

1968 Present : T. S. Fernando, J., and Weeramantry, J.

U. G. JAYANERIS and another, Appellants, and U. G.  
SOMAWATHIE and 2 others, Respondents

S. C. 41/66 (Inty.)—D. C. Galle, 2504/P

*Partition action—Claim to part of corpus by the contesting defendants on basis of prescriptive possession—Possession by same person as agent of the contesting defendants and on behalf of some of the co-owners—Adverse possession—Burden of proof.*

The 7th, 8th and 9th defendants, who were the contesting defendants in a partition action, claimed an undivided one-sixth share of the corpus on the basis of prescriptive possession. Their claim was based on the possession of one J who acted as their agent. This same J was already in possession of the land on behalf of two of the co-owners. The contesting defendants' claim based on the possession of J therefore raised the question of possession by an agent acting in disparate capacities—on the one hand for the benefit of co-owners claiming by a rightful title and on the other for the benefit of those seeking to dispossess them.

*Held*, that the burden was on the contesting defendants to prove by clear and cogent evidence that the adverse aspect of J's possession on their behalf was so manifest that all the co-owners, and not merely some of them, saw in it a challenge to their claims.

**A**PPEAL from an order of the District Judge, Galle.

H. W. Jayewardene, Q.C., with S. S. Basnayake, for the plaintiffs-appellants.

*M. T. M. Sivardeen*, for the 7th, 8th and 9th defendants-respondents.

*Cur. adv. vult.*

March 8, 1968. WEERAMANTRY, J.—

In this case the plaintiffs seek to partition a land originally belonging to one Odiris de Silva, who died intestate leaving six children. The contest in this case centred around the undivided one-sixth share that devolved on Agiris, one of the children of Odiris. It was common ground that this Agiris had not been heard of for several years and according to the plaintiffs his share devolved on his surviving brothers and sister on the basis that he died intestate, unmarried and issueless. The seventh, eighth and ninth defendants on the other hand laid claim to the undivided share of Agiris on the basis that Agiris had conveyed his share by deed to one Salman to whose interests they succeeded upon intestacy. However, though this was the position envisaged by them in their pleadings, these defendants (hereinafter called the contesting defendants) proceeded to trial on the basis of a claim to this undivided one-sixth share by purely prescriptive title, the possession alleged by them being in the main a period of possession on their behalf by one Jayaneries who acted as their agent.

This same Jayaneries, at the time he is stated to have been entrusted with possession on behalf of these contesting defendants, was already in possession of the land on behalf of certain co-owners, namely the first defendant and the fifth defendant, who claimed under the common title devolving from Odiris. The possession of one co-owner must necessarily enure to the benefit of all. The contesting defendants' claim based on the possession of Jayaneries therefore raises the interesting question of possession by an agent acting in disparate capacities—on the one hand for the benefit of co-owners claiming by a rightful title and on the other for the benefit of those seeking to dispossess them.

Mr. Jayewardene argues, and rightly in my view, that such a contention can only be based upon clear and cogent evidence pointing unmistakably to this dualism in the nature of his possession. The adverse aspect of his possession cannot in other words remain a mere concept in the recesses of the agent's mind but must so manifest itself that those against whom it is urged may see in it a challenge to their claims. Even as possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner,<sup>1</sup> so also is possession through an

<sup>1</sup> *Corca v. Appuhamy* (1911) 15 N. L. R. 65, P. O.

agent incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent.<sup>1</sup>

This does not mean however that express communication is required of the change in the nature of the agent's possession. So long as the agent's conduct carries without ambiguity the message of the altered nature of his possession, express communication may well be dispensed with ; but we have here no conduct so unambiguous, no distinction of capacities so clear, that we may with assurance invest the co-owners with knowledge that adverse possession had commenced or was running against them.

The only material before us on this matter is that Jayaneris planted "catch crops" on the land. There is no evidence of a division of this produce between two sets of principals nor is there such a demarcation of the crops as to lend colour to the suggestion that he played a dual role. His simple activity on the land would appear difficult therefore to relate to the sophisticated notion of agency in opposed capacities, as contended for by the respondents. Jayaneris was there on behalf of some of the holders on a lawful title and hence on behalf of them all. It would thus be as difficult for us to attribute to him a simultaneous possession eroding that same title as it was for the Privy Council in *Corea v. Appuhamy*<sup>2</sup> to permit Iseris who entered under a legal title to "masquerade as a robber or a bandit" ; and we are drawn back again to the cardinal principle approved in *Corea v. Appuhamy* and consistently followed ever since, that "possession is never adverse if it can be referred to a lawful title".

The material before us does not in this view of the matter bring us anywhere near the high order of proof required to establish adverse possession, the burden of which rests entirely upon the contesting defendants.

It has been submitted by learned Counsel for the contesting defendants that the dichotomous nature of Jayaneris' possession was admitted by two defendants, namely the second and the fifth. These defendants are brothers of Jayaneris and are parties who are entitled to other undivided shares than those deriving from Agiris.

However the defendants who would otherwise succeed to Agiris' share have not admitted that Jayaneris' possession was of the character claimed by Jayaneris or the second and fifth defendants, and, in the absence of any admission by them, the admission by the second and fifth defendants cannot avail the contesting defendants. Moreover, where notice of the altered

<sup>1</sup> *Nagudu Marikar v. Mohammodu* (1903) 9 N. L. R. 91, P. C.

<sup>2</sup> (1911) 15 N. L. R. 65, P. C.

character of a person's possession is necessary, this notice is necessarily required to all the co-owners, and a notice to some alone will not suffice to stamp the possession in question as adverse.

Another observation I feel constrained to make is that the case of prescriptive possession set up by the contesting defendants became apparent only at the trial and indeed after the close of the plaintiffs' case. The plaintiffs were entitled to assume upon the pleadings of the contesting defendants that their title was based upon a transfer by Agiris. Indeed when the points of contest were formulated at the commencement of the trial, the learned Judge noted that, apart from the usual issue relating to prescriptive rights of parties, the only dispute was whether Agiris died without marriage or issue and whether the rights of Agiris devolved on his surviving brothers and sisters as stated by the plaintiffs or whether Agiris sold his rights to Salman who died leaving the contesting defendants as his heirs.

It would be wrong, therefore, to say that a case of adverse possession was the case which the plaintiffs were called upon to meet or that there was a burden on them to lead evidence in disproof of prescriptive title on the part of the contesting defendants. Consequently, I do not think that an adverse inference can be drawn against the plaintiffs from their failure to meet in advance this altered case of the contesting defendants. In this context the comments made in the judgment on the weakness of the plaintiffs' evidence of possession and on their failure to call other witnesses on this point would appear to lose their force.

Another item of evidence relied upon by the contesting defendants in support of prescriptive title, is an inventory of 1930 filed in the testamentary case of Salman, their predecessor. This document is relied upon to show that a land by the same name as that of the corpus in this case was included in the estate of Salman. The appellants contend that the inventory is inadmissible as evidence of ownership unless the affirmant to the affidavit filed therewith is called as a witness. The appellants further dispute the identity of the land referred to therein, in view of a discrepancy between the extent there stated and the extent of the corpus.

Be these objections as they may, the inventory is at best a pointer to possession in or around the year 1930 and is insufficient of its own force to establish prescriptive possession. In the view indicated above of the nature of Jayaneris' possession, the inventory does not advance the case of the contesting defendants.

In the result, therefore, we hold that the claim of the contesting defendants to an undivided one-sixth share of the corpus on the basis of prescriptive possession must fail. The order of the learned District Judge is hence set aside in so far as he holds the contesting defendants entitled to the undivided one-sixth share of Agiris. The rights to this one-sixth share will devolve in the manner set out in the plaint and the interlocutory decree will be amended accordingly.

As regards the costs of contest, the order of the trial Judge will be reversed and the seventh, eighth, and ninth defendants must pay a sum of rupees sixty-three to the plaintiff and a like sum to the third and sixth defendants. The plaintiffs will be entitled to the costs of this appeal. The costs of the action, including survey fees, will be borne by the parties *pro rata*.

T. S. FERNANDO, J.—I agree.

*Order set aside.*

