MARSHALL APPUHAMY AND ANOTHER

v.

PUNCHI BANDA

SUPREME COURT.
WANASUNDERA, J., TAMBIAH, J. AND L. H. DE ALWIS, J.
S.C. APPEAL No. 16/85.
C.A. No. 866/75 (F).
D.C. NUWARA ELIYA No. 319/L.
JANUARY 30, 1986.

Prescription by stranger buying entirety of co-owned land ignorant of rights of the other co-owners – Is proof of ouster necessary?

A stranger who enters into possession of the entirety of co-owned property in the belief that he is the sole owner, need not prove ouster or something equivalent to ouster but only adverse possession for a period of 10 years in order to acquire a prescriptive title to it. Mere execution of deeds by the other co-owners can in no way interrupt the stranger's prescriptive possession.

Cases referred to:

(1) *Corea v. Iseris Appuhamy (1911) 15 NLR 65, 1912 AC 230.*
(2) *Kobbekaduwa v. Seneviratne (1951) 53 NLR 354.*
(3) *Tillekeratne v. Bastian (1918) 21 NLR 12.*
(4) *Hussaima v. Ummu Zaneera (1961) 65 NLR 125 P.C.*

(5) *Fernando v. Podi Nona (1955) 56 NLR 491, 492, 493.*

(6) *Hamidu Lebbe v. Ganitha (1925) 27 NLR 33.*

(7) *Bhavrao v. Rakhmin AIR (23) Bom. 137; 1LR 23 Bom. 137.*

(8) *Palania Pillai v. Rowther (1942) 55 Madras L.W. 532.*

(9) *Sellappah v. Sinnadurai (1951) 53 NLR 121.*

(10) *Brito v. Muttunayagam (1918) 20 NLR 327.*

APPEAL from judgment of Court of Appeal.

S. C. B. Walgampaya for defendant-appellants.

N. R. M. Daluwatte, P.C. with *K. Balapatabendi* and *T. G. A. de Silva* for plaintiffs-respondents.

Cur. adv. vult.

March 4, 1986.

L. H. DE ALWIS, J.

The only matter that was argued before us by learned counsel for the appellants at the hearing was whether the evidence of possession placed by the plaintiff before the trial Judge was sufficient to amount to an ouster of the defendants, so as to establish a prescriptive title in favour of plaintiffs, inasmuch as their respective predecessors-in-title were co-owners of the land in question. The land is called Pitiyahenawatta and there is no dispute as to its identity.

The plaintiffs and the defendants claim title to the land on two different pedigrees. The plaintiffs state that the original owner of the land was one Hinguruwela Senanayake Seneviratne Herat Mudiyanselage Kiribanda while the defendants say that the original owner was one Walakonawattegedera Kiriwantha. According to the plaintiffs, the aforesaid Kiribanda on deed No.550 of 11. 8. 1946 (P1) conveyed the entire land to Welakonewattegedera Senanayake Seneviratne Herat Mudiyanselage Herat who on deed No. 6697 of 6.3.1947 (P2) transferred it to Navaratne Mudiyanselage Alutgedera Heen Menika. Heen Menika died leaving the plaintiffs as her heirs.

The first defendant's case is that W. Kiriwantha died leaving as his heirs Welakonewattegedera Herat Mudiyanselage Heen Menika and W. H. M. Muthu Menika. The said Muthu Menika on deed No. 4442 of 6.10.58 (D2) and Heen Menika on deed No. 4454 of 13.10.58 (D3) conveyed their respective rights in the land to the first defendant.

In an earlier action No. 4927 filed in the Court of Requests of Nuwara Eliya by W. H. M. Heen Menika and W. H. M. Muthu Menika against W. H. M. Kiribanda and four others, decree was entered on 18.10.1910(D4A) declaring Heen Menika, Muthu Menika and Kiribanda the owners of the land in question.

On the issues raised in the present trial, the learned Judge held with the plaintiffs that the original owner of the land was Kiribanda and that in view of the decree (D4A) in the Court of Requests case, the plaintiffs were entitled to a 1/3 share of the land and the first defendant to a 2/3 share, that is, on the basis of the documentary evidence. On the issue of prescriptive title raised by the parties however the learned Judge answered it in favour of the plaintiffs and against the first defendant.

The first defendant appealed against the judgment to the Court of Appeal which held that there was ample evidence to support the finding and affirmed the judgment of the trial Judge and dismissed the appeal. It is from the judgment of the Court of Appeal that the first defendant now appeals.

Learned counsel for the first defendant-appellant contended that on the finding of the trial Judge the predecessors-in-title of the parties were co-owners, but both the trial Judge and the Court of Appeal failed to approach the question of prescriptive title from that standpoint and that the evidence of possession led by the plaintiffs was insufficient to amount to an ouster of the first defendant and his predecessors in title and establish a prescriptive title in favour of the plaintiff.

He relied on several cases including *Corea v. Iseris Appuhamy* (1) where the Privy Council laid down the principle of law that the possession of one co-owner of the land enures to the benefit of the other co-owners and that a co-owner's possession in law is the possession of his co-owners. It is not possible for a co-owner to put an end that possession by any secre intention in his mind and nothing short of ouster or something equivalent to ouster could bring about that result.

In *Kobbekaduwa v. Seneviratne* (2) it was held that the mere fact that a co-owner who was in occupation of the common property and purported to execute deeds in respect of the entirety of it for a long period of years does not lead to the presumption of an ouster, in the absence of evidence to show that the other co-owners had knowledge of the transactions.

Tillakeratne v. Bastian (3) a decision of a Full Bench of this court, also cited by learned counsel, was a case where the presumption of ouster among co-owners was drawn. Bertram, J. said:

> "It may be taken therefore that it is open to court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse."

His Lordship also said:

> "It is, in short, a question of fact wherever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action brought."

These two passages in the judgment of Bertram, C. J. were cited with approval by the Privy Council in *Hussaima v. Umma Zameera* (4), as setting out correctly the principles of law applicable to prescription among co-owners in our country.

In the present case, however, although the predecessors-in-title of the plaintiffs and the first defendant were co-owners by virtue of the decree D4A entered on 18.10.1910 in the Nuwara Eliya Court of Requests case, one of the plaintiffs' predecessors in title Hingurawela H. M. Kiribanda who was only entitled to a 1/3 share of the land, conveyed the entirety of the land on P1 in 1946 to Welakonewattegedera H. M. Kiribanda and he in turn conveyed the entirety of the land on P2 in 1947 to Aluthgedera Heen Menika who was a complete stranger to the family of the original owner. The evidence is that she was the mistress of the vendor and came to live with him in 1947, on the execution of P2.

The position of a stranger who enters into possession of the entirety of the common property without the knowledge or belief that any other party is entitled to any interest in the property is different from that of a co-owner. This is clearly demonstrated by Gratiaen, J. in *Fernando v. Podi Nona* (5). At page 492 he says:

> "The ratio decidendi of *Corea v. Appuhamy (supra)* is that a person entering as a co-owner into possession of the common property cannot, by merely forming a secret intention which has not been

communicated to his other co-owners either by express declaration or by overt action, alter the character of his possession and thereby acquire title to their shares by prescription. This principle is, of course, subject to the rule of common sense that, in appropriate cases, an ouster may be presumed to have taken place at some point of time after the date of entry, which was originally not adverse – *Tillekeratne v. Bastian (supra), Hamidu Lebbe v. Ganitha* (6). There is, however, no room for the application of presumptions or counter-presumptions where *a man had from the inception entered into possession of the land unequivocally claiming title to the entirety.* In such a situation, his possession is at every stage adverse to the true owner or his true co-owners (as the case may be), and in the latter event the other co-owners cannot be heard to say that his possession was merely 'in support of their common title'. Where a stranger purporting to have purchased the entire land from a person who was in fact only a co-owner, he has been held to hold adversely against the other co-owners for purposes of prescription. In *Bhavrao v. Rakhmin* (7) the Full Court of the Bombay High Court took the view that prescription would run in favour of the purchaser as soon as he entered into exclusive possession of the property, if he did so claiming to be the sole owner. 'Adverse possession', the judgment points out, 'depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested.' The distinction between the possession of the entire land by a co-owner on the one hand and of a stranger who has purported to purchase the entire land is also emphasised in *Palania Pillai v. Rowther* (8). 'While possession of one co-owner' said Chief Justice Leach, 'is in itself rightful, the position is different when a stranger is in possession'. *The possession of a stranger in itself indicates that his* possession is adverse to the true owners."

Gratiaen, J. finally came to the conclusion that –

"The true test now becomes clear. Where a stranger enters into possession of a divided allotment of land, claiming to be sole owner, although his vendor in fact had legal title only to a share, *Corea v. Appuhamy (supra)* has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title."

In *Sellappah v. Sinnadurai* (9), it was also held that where one of the several co-owners sells the entirety of the common property to a person who is a stranger and not a co-owner, and who possesses it without knowledge or belief that any other party is entitled to any interest in the property, his possession is not possession of the co-owner. In such a case *Corea v. Iseris Appuhamy (supra)* or *Brito v. Muttunayagam* (10) is inapplicable. The purchaser acquires title to the entirety of the property after adverse possession for 10 years.

No issue of co-ownership was raised by the parties at the trial. Learned counsel for the appellants submitted that it was the duty of the trial court to have framed such an issue. I do not think any prejudice has been caused by it to the first defendant. For it is apparently from this angle that both the trial court and the Court of Appeal have approached the question of the plaintiff's prescriptive title to the entirety of the land.

A stranger who enters into possession of the entirety of co-owned property in the belief that he is the sole owner need not prove ouster or something equivalent to ouster but only adverse possession for a period of 10 years in order to acquire a prescriptive title to it.

In the present case P2 of 1947 conveyed the entirety of the land to Alutgedera Heen Menika who was a complete stranger and she had entered into possession in the belief that she was the sole owner. In fact the vendor himself had purchased the entirety of the land on P1 in 1946 before conveying it to her. There is nothing to indicate that Heen Menika had any knowledge or belief that any other party had interests in the property at the time she entered the land. As the Court of Appeal has pointed out there was ample evidence of adverse possession by Heen Menika and the plaintiffs. Witness Wannakurala stated that Heen Menika came to live in the house on the land in 1947, on the execution of Deed P2. The witness states that he worked on the land in about 1952 along with the second defendant's father, Punchirala, under Heen Menika, the plaintiff's mother. The first defendant's case was that Punchirala lived on the land under him and that after the latter's death he permitted Punchirala's son, the second defendant to look after the land. Kiriwanthe, a brother of the second defendant, had given the plaintiffs a document dated 26.8.1970(P3) undertaking to look after the land on their behalf. Subsequently a dispute arose between Kiriwanthe and the plaintiffs. The matter was

inquired into by the Chairman of the Conciliation Board of the area, who wrote letter dated 1.1.73 (P5) to the Grama Sevaka stating that Kiriwanthe admitted the ownership of the plaintiffs and agreed to vacate the land. Although the documents P3 and P5 containing Kiriwanthe's undertaking, do not constitute an acknowledgement of the plaintiffs' right to the land by the defendants, they nevertheless support the plaintiff's case that they did have possession of the land.

The learned trial Judge has accepted the plaintiff's position and rejected the first defendant's version for cogent reasons. This is a finding of fact which has been affirmed by the Court of Appeal.

In 1958 the first defendant purported to purchase the rights of Muthu Menika and Heen Menika on D2 and D3 respectively. The finding of the trial Judge which is affirmed by the Court of Appeal is that the plaintiffs were in possession of the land. Mere execution of deeds, in respect of the land can in no way interrupt the plaintiffs' prescriptive possession of it. In fact the plaintiffs and their predecessors-in-title had already acquired a prescriptive title to the land by adverse possession from 1947 for over 10 years by the time D2 & D3 were executed in 1958.

The two defendants unlawfully and forcibly entered the land only on 8. 1. 1973 and started disputing the plaintiffs' title to it, as was found by the trial court. From 1947 up to that date is a period of about 26 years and by then, as was pointed out earlier, the plaintiffs and their predecessors-in-title had by exclusive and adverse possession of the entire land acquired a prescriptive title to the land. This action, it might be mentioned, was filed on 6.8.73 within about seven months of the defendant's forcible entry into the land.

I therefore affirm the judgment of the Court of Appeal and dismiss the appeal of the first defendant with costs.

WANASUNDERA, J. – I agree.

TAMBIAH, J. – I agree.

Appeal dismissed.