1954 *Present :* **De Silva J. and Fernando A.J.**

M. GITHOHAMY *et al.*, Appellants, *and* E. R. KARANAGODA *et al.*
Respondents

S. C. 69 (Inty.)—D. C. Colombo, 5,889 P.

Co-owners—Amicable partition—Plan made by a co-owner—Its value as evidence of divided possession—Prescription—Ouster.

A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession.

"When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition."

APPEAL from a judgment of the District Court, Colombo.

Sir Lalitha Rajapakse, Q.C., with *G. D. C. Weerasinghe*, for the 2nd and 3rd defendants appellants.

Ivor Misso, for the plaintiffs respondents.

N. E. Weerasooria, Q.C., with *Ivor Misso* and *S. W. Walpita*, for the 1st defendant respondent.

Cur. adv. vult.

December 21, 1954. DE SILVA J.—

This is an appeal from the judgment of the Additional District Judge, Colombo, in a partition action. The 1st plaintiff who is a minor appearing by his next-friend the 2nd plaintiff instituted this action for the partition

of the land called lot B of Delgahawatte in extent 2 roods, 17·12 perches and depicted in plan No. 1034 marked X. The devolution of title was set out in the plaint in the following manner. By right of purchase on deed P1 of 1891 Sadiris became the owner of the subject matter of this action. He by deed P3 dated 24.8.1908 sold it to Maraya Tennekoon who by deed P4 of 1911 sold it to Podihamy and she by deed P6 of 1927 transferred the same to Sumanawathie who died leaving as her heirs her husband Richard and one child Edmund the 1st plaintiff, a minor. Richard by deed 1D4 of 1940 sold his half share to the 1st defendant. Githohamy, the 2nd defendant and her son Reginald the 3rd defendant intervened in the action and stated that the corpus sought to be partitioned was an undivided portion of a larger land in extent about 1 acre, of which they claimed undivided shares. According to them the larger land of 1 acre originally belonged to Don Lewis by right of purchase on deed 2D1 of 1886. Don Lewis was married in community of property to one Ilona Alwis who died leaving as her heirs her husband and 2 children, namely the 2nd defendant and Peiris. Thereafter Don Lewis contracted a marriage with Caralina and he died leaving as his heirs his widow Caralina and the 2 children already mentioned. Accordingly, each of the two children became entitled to 3/8 share while the widow got ¼ share. Peiris by deed 2D6 of 1910 conveyed an undivided half of half to Alwis the husband of the 2nd defendant. Thereafter Peiris died unmarried and his balance rights, that is to say, ⅛ share devolved on his sister the second defendant. Alwis died leaving as his heirs his widow the 2nd defendant and 8 children the 3rd and 5th to 11th defendants. Caralina sold her rights on P1 to Sadiris whose interests have now devolved on the 1st plaintiff and the 1st defendant in equal shares. Thus according to the contesting defendants the 2nd, 3rd and 5th to 11th defendants are jointly entitled to a ¾ share of the larger land while the balance ¼ belongs to the 1st plaintiff and the 1st defendant. At the trial the plaintiff and the 1st defendant conceded that the larger land belonged to Don Lewis the father of the 2nd defendant. The plaintiff and the 1st defendant, however, contended that on P1 Caralina had conveyed a half share of the larger land and that her successors in title exclusively possessed lot B in lieu of the undivided half share conveyed on P1 and had acquired a prescriptive title to lot B. The learned District Judge accepted that position and ordered a decree for partition allotting half share each to the plaintiff and the 1st defendant. The claim of the contesting defendants was dismissed and they have now appealed from this judgment.

The plaintiffs produced plan P2 dated 13th July, 1908. The land shown in this plan is identical with the corpus sought to be partitioned. In P2 the western boundary is shown as "Lot A the other one-half portion of the same land". In regard to the plan P2 the learned District Judge commented, "The plaintiffs are relying strongly on the plan P2 of 1908, which shows that on that date when the plan was made and the partition carried out Sadiris claimed lot B depicted in that plan, and on the face of the plan it is quite clear that there was an actual partition of the land of 1 acre into 2 halves". Sir Lalitha Rajapakse who appeared for the appellants argued that the learned District Judge had misdirected himself in holding that a partition of the land was effected on the date appearing on this plan. If I

may say so, with respect, there is substance in Sir Lalitha's contention. It is true that evidence has been led on behalf of the plaintiff's and the 1st defendant to prove that Podihamy and her successors in title were in exclusive possession of lot B. Apart from the plan P2 there is no other evidence to show that the land in fact was partitioned on the occasion the plan P2 was prepared. The preparation of a plan for a portion is one thing while the partitioning of a land is another. If one co-owner gets a plan prepared for a portion of the land it does not mean that the land has been partitioned. There is no evidence whatsoever to show that the co-owners other than Sadiris acquiesced in the preparation of this plan nor is there any evidence that those co-owners were aware that such a plan had been prepared. The fact that Peiris in the year 1910 conveyed on 2D6 an undivided ¼ share of the larger land establishes, beyond doubt, that, at least he, did not recognize the partition which is alleged to have taken place 2 years earlier. It is conceded that Sadiris and his successors in title made plantations and built houses on lot B while they did not exercise such rights over the remaining portion of the land. There is no evidence in regard to the plantations standing on the portion to the west of lot B. According to the surveyor all the plantations on lot B are 40 years and under, in age. That is not disputed. The age of these plantations clearly shows that they were made after Caralina had executed the deed P1 of 1891. A co-owner who makes a plantation on the undivided land is entitled to take the entire produce of that plantation until the co-ownership is put an end to by a decree of the Court or mutual agreement. Similarly a co-owner who erects a building on the land held in common is entitled to possess it until the land is partitioned. Therefore even if Sadiris and his successors in title appropriated the produce of all the trees standing on lot B and possessed the buildings put up by them on it that itself is insufficient to give them a prescriptive title to lot B. Sadiris obviously entered the land as a co-owner. Therefore in the absence of other cogent evidence his possession of lot B as well as that of his successors in title must be referable to co-ownership. The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in *Corea v. Iseris Appuhamy* [1]. It is true that ouster can be presumed from exclusive possession in special circumstances as was decided in the case of *Tillekeratne v. Bastian* [2]. The special circumstance which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore if the other co-owners did not protest when the land was being possessed in a manner that its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise. Sadiris and his successors in title have executed a large number of deeds for lot B. There is no evidence nor is there any reason to think that the other co-owners were

[1] (1911) 15 N. L. R. 65. [2] (1918) 21 N. L. R. 19.

aware that such documents were being executed. In *Kobbekadduwa v. Seneviratne*[1], it was held that the mere fact that a co-owner who was in occupation of the common property purported to execute deeds for a long period on the basis that he was the sole owner, did not lead to the presumption of an ouster in the absence of evidence that the other co-owners had knowledge of the transactions.

When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition. Neither of these methods has been followed in respect of this land. Evidence was led on behalf of the plaintiffs and the 1st defendant to establish that there was a wire fence separating lot B from the remaining portion of this land. The contesting defendants denied the existence of any such fence. Admittedly, there was no such fence when the surveyor went to the land in the year 1950. According to the plaintiffs' witness Wilmot this fence was intact up to 4 years prior to his giving evidence. He gave evidence in February 1953. It was however suggested to the 2nd defendant in cross-examination that this fence was pulled down in the year 1943. It is rather strange that if the fence was pulled down that there was no complaint to the Police or the headman. The evidence of the existence of this fence appears to be very meagre. Even if such a fence did exist it is possible that it was erected either for the convenience of possession or for raising a plantation. The house No. 1 was built by the 3rd defendant. He says he built it 16 or 17 years ago, whereas the 1st defendant in his evidence stated that it was built 5 years ago. The 1st defendant gave this evidence in February 1953. But before the surveyor in October, 1950, the 1st defendant has stated that this house was built 8 years prior to that. It is clear that the 1st defendant has made an attempt to reduce the age of this house while the contesting defendants tried to make it a little older than what it actually is. That observation would apply also to house No. 6 which belongs to the 6th defendant. It would appear that both these buildings were constructed over 10 years ago, because according to the evidence of the 3rd defendant, a building permit from the District Engineer became necessary about 10 years ago to put up new buildings. The 3rd defendant says that at the time he constructed house No. 1 no such building permit was necessary. If houses 1 and 6 were built within the last 10 years the plaintiffs and the 1st defendant could have proved it by the production of certified copies of the building applications made to the District Engineers. No such documents have been produced. The Counsel for the 1st defendant asked the 3rd defendant in cross-examination whether he gave a writing in regard to the house he had put up. The 3rd defendant denied that he gave any such document. If is rather strange that the writing was not produced by the 1st defendant if in fact he obtained one from the 3rd defendant. Again, the 1st defendant claims to have paid Rs. 125 to the 6th defendant about the year 1950 as compensation for house No. 6. But the 1st defendant did not think it necessary to obtain a writing in support of this transaction although by that time the 2nd defendant and her children were challenging

[1] *(1951) 53 N. L. R. 354.*

the claims of the 1st plaintiff and the 1st defendant. This story is difficult to believe. The 6th defendant is still in possession of house No. 6 through a lessee. The evidence of the 1st defendant that houses 1 and 6 were erected with his permission is unsupported and should not have been accepted.

Peiris by deed 2 D 6 transferred a half of half share to his brother-in-law. The learned District Judge observes that this deed suggests that regardless or ignorant of his legal right to $\frac{3}{8}$ share, Peiris looked upon himself as the owner of only $\frac{1}{4}$ share and conceded a $\frac{1}{2}$ share to his step-mother. This inference is not warranted. It does often happen that a co-owner sells a lesser share than what he is entitled to. In such event it is not necessary to state expressly in the deed that he reserves to himself his balance rights.

It is clear that the possession of lot B by Sadiris and his successors in title, even if it was exclusive, which is doubtful, was not based on an amicable partition of the land. The evidence of exclusive possession led in the case is insufficient to confer a prescriptive title to lot B on the 1st plaintiff and the 1st defendant. Therefore the larger land of 1 acre must be held to be owned in common by the heirs and successors in title of Don Lewis.

Accordingly I allow the appeal and dismiss the plaintiff's action. The 1st plaintiff and the 1st defendant will pay the costs of the 2nd and 3rd defendants of this appeal and in the Court below.

FERNANDO A.J.—I agree.

Appeal allowed.