1946 *Present :* **Howard C.J. and de Silva J.**

UMMU HAM *et al.*, Appellant, *and* KOCH, Respondent.

379—D. C. Kandy, 757.

Prescription—Co-owners—Possession of entire common property by one co-owner—Deeds executed by him in respect of it—Inference of ouster.

Mere possession and the execution, without the knowledge of the other co-owners, of deeds referring to the whole of the common property by a co-owner are not sufficient to constitute an ouster.

APPEAL from a judgment of the District Judge of Kandy.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the plaintiffs, appellants.

H. V. Perera, K.C. (with him *Kingsley Herat*), for the defendant, respondent.

Cur adv. vult.

February 26, 1946. DE SILVA J.—

This action was instituted by the plaintiffs for declaration of title to an undivided four-eighths shares of the land depicted as lots 1 and 2 in the plan P 1 filed of record. After trial the learned District Judge dismissed the plaintiffs' action, holding that the defendant had acquired title to the land by prescriptive possession. The plaintiffs appeal from this decree.

The case for the plaintiffs was that one Ahmed Keedin Tuwan was the owner of the entirety of lots 1 and 2 and that he, by deed No. 10620 of November 9, 1875 (P 4), conveyed to Magudu Meera Saibo who died about the year 1886 leaving as his heirs his widow Pathumuthu, his three sons Mammado Thambi, Mammado Meera Saibo, Magudu Mohammadu and a daughter Pathumma Natchiya ; that Mammado Thambi died in the year 1896 and left as his heirs his daughter, the first plaintiff, and his brother Mammado Meera Saibo, each of whom became entitled to a one-eighth share ; and that Mammado Meera Saibo died a year later leaving as his heirs his widow, Beebe Pathumuthu, and his daughter, the second plaintiff, who on the death of her mother became entitled to the entirety of her father's interest.

The defendant in her answer stated that one Seyadu Ismail was the owner of the lands and that he by deed No. 1285, dated March 22, 1904 (D 2), conveyed these lands to Seyed Ahamad and Sahul Hameed, two of the sons of Pathumma Natchiya, the daughter of Magudu Meera Saibo. Seyed Ahamad and Sahul Hameed, who are alleged to have consolidated the two lands into one corpus called Hakgirigalawatta, by deed No. 953 dated July 2, 1923 (D 3), conveyed the same to Lydia Amerancia Schokman, who died on March 19, 1934, leaving a last will, dated December 7, 1933, by which the land was devised to the defendant. This last will was proved in D. C., Colombo, Testamentary case No. 6,780, and the executrix by deed No. 26, dated December 16, 1941, conveyed the land to the defendant.

At the trial it appeared that both parties traced their title to Nagudu Meera Saibo. Seyadu Ismail, the defendant's predecessor in title, had on deed No. 4934, dated July 17, 1900 (P 6), purchased from Pathumuthu, widow of Magudu Meera Saibo, and his daughter Pathumma Natchiya, their interests in these lands. The learned District Judge appears to have been under the impression that this deed purported to convey the entirety of the lands. It is not clear from the deed itself whether these parties purported to convey their interests in these lands or the lands themselves.

On March 22, 1904, Seyadu Ismail by deed No. 1284 (P 7) purchased Magudu Mohammado's rights which the latter had inherited from his father, Magudu Meera Saibo, in the two lands. It would appear from this that Seyadu Ismail was probably aware that the interests of the other heirs of Magudu Meera Saibo were outstanding. Seyadu Ismail, who was thus entitled to the shares of Pathumuthu, the widow of Magudu Meera Saibo, Pathumma Natchiya, his daughter, and Magudu Mohammado, one of the sons, purported to convey the entirety of the two lands to Seyed Ahamed and Sahul Hameed, but the deed would be operative to convey only the shares to which Seyadu Ismail had acquired title.

It also appeared in evidence that Seyed Ahamed was married to the first plaintiff in 1906 and that he and Sahul Hameed were carrying on business in Ceylon and that their wives were living in India in one house along with the second plaintiff and her husband, the witness Rawanna Magudu Meera Saibo, who is a brother of Seyed Ahamed and Sahul Hameed. It was also established that the two plaintiffs had never come to Ceylon and that the first plaintiff was born on July 11, 1895, and that the second plaintiff was born on July 22, 1894. It was further proved that remittances had been made by Sahul Hameed from time to time for the maintenance of the plaintiffs.

As the defendant and her predecessors in title had title only to the shares of the widow, the daughter and one of the sons of Magudu Meera Saibo, she has to rely on prescriptive possession to establish her title to the balance shares. Therefore, the question which had to be decided was whether, in view of the minority of the plaintiffs and their absence beyond the seas, the defendant and her predecessors in title have had adverse and uninterrupted possession for a period extending to 30 years. The learned District Judge, after considering all the evidence before him, came to the conclusion that there had been adverse and undisturbed possession from the year 1904 and held that the rights of the plaintiffs had been lost owing to such possession.

In appeal it was argued for the plaintiffs-appellants that Seyed Ahamed and Sahul Hameed and their successors in title entered into possession as co-owners and that in view of the authorities their possession cannot be regarded to be adverse unless there was proof of an ouster or something equivalent to an ouster. The appellants' Counsel relied on the well known case of *Corea v. Iseris Appuhamy and others* [1] in which their Lordships of the Privy Council held that a co-owner's possession was in law the possession of his other co-owners and that it was not possible for him to put an end to that possession by any secret intention in his mind ;

[1] *15 N. L. R. 65.*

nothing short of an ouster, or something equivalent to an ouster, could bring about that result. He also referred to the case of *I. L. M. Cadija Umma and another v. S. Don Manis Appu and others* [1]; *Cooray v. Perera* [2]; and the case of *Sideris and others v. Simon and others* [3]. In the last-mentioned case all the previous authorities were reviewed and it was held that the question whether a presumption of an ouster may be made from long continued and undisturbed and uninterrupted possession is one of fact which would depend on the circumstances of each case. In the circumstances of that particular case it was held that possession from 1904 to 1942, though undisturbed and uninterrupted, was not sufficient to give a title by prescriptive possession. It is therefore necessary to consider whether there are any circumstances in this case which would amount to an ouster.

From 1904 to 1923 the property was possessed by Seyed Ahamed and Sahul Hameed. Seyed Ahamed is the husband of the first plaintiff whom he married in 1906 and second plaintiff was married to a brother of Seyed Ahamed and Sahul Hameed in 1913. After their respective marriages the plaintiffs were being maintained from the general income of Seyed Ahamed and Sahul Hameed but I agree with the learned Judge that the moneys remitted by them to their families in India were not remitted as the plaintiffs' share of the income from the property in question and that such remittances cannot be regarded to constitute an admission of the title of the plaintiffs. On the other hand, apart from the fact that the plaintiffs had received some benefit from the income of the property, the burden is on the defendant to prove some circumstance or incident from which it can be definitely inferred that her possession and that of her predecessors in title became adverse to the co-owners at some definite point of time.

The trend of judicial opinion in recent cases seems to be that mere possession and the execution of deeds referring to the whole land by a co-owner are not sufficient to constitute an ouster. In this case it is possible to hold that the acts of Lydia Schokman after her purchase, such as putting up buildings and letting such buildings on hire without reference to the other co-owners, would make it manifest that she was holding the land adversely to the other co-owners. But with regard to the period from 1904 to 1923 it is difficult to find any circumstance which would amount to an ouster of the plaintiffs. The learned Judge refers to the various mortgages and sales which are disclosed in the extracts of encumbrances (D 8), and from the fact that these encumbrances were paid off on the same day as that on which the transfer in favour of Seyed Ahamed and Sahul Hameed was executed infers that it seems probable that it was intended that D 2 should pass title to the entirety of the lands.

At the time of the execution of D 2 the plaintiffs were about 9 and 10 years of age respectively and it is very unlikely that they were aware of any such intention or were capable of consenting to any arrangement by which they waived their rights in favour of Seyed Ahamed and Sahul Hameed. It is true that these vendees had subsequently in 1905 and

[1] *40 N. L. R. 392.* [2] *45 N. L. R. 455.*

[3] *46 N. L. R. 273.*

1916 mortgaged the entirety of the land to Sivaprakasa Ammal and Cracklow but there is no evidence to show that the plaintiffs were aware of these mortgages. It seems to be settled law that in the absence of such knowledge such transactions are not sufficient to constitute an ouster. In the circumstances the conclusion that the defendant had failed to establish her title to the shares of the plaintiffs by prescriptive possession seems to be irresistible.

As stated before the plaintiffs alleged that on the death of Mammado Thambi a one-eighth share devolved on the first plaintiff and the remaining one-eighth on Mammado Meera Saibo. It is not clear how Mammado Meera Saibo could have inherited a one-eighth share as Magudu Mohammadu appears to have been alive at the time of the death of Mammado Thambi. The first plaintiff seems to have altered her position during the course of the trial and to have claimed the entire share of her father as his only daughter. This point, however, is not made clear in the proceedings.

I would set aside the decree of the District Court and send the case back for ascertaining the shares of the plaintiffs on the basis that the defendant has not acquired their shares by prescription and for the trial of the other issues between the parties. The plaintiffs will be entitled to the costs of this appeal. The other costs, including the costs of the trial already held will abide the final result of the case and the District Court should make an appropriate order at the conclusion of the further proceedings.

HOWARD C.J.—I agree.

Decree set aside.