KARUNAWATHIE AND 2 OTHERS
V.
GUNADASA

COURT OF APPEAL.
SENANAYAKE, J.
EDUSSURIYA, J.
C.A. 112/88 (F).
D.C. KEGALLE 19771/P.
JULY 17, 1996.

Partition - Partition Act - Co-owned land - Exclusive Possession - Ouster - Presumption - Adverse Possession.

The Plaintiffs instituted action to partition the land in question. The contesting Defendants contended that the Corpus was exclusively possessed by them and that the Plaintiffs had no rights to the Corpus . The District Judge rejected the contention of the Defendants. On appeal-

Held :

There was overwhelming evidence that the Defendants, since 1955 took the produce to the exclusion of the Plaintiffs and their predecessors in title and gave him no share of the produce or paid them a share of the profits nor any rent and did no act from which an acknowledgement of a right existing and there would fairly and naturally be inferred.

***Per* Senanayake, J.**

"In considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone, of the property owned in common, it is relevant to consider (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus."

AN APPEAL from the judgment of the District Court of Kegalle.

Cases referred to:

1. *Corea v. Iseris Appuhamy* 15 NLR 65 (P.C.)
2. *Subramaniam v. Sivaraja* 46 NLR 540.
3. *Rajapakse v. Hendrick Singho* 61 NLR 33.
4. *Abdul Majid v. Umma Zaneer* 61 NLR 361.

N.R.M. Daluwatte, P.C. with *Faiz Mushtapha, P.C. J.A. de Gunaratne* and *U.R. Hewage* for 4th Defendant-Appellant.

P.A.D. Samarasekare, P.C. with *Yasa Jayasekare* for 2,3 and 5th Plaintiffs-Respondents.

Cur. adv. vult.

August 23, 1996.
SENANAYAKE, J.

This is an appeal from the judgment of the learned District Judge of Kegalle allowing the Partition of the land called Thennapitiyahena.

The Plaintiffs instituted this action on 13.10.1972 to partition the land described in the schedule to the plaint and depicted as 'X' in plan 3079 dated 26.04.73 made by Surveyor, L.B. Beddawella. There was no dispute regarding the corpus as all parties agreed that corpus consist of lots 1, 2 and 13.

It was the contention of the learned Counsel for the Defendants-Appellants that the corpus was exclusively possessed by the contesting Defendants and the Plaintiffs had no rights to the corpus.

The Plaintiffs position was that the original owners of the land were Yapathhamy, Tikkiri Appu, Mudalihamy and Punchirale each entitled to 1/4 share. Yapathhamy and Tikkiri Appu had an associated marriage and died intestate leaving as heirs Appuhamy and Mudiyanse and Mudiyanse died intestate and issueless leaving his brother Appuhamy as his heir. Thus Appuhamy was entitled 1/2 share of the land. In 1943 Appuhamy conveyed 1/4 of the share by Deed 'P-1' to Bramphy Appuhamy and subsequently the balanced 1/4 share was inherited by the said Bramphy Appuhamy who died intestate in 1955. His Estate was administrated by his widow Dingiri Mahatmaya as proved by 'P-3' and 'P-4'. On the death of Bramphy Appuhamy the Plaintiffs were entitled to 1/4 share of the land and the widow Dingiri Mahatmaya to 1/4 who subsequently transferred her share subject to her life interest. Therefore the Plaintiffs claim 1/2 the share of the corpus. It was the contention of the learned Counsel for the Plaintiffs that the Thennepitiyahena was one of the lands held in common by the original owners as admitted in the Partition Action 4192 'P-5' in

1949 where the parties and the predecessor to the title in the instant case had agreed that the corpus was held in common. Therefore it was the contention of the Counsel for the Plaintiffs-Respondents that the parties were co-owners and there was no adverse possession and ouster by the contesting Defendants. The contesting Defendants claimed title from one of the original owners Mudilihamy and from his daughter Kusalahamy.

The learned Counsel for the Defendant-Appellant contended that the Appellant had adverse possession. He contended the Plaintiffs did not have even a days possession of the corpus and the Defendants predecessor in title Kusalahamy had possessed this lot as a separate land and the 4th Defendant-Appellant, Podi Amma and her father possessed the corpus exclusively. He contended that the learned District Judge erred in law when he held that the Defendants had not established ouster and adverse possession.

If one were to examine the corpus, the entire West North and East of the corpus of lots '1' and '2' consist of a barbwire and live fence and in the South there is the Ela which excludes lots '3' to '11' and lot No: 13 consist of a large Rock. The 3rd Plaintiff was the only witness who gave evidence on behalf of the Plaintiffs. He had admitted in page '187' that he had no possession and he had categorically stated that he had no possession of this corpus. At the time he gave evidence he was 50 years old he was born in 1934 and admitted that he had not gone to the land and that the 4th Defendent was in possession of the corpus. He had further stated in evidence that "after our father's death we did not possess" (vide page 213). It was an admitted fact that his father died in 1955. In 1955 he was 21 years old and admitted that the produce was exclusively taken by the 4th Defendant-Appellant and that she was forcibly possessing. There was no evidence led by the Plaintiffs that their predecessors in title were enjoying the produce of the said lots. The Plaintiff conceded that due to the forceful possession of the lots '1' and '2' by the 4th Defendant that he had not gone to the land. The Plaintiff failed to lead the evidence of his mother Dingiri Mahatthaya who was the widow of Bramphy Appuhamy to establish that they had possession and enjoyed the produce of the land or that some payments was made to them as an admission of co-ownership, though the land was included in the in-

ventory of his father's testamentary case. There was no evidence to show that the Plaintiffs had common ownership except paper title. Though it is well settled law that possession by a co-heir enures to the benefit of his co-heirs vide *Corea v. Iseris Appuhamy*[1] "a co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In the instant case according to 'X-1' the Commissioner's Report there were over 1,031 coconut trees between the ages of 20-50 years. According to the evidence of the 4th Defendent the entire produce from the coconut and other trees were enjoyed by the 4th Defendant. The 4th Defendant had challenged the report 'X-1' and in her statement of claim and in her evidence she had claimed the entire plantation of lot '1' and lot '2'. In the instant case there was overwhelming evidence that the Defendants since the year 1955 took the produce to the exclusion of the Plaintiffs and their predecessors in title and gave them no share of the produce or paid them a share of the profits from the rubber nor any rent and did no act from which an acknowledgement of a right existing in there would fairly and naturally be inferred. The Plaintiff's own evidence was that from 1955 they had no possession or any acknowledgement of their rights. On the other hand there was defiance on the part of the 4th Defendant-Appellant. Her evidence was corroborated by the other Defendant's evidence. The Plaintiff confessed that he had no possession nor did he give evidence to establish that his father Bramphy Appuhamy took the produce. *Vide Subramaniam v. Sivaraja*[2] where it was held if one enters and take the profits exclusively and continuously for a very long period under circumstances which indicate a denial of a right in any other co-tenant to receive them as by not accounting with the acquiescence of the other cotenants an ouster may be proved.

It was also held in *Rajapakse v. Hendrick Singho.*[3] That exclusive possession of the common property by some co-owners the effect of ouster could be asserted. In the said case Basnayake, C.J. had considered and referred to number of authorities regarding the expression actual ouster at page '35' he observed "The expression actual ouster need explanation, and as it is an expression used by

both Lord Mansfield and Lord Kenyon in the cases referred to above I cannot do better than explain it in the very words of Lord Mansfield quote", Some ambiguity seems to have arisen from the term actual ouster as if it meant some act accompanied by real force and as if a turning out by shoulders were necessary. But that it is not so".

It would appear therefore that on the facts of the instant case the Plaintiffs cannot claim the benefit of the Defendant-Appellant possession as she has possessed not on their behalf but for herself without giving them the share of the produce nor acknowledging their rights she was possessing exclusively and it was in adverse and in defiance of the rights of the Plaintiffs. This is not a case where a rich brother or a close relation had allowed a person in penury to enjoy the produce and to possess the land by permissive user. One may say our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of many of our people consider it below dignity to alienate ancestral lands to strangers. Those who are in more affluent conditions permit their less fortunate relatives to take the income of the ancestral property owned in common. But it would be different if a person who had left the ancestral lands for more luxurious Residence in a salubrious climate and obtain a high post in the State with a monthly sinecure fails even to go to the ancestral land and exercise his symbolic right to the property even by getting some one to pluck a king coconut or a young coconut for his own benefit. The question is could he return to the ancestral land after his retirement after he loses all the perks and the sinecure from the State and claim his rights to the ancestral land. I am of the view that the poor relatives who were living on the ancestral property would treat him as an interloper or trespasser since for number of years he had failed to visit his ancestral land and those who were in possession will not tolerate him as he by his own conduct had abandoned whatever interest he had to the common property. Therefore his poor relatives would be possessing adversely to his interest unless he could establish that he had close connection with the ancestral land and the others paid him rent or gave part of the produce or acknowledged his rights. It is time that we understood that with the open market economy and the commercial development and with the influence of Adam's Smith principles of laisses-faire had revolutionized our traditional social concepts. If one

were to realistically view this problem today we see that there is a break down of our traditional social concepts for eg. we know that persons holding very high office in the Country would leave their aged parents in Homes for the aged. These were unheard in the past. There is no question of poor relatives who were prepared to do the bidding of high and mighty. We must not live in seclusion and fail to realize the momentum of changes taking place in the economy and thereby eroding the traditional social values and concepts. We must realize that we are now living in a money-oriented society.

In considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone of the property owned in common, it is relevant to consider (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus.

In the instant case, the income from the Coconut and other trees would have been considerable and income from the Rubber plantation would have been high, this was a valuable piece of property and the 4th Defendant-Appellant was the only person who was residing in the corpus and the corpus was fenced on three sides which establish the exclusive possession. There was not an iota of evidence that the Plaintiffs had plucked even a Coconut or jak fruit or that he received even a Coconut husk from the 4th Defendant. If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner. The 4th Defendant is not closely related to the Plaintiffs though they have a common pedigree. Though the report marked 'X-1' states that there were more that 1100 Coconut trees over 20 years and the Court has to presume that income from Coconut would be considerable. The report does not state that they were barren trees. Further there was evidence that Rubber plantation in lot '2' was yielding an income and it was exclusively taken by the 4th Defendant-Appellant. The Plaintiffs have done nothing to assert a claim to any share of the property on his own confession positively from 1955 till the filing of the Action in 1972. Nor was there any positive evidence led to indicate that his father asserted any claim to the property. On the other hand there was specific evidence of the 4th Defendant of exclusive

possession vide page '259' and '306'. She was born in the house situated in the corpus and she had lived with her mother and father on this land without admitting any rights of the Plaintiffs or conceding any rights to them and her claim was adverse though she was a co-owner nevertheless she had put an end to common possession by ouster and by forceful occupation of the corpus from 1955.

Each case has to be viewed on its own facts. In this case there is very clear and strong evidence of ouster the Plaintiff's own evidence was at least from 1955 the 4th Defendant-Appellant was forcefully possessing the said lots. the possession was adverse and this was not a separate possession on grounds of convenience. The possession of the 4th Defendant-Appellant was in defiance to the claims of the Plaintiffs. There was no evidence led to show that the fencing of the lots was for convenience of possession. As H.N.G. Fernando. J. observed in *Abdul Majied v. Umma Zaneer*[4] that "by proving that although his entry was by virtue of his lawful title as a co-owner nevertheless it had put an end to his possession in that capacity by ouster or something equivalent to ouster and that therefore and thereafter his possession had been adverse'. The confession by the Plaintiff that 4th Defendant was possessing it forecefully and that he had not stepped onto the land at any stage even after his father's death in 1955 conclusively prove, that there was adverse possession by the 4th Defendant-Appellant. Each case depends on the facts and one cannot apply decisions of other cases if the facts differs, at least from 1955 the possession of the 4th Defendant-Appellant was adverse to the rights of the Plaintiffs.

It was contended on behalf of the Respondent that the Appellant's case was Kusalahamy had adverse possession and had prescribed to it but that settlement of 1949 cuts across the position of the Appellant. However where the Appellant established ouster and adverse possession thereafter for a period exceeding 10 years for the reasons hereinbefore given by me, can a Court deny the rights acquired by the Appellant.

In the circumstances, I set aside the judgment of the learned District judge and allow the appeal with costs fixed at Rs.10,500/-.

EDUSSURIYA. J. – I agree.
Appeal allowed.