did not possess the entirety; in any event, he must be treated as having been in exclusive possession at least of that which he did use and enjoy. That there was no cultivation on those small portions, at the time of the surveyor's report, hardly proves the absence of possession earlier. Further, in regard to prescription as against co-owners an overt act referable to a particular moment in time, is not essential (*Tillekaratne v. Bastian* [5]) except where prescriptive title is claimed only by virtue of ten years adverse possession after such an act.

The principal matter for determination is whether the 4th Defendant had acquired prescriptive title, by virtue of possession by herself and her predecessors in title since 1936. The Court of Appeal referred to the principles laid down in several decisions: that entry into possession by a co-owner is referable, wherever possible, to a lawful title, and such possession is not adverse to, but is possession on behalf of the other co-owners; that such a co-owner cannot, by forming a secret intention in his mind not communicated overtly to the others, alter the character of his possession; that nothing short of ouster or something equivalent to ouster would suffice to enable a co-owner to establish title based upon prescriptive possession (*Corea v. Iseris Appuhamy* [6], *Brito v. Muthunayagam* [7]), that where a co-owner whose possession was originally not adverse claims that it has become adverse, the onus is on him to prove it, by establishing not only his intention to possess adversely, but a manifestation thereof to the true owner against whom he sets up his possession (*Tillekaratne v. Bastian* [5]), and that a "high order of proof is required to establish adverse possession, the burden of which rests entirely upon the co-owner who seeks to prescribe (*Jayaneris v. Somawathie* [4]).

On the basis of these principles, it was held that the 3rd and the 4th Defendants had not "successfully met the requirement of the high order of proof demanded of them to succeed in their claims", once again treating their case as indivisible. Although the following passage from the judgment of Bertram, C.J., was quoted, learned Counsel for the 4th Defendant submitted that the Court of Appeal erred in applying the principle to the facts of this case:

"If it is found that one co-owner and his predecessor's in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognise the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession." (21 N.L.R. at pp. 20-21)

Relying on the observations of Bertram, C.J., learned counsel for the 4th Defendant submitted, cogently and emphatically, that whether one co-owner has prescribed against another is a question of fact: is it just and reasonable in the circumstances of the case to treat proven separate and exclusive possession as having become adverse at some point of time more than ten years before the action was brought? Whether possession has become adverse would also depend on the relationship between the particular co-owners: whether they were co-heirs or strangers; regard must be had to the relevant provisions of section 3 of the Prescription Ordinance ("undisturbed and uninterrupted possession, by a title adverse to and independent of all others ...") and "that we should drop the word 'ouster', and that instead of asking whether there has been an 'ouster', we should ask ourselves simply whether the possession in question was or has become adverse." (21 N.L.R. at p. 18)

The decisions cited establish that:

(1) the possession of one co-owner is in law the possession of all; in circumstances where a person's possession may be referable either to an unlawful act or to a lawful title, is presumed to possess by virtue of the latter; person who has entered into possession in one capacity is presumed to continue to possess in the same capacity; it cannot be

changed by a secret intention in his mind; if he claims that his possession has become adverse, the onus is on him to prove it (*Corea v. Iseris*, at p. 78, *Tillekaratne v. Bastian*, at pp. 18-19);

(2) the question whether a co-owner has prescribed to a particular divided lot as against the other co-owners is one of fact, to be determined by the circumstances of each case (see the decisions cited in *Ponnambalam v. Vaitialingam*, at 169);

(3) stronger evidence would be required to prove that possession was adverse where the contest was between co-heirs as in *Corea v. Iseris Appuhamy*, *Brito v. Mutunayagam*, *Tillekaratne v. Bastian*, *Simpson v. Omeru Lebbe* [8], *Hamidu Lebbe v. Ganitha* and *Abdul Majeed v. Zaneera Umma* [9], than in a claim by or against a stranger who claimed through a co-heir cf. *Abdul Majeed v. Zaneera Umma*, per K. D. de Silva, J., at p. 372, and per H. N. G. Fernando, J., (as he then was) at pp. 382-383, discussing *Rajapakse v. Hendrick Singho* [10], *Obeysekera v. Endoris* [11];

(4) where one co-heir purports to transfer the **entire** land to a stranger, who forthwith enters into possession of the entire land, believing or claiming that he was the owner thereof, such possession is adverse *ab initio Punchi v. Bandi Menike* [12], *Fernando v. Podi Nona* [13], *Marshal Appuhamy v. Punchi Banda* [14], but not if he was aware that his vendor was only a co-owner *Kanapathipillai v. Meera Saibo* [15];

(5) where one co-heir transfers his **share** to a stranger who thereupon possesses the **entire** land, his possession is not initially adverse; if there is ouster, or something equivalent (e.g. the physical dispossession or exclusion of the other co-owners, or the expropriation of the entire produce or the income of the land against the wishes of the others) prescriptive title could be acquired by ten years exclusive possession thereafter. However a "definite positive act" is not essential (*Tillekaratne v. Bastian*), and even if nothing of that sort is proved, nevertheless long continued exclusive possession, of the kind described by Bertram, C.J., can

displace the presumption that such stranger's possession continues to be that of the other co-owners, and gives rise to a counter-presumption that possession had become adverse more than ten years before action was brought (as in *Tillekaratne v. Bastian*);

(6) Where there is an amicable division of the land by **all** co-owners, followed by separate possession of the divided allotments by the co-owners;

(a) common ownership is terminated forthwith if cross conveyances are executed by all the co-owners; and

(b) if no such conveyances are executed, such separate possession becomes adverse *ab initio*, if the division was intended to be permanent (*Kirimenika v. Menikhamy* [16]) and prescriptive title can be acquired by virtue of exclusive possession of such divided lots for ten years; but not where such division was for mere convenience of possession "unless the arrangement continues for so long that on equitable grounds it is presumed that at some point of time it became adverse" (*Nonis v. Peththa* [17]);

If the division is not by **all** the co-owners, but is based on a plan prepared by one co-owner without the knowledge of the other co-owners, his possession of divided allotment is not adverse (*Githohamy v. Karanagoda* [18]), but prescriptive title can be acquired by virtue of possession for such a period and in such circumstances that the counter presumption applies;

(7) such a counter-presumption is perhaps more easily drawn where the act of possession results in a depreciation in the value of the land – e.g. the removal of plumbago (as in *Tillekaratne v. Bastian*, pp. 27-28), as distinct from natural produce (*Sediris v. Simon* [19], *Perera v. Thomas Sinno* [20], *Githohamy v. Karanagoda* [18], *Sediris v. James* [21]); or where the property is valuable or the income is considerable (*Abdul Majeed v. Zaneera Umma*, at pp. 372) or from its amalgamation with an adjoining land belonging to the

prescribing co-owner (*Fernando v. Ganitha* [22], *Perera v. Jayatunga* [23], *Ponnambalam v. Vaitialingam*, at 171);

(8) such inference of ouster, or counter-presumption of adverse possession, could only be drawn in favour of a co-owner upon proof of "additional circumstances" apart from the length of possession (*Abdul Majeed v. Zaneera Umma*, at p. 380, *Ponnambalam v. Vaitialingam*, at p. 168, *Seetiva v. Ukku* [24];)

(9) there is much to be said for the view expressed by Bertram, C.J., "that we should drop the word 'ouster', and that instead of asking whether there has been an 'ouster', we should ask ourselves simply whether the possession in question was or has become adverse" (*Tillekaratne v. Bastian*, at p. 18).

Abdul Majeed v. Zaneera Umma was a borderline case. Basnayake, C.J., was prepared to draw the counter-presumption of ouster (or of adverse possession); the other two Judges were not, because the contest was not between co-heirs and a stranger (i.e. a vendee from a co-heir), and because no "additional circumstances" had been established. The majority decision was affirmed (*sub nom Hussaima v. Zaneera* [25]) by the Privy Council "with some regret", and the passage from the judgment of Bertram, C.J., in *Tillekaratne v. Bastian* in regard to the presumption to be drawn from long possession was quoted with approval. In the present case, the claim by the 4th Defendant was not as one co-heir against another, but as a stranger to the original co-heirs and their heirs. The Plaintiff himself was not a co-heir but a stranger; further he was a lessee and licensee of parts of lot 5 under the 4th Defendant; his claim was based on a secret and speculative purchase, upon his encroachment being challenged. There were "additional circumstances", namely the amalgamation of lot 5 with Kendagahalanda, and the erection of a fence to separate it from lot 4, as well as the execution of deeds on the basis of full ownership of lot 5 as a separate and divided allotment; but I doubt whether planting rubber could also be so regarded (cf. *Seetiva v. Ukku*, at p. 228). All this was done openly demonstrating to all the co-owners that she was claiming the entirety of lot 5. It would be artificial in the highest degree (to use

Bertram, C.J.'s phraseology) to say that in and after 1951 the 4th Defendant and her predecessors in interest possessed on behalf of the other co-owners, simply because there was no definite positive act which can be pointed to as originating or demonstrating their adverse possession.

I therefore hold that from 1951, and in any event for more than ten years before 1969, the 4th Defendant's separate and exclusive possession of lot 5 was adverse to the Plaintiff (and his predecessors in title) and the other three Defendants, and that by 1969 she had acquired a prescriptive title thereto. The 2nd Defendant was born in 1934, and therefore became a major in 1955 (or earlier, if she had got married before the age of 21); and notwithstanding her minority up to 1955, she was a major during a period of over ten years relevant to the presumption of adverse possession.

The 4th Defendant's appeal is allowed, and the judgment and order of the Court of Appeal is varied as follows:

(a) The learned District Judge's order in regard to the corpus, and the exclusion of four allotments (lots 5B, 5C, 5D and 6B) is affirmed;

(b) The 4th Defendant is entitled absolutely (and free of any claim by the Plaintiff and the other Defendants) to lots 1 and 2, as well as the remaining portion of lots 5 and 6 in the Preliminary Plan; she will not be entitled to any share din lots 3, 4 and 7;

(c) The learned District Judge will enter an interlocutory decree for partition in respect of lots 3. 4 and 7 on the basis that the Plaintiff, and the 1st, 2nd and 3rd Defendants are entitled to shares therein in the ratio 232:4:124:300;

(d) As the 3rd Defendant did not appeal, the finding of the Court of Appeal that upon P15 and P16 the interests of Tudor, one of the three children of the 3rd Defendant, did not pass to the 3rd Defendant, and the direction that an opportunity be given to the 3rd Defendant to adduce proof that the rights of her son

Tudor passed to her as claimed (failing which (i) Tudor will be added as a party and those rights allotted to him, or (ii) the said rights will remain unallotted if in the opinion of the learned District Judge such addition is not practicable), is affirmed. The aforesaid share of the 3rd Defendant will be subject to that order;

(e) As ordered by the Court of Appeal, the Plaintiff will be entitled to recover from the other parties the recoverable costs *pro rata* (which will include the costs of the preliminary plan only), and there will be no costs of contest in the District Court;

(f) the 4th Defendant will be entitled to costs in the Court of Appeal and in this Court in a sum of Rs. 3,000/-.

WADUGODAPITIYA, J. – I agree.

WIJETUNGA, J. – I agree.

4th Defendant's appeal allowed.
Order of Court of Appeal varied.