1958 *Present :* **Pulle, J., and Sinnetamby, J.**

K. A. SEDIRIS APPUHAMY, Appellant, *and* K. A. JAMES APPUHAMY *et al.*, Respondents

*S. C. 152 (Inty.)—D. C. Gampaha, 960/P*

*Co-owners—" Adverse possession "—" Ouster ".*

**Where a co-owner and his successors in title possessed for a period of about fifty years or more a specific portion of the common property on the ground of convenience, and their share in the common property was less than the extent of the specific portion—**

***Held,* that the separate possession could not, by itself, be regarded as adverse possession for purposes of establishing prescriptive title. The fact that certain deeds were executed in relation to the specific portion was not material if the other co-owners were not aware of their execution.**

APPEAL from an order of the District Court, Gampaha.

*H. W. Jayewardene, Q.C.*, with *A. C. M. Uvais* and *C. P. Fernando*, for the 11th defendant-appellant.

*Sir Lalita Rajapakse, Q.C.*, with *D. C. W. Wickremasekere*, for the plaintiff-respondent.

*K. Herat*, with *S. D. Jayasundera*, for the 1st to 4th, 9th and 10th defendants-respondents.

*Cur. adv. vult.*

September 3, 1958. SINNETAMBY, J.—

The plaintiff sought in this action to partition the land depicted in plan No. 5000 dated 14th January, 1950, marked " X " and filed of record comprising of three lots marked A, B and C. The 11th, 12th, 16th and 20th defendants contended that this land formed part of a larger land depicted in plan No. 878 dated 10th May, 1951, and marked " Y ". The plaintiff had traced his title from one Andiris who, he said, was the original owner of the land he sought to partition. The contesting defendants on the other hand said that Andiris was a son of one Punchappuhamy and that lots A, B and C formed part of the larger land depicted in plan Y, which was owned by the said Punchappuhamy. Indeed, at the trial it was agreed that the lots A, B and C depicted in plan X did form part of the larger land depicted in plan Y but it was contended on behalf of the plaintiff that A, B and C were separated off and became a separate entity. The contesting defendants on the other hand said that Andiris derived only a co-owner's interest in the original land and that lots A, B and C were possessed by him for convenience: they claimed a partition of the entire land among the heirs of Punchappuhamy allotting to the heirs of Andiris a share. The plaintiff gave evidence of the title that devolved upon himself and the defendants who supported his case and were successors in title to Andiris. In the course of cross-examination there was elicited from him the shares that devolved from Punchappuhamy

on the 11th and 12th defendants and on the other defendants who supported them. The main contest resolved itself into a consideration of the question whether lots A, B and C had been separated off and possessed by Andiris and his heirs exclusively and adversely to the other co-owners; in short, the question was whether they had acquired a title by prescription to these lots. The learned District Judge held that they had and this appeal is against that decision.

It would appear that Punchappuhamy was the owner of the larger land called Alubogahawatta or Alubogahalanda. He had four children of whom Andiris Appuhamy through whom the plaintiff claims is one; the others are Juwanis, Caronis and Ethan Hamy. The title of Andiris devolved, however, as stated by the plaintiff on the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 24th to 27th defendants. Punchappuhamy by deed No. 11 D1 of 25th September, 1871, transferred an undivided half share of the larger land to his son Juwanis. Thereafter, he died and each of his four children including Andiris became entitled by inheritance to 1/8th share. Juwanis Appuhamy by deed No. 16 D4 of 1897 transferred an undivided 1/4th share to Caronis who is also known as Carolis. Ethan Hamy's share was also said to have been transferred to Caronis who, according to the plaintiff, at the time of death was entitled to a half share. His administrator on deed No. 16 D1 transferred this half share to his six children, namely, the 14th, 15th, 16th, 22nd defendants, Brampy and Bartin Nona. Juwanis was thus left with a 3/8th share of the land which by deed No. 11 D2 of 1900 he transferred to Baba Hamy, Punchi Hamy and Joisa Hamy. Baba Hamy transferred her interests on deed 11 D3 to the 11th defendant. Punchi Hamy's interests by deeds 12 D1, 12 D2 and 12 D3 devolved as set out on the 12th defendant. Joisa Hamy's share also devolved as set out in the evidence on the 11th defendant and the 23rd defendant. Carolis had six children and his interests devolved on them, namely, the 14th defendant, 15th defendant, 16th defendant, 22nd defendant, Brampy Appuhamy and Bartin Nona. Bartin Nona's share is said to have devolved on the 19th and 20th defendants as set out in the evidence of the plaintiff. Brampy's interests devolved on his widow, the 17th defendant, and his children the 18th and 19th defendants.

Andiris married Delenchi Hamy and died leaving his widow and five children, Soysa, Haramanis, Sanchi Nona, Pelis and Alisandri. Delenchi Hamy by deed P1 of 1911 transferred her half share in the proportion of 2 to 1 to Alisandri and Haramanis respectively. Haramanis died without issue and unmarried and his share devolved on his brothers and sisters. Soysa by deed P2 of 1920 transferred his share to the first defendant and plaintiff. Sanchi Nona by P3 of 1921 transferred her rights to the 2nd defendant and Aron. The 2nd defendant died after the institution of the action leaving her husband Lewis the 24th defendant and three children, namely, the 25th to 27th defendants. Aron's interest devolved on the 3rd, 4th, 5th and 6th defendants. Pelis's interests devolved on the plaintiff and the 7th and 8th defendants while Alisandri's interests by deed of transfer 1 D1 and by inheritance devolved on the 1st, 9th and 10th defendants.

In support of the plaintiff's contention that lots A, B and C were separated off and possessed by Andiris and his heirs, reference was made to a lease of 1862 marked P4 executed by Punchappuhamy, Andiris's father. By that deed Andiris leased to his son Juwanis Appuhamy and two others, all the fruit trees on a 7/8th share of Alubogahawatta. In that deed he gives the northern boundary of the land on which these fruit trees stand as the "1/8th portion of this same land *belonging* to Andiris Appuhamy", and not Iriyagahakumbura which lies to the north of the larger land. Reliance was also placed upon a deed of lease P5 of 1869 by which this Punchappuhamy leased to Don Hendrick Appuhamy and Jusey Perera Appuhamy the produce of certain trees on this same land which is described as having as its northern boundary the land of Andiris Appuhamy but he describes the extent of this land as 12 acres. By these deeds and by the existence of old fences coupled with possession it is sought to establish that Andiris's portion has been separated off. As against this, however, the 11th defendant relies upon a deed 11 D1, already referred to, of 1871 by which Punchappuhamy transferred an undivided half share of the entire land of 12 acres. The boundaries given are the boundaries of the entire land which would include the 1/8th share of Andiris. What value should therefore be attached to the description in the lease P4 wherein the northern boundary of the 7/8th share describes the 1/8th share as *belonging* to Andiris Appuhamy ? The execution subsequently of 11 D1 seems to suggest that this lease granting to the lessee the right to enjoy the produce of certain fruit trees was confined to the 7/8th share of the larger land excluding the portion which was apparently possessed by Andiris. There is no evidence to establish the identity of this 1/8th share with lots A, B and C. The word "*belonging*" *in that deed must be taken to be somewhat loosely used*: if in fact title was transferred a deed would have been executed and must be produced: 11 D2 by which Juwanis transferred 3/8th share of 12 acres which share he describes in extent as 4 acres and 2 roods also gives the boundaries of the entire land and states that this share was possessed undividedly in common by the grantor. The contesting defendants also relied upon a deed of lease marked 12 D4 executed in 1896 by Delenchi Hamy the widow of Andiris and her children one of whom is the father of the plaintiff, namely, Pelis. It is a lease of "the undivided part of the land from and out of the land called Alubogahawatta . . . . . containing in extent within the said boundaries about 12 acres". This deed gives the northern boundary as Iriyagahakumbura which is the northern boundary of the larger land depicted in plan Y. Another deed of which one should take note is 16 D4 which is the transfer of Juwanis to his brother Carolis dated 1897 and the share conveyed is an undivided 1/4th share of the entire land of 12 acres "held and possessed by me in common and by virtue of deed of transfer No. 3423 dated 25th September, 1871." (11 D1). Deeds P1, P2 and P3 describe lots A, B and C and give the southern boundary as another portion of the same land. These are fairly recent deeds and there is nothing to show that the successors in title of the other sons of Punchappuhamy were aware of the execution of these deeds. On the other hand, plaintiff's father Pelis had been a witness to the deed of lease 16 D4 which dealt with an undivided

1/8th share of the larger land: it was of course contended that Pelis was only a witness to the signature and one cannot infer that he knew what the contents of that deed were. It must, however, be remembered that he was a member of the grantor's family and it would not be unreasonable to assume that he was aware of the contents of the deed. It is relevant to note that in 12 D4 Pelis Appuhamy, the plaintiff's father, was one of the lessors and the lease is in respect of that 1/8th part or share of the larger land of 12 acres the northern boundary of which is given as Iriyakumbura. All these facts afford overwhelming evidence that the words " belonging to Andiris " in describing the northern boundary of the leased trees in deed P4 is not accurate. After all P4 was a lease of fruit trees and it excluded the trees planted by Andiris Appuhamy and belonging to him on the north and only applied to the trees standing on the 7/8th share of the land.

The oral evidence in the case was confined to the evidence of the plaintiff and the 15th defendant Hendrick Appuhamy who is a son of Carolis. The plaintiff is 65 years old and in the course of his evidence stated that he and the members of his branch of the family, that is, Andiris's heirs, were in possession of lots A, B and C. He admitted that Andiris had possessed the northern portion with the permission of Punchappuhamy. He is unable to explain why Andiris's widow in 12 D4 leased an undivided share of the entire land. The witness Don Hendrick who is a little older stated that his father, Carolis, and his successors possessed lots E and F and that Andiris's descendants possessed lots A, B and C. Between these various lots there were old fences of 50 to 60 years of age according to him. In the course of his evidence he purported to speak of a division amongst the heirs of Punchappuhamy but he admitted that he was living in lot E only since 1918 and the only reason why he said there was division was because of the existence of the fences. In cross-examination he admitted that the persons whom he had mentioned were possessing various lots of this land for convenience. Indeed, in re-examination he admitted at first that Lewis, the husband of the 2nd defendant who claims a share through Andiris, has rights in lots E and F which were the lots possessed by the heirs of Carolis and that he has a right in Lewis's residing land. He explained the separate possession only on the ground of convenience. Subsequently, he went back on this and stated that he did not claim rights in A, B and C nor did he concede that Lewis had any claim to lots E and F. The learned Judge took the view that from the length of possession of the divided lots by the heirs of Punchappuhamy and their successors he was entitled to conclude that there was exclusive and adverse possession. To use his own words, he states " the evidence taken as a whole points to the inference of an amicable division at some point of time followed by exclusive possession in severality for over half a century ". He accordingly rejected the claim by the 11th defendant and the 12th defendant and those who supported them for a partition of the larger land and agreed that the plaintiff and those who supported him were entitled to partition lots A, B and C as forming a distinct and separate land.

I have already indicated that the earlier deeds by themselves do not support the contention of the plaintiff that Andiris's share was separated

from the rest of the land and owned and possessed by him as such. The only inference in support of this contention is to be gathered from the lease P4. There is no evidence at all of an amicable partition among the co-owners. The later deeds from 1911, no doubt, deal with lots A, B and C as if they formed a separate entity but, as I stated earlier, there is nothing to indicate that the heirs of the other branches of the family of Punchappuhamy were parties to these deeds or were aware of their execution. A co-owner cannot by a secret intention formed in his own mind change the character of his possession of the common land to the detriment of his co-owners. The mere fact, therefore, that deed P1 and the later deeds executed after 1920 described lots A, B and C as a separate land is by no means helpful in establishing adverse possession—*Kabbikaduwe v. Seneviratne* [1]. As against these documents there are several deeds executed by the other heirs of Punchappuhamy dealing with the entire land. While these deeds themselves are by no means conclusive, they are relevant in deciding whether a possession by Andiris and his family was adverse. While the members of the other branches of the family of Punchappuhamy have not dealt with a separate portion in any of their deeds, there have been produced deeds in which members of the family of Andiris had dealt with their shares as being undivided shares of the larger land of 12 acres—vide 12 D4 and 16 D4—which it would be reasonable to infer were executed with the knowledge of the plaintiff's father Pelis.

The rule laid down by the Privy Council in *Corea v. Iseris Appuhamy* [2] that possession by one co-owner enures to the benefit of his other co-owners has not been departed from and has been consistently followed in our Courts. In *Tillekeratne v. Bastian* [3] a Full Bench of the Supreme Court took the view that, if the circumstances of the case warranted it, long continued exclusive possession by one co-owner would justify a presumption of ouster at some point of time more than 10 years before action brought. In that case the special circumstances consisted of the co-owner in possession taking minerals that had been mined from the common property without accounting to the other co-owners. De Sampayo, J. puts the matter thus:—

> "While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners the aspect of things will not be the same in the case where valuable minerals are taken a long series of years without any division in kind or money."

As pointed out by the learned Judge the mere taking of the natural produce of the co-owned land by one co-owner such as the produce of trees has never been regarded as a circumstance from which ouster may be presumed. This is particularly so where other co-owners are in possession of other parts of the common property. The Courts have recognised other circumstances from which a presumption of ouster may be drawn but that has never been done where the only circumstance consists of long continued possession where the other co-owners are also in possession

[1] *(1951) 53 N. L. R. 354.* [2] *(1911) 15 N. L. R. 65.*
[3] *(1918) 21 N. L. R. 12.*

of other allotments of the same land. The position is different where one co-owner is in possession of the entire common land and does not account for or share with his co-owners the income derived therefrom. For instance in *Subramaniam v. Sivarajah*[1] the Court presumed an ouster from the fact that one co-owner was in possession of the entire land and took the profits exclusively and continuously for a period of over 60 years without accounting to the other co-owners who lived in close proximity under circumstances which indicated a denial of a right to the other co-owners to take or receive them. In the present case, however, the facts are different. The co-owners are in possession of different allotments of the co-owned land and the plaintiff's witness himself admitted that such possession was for convenience. It is now clear law that a co-owner who improves the common property or a portion of it is entitled to possess the improvements effected even to the extent of fencing it off without acquiring any exclusive right to the soil on which the improvements have been made. He is even entitled to bring a possessory action to remain in possession of the improvement if he is ousted—*Pieris v. Appuhamy*[2] and *Cathonis v. Silva*[3]. There are other instances in which a presumption of ouster has been drawn or where there had in fact been an ouster accompanied by adverse possession. Where there has been a division among co-owners of the common land unaccompanied by a notarial deed of transfer, a possession by each co-owner of the portion allotted to him for a period of over 10 years has been held to entitle him to a decree under section 3 of our Prescription Ordinance—*Mensin Nona v. Nimal Hamy*[4]. Likewise, where a co-owner who owns exclusively property which adjoins the common land fences off a portion of this common land and incorporates it with his own land and possesses both as one lot, an ouster has been presumed—*de Mel v. de Alwis*[5]. In the present case the only evidence is that there has been possession for a period of about 50 years or more by Andiris and his heirs of lots A, B and C. There are also very old fences. These facts alone will not justify a presumption of ouster. The deeds of the contesting defendants on the other hand deal with the entire land as co-owned property and there are some deeds signed or witnessed by members of Andiris's family which also describe the land as undivided. There are no special circumstances which would justify a presumption of ouster. Very clear and strong evidence of ouster among co-owners is called for and separate possession on grounds of convenience cannot be regarded as adverse possession for purposes of establishing prescriptive title—*Simpson v. Omeru Lebbe*[6].

The learned District Judge, in my opinion, was wrong in the inferences he drew from the facts which he accepted as established. I do not agree with him that convenience of possession means " the personal comfort derived by such exclusive possession, and results, after a length of time, in material advantage to the possessor and that is the advantage of a new title which cannnot be lightly disturbed by the mere execution of notarial deeds which copy the description in earlier documents". Every co-owner is in law entitled to his fractional share of everything in the co-owned property including the soil as well as the plantations, but in

[1] *(1945) 46 N. L. R. 540.*
[2] *(1947) 48 N. L. R. 344.*
[3] *(1919) 21 N. L. R. 452.*
[4] *(1927) 10 C. L. R. 159.*
[5] *(1934) 13 C. L. R. 207.*
[6] *(1947) 48 N. L. R. 112.*

practice it is not possible for every co-owner to enjoy his fractional share of every particle of sand that constitutes the common property and every blade of grass and every fruit from trees growing on the land without causing much inconvenience to himself as well as the other co-owners. To avoid this, for the sake of convenience, co-owners possess different portions of the common land often out of proportion to their fractional shares merely because of improvements they have effected. That is what I understand convenience of possession to mean and possession of a specific portion of the common property for such a purpose would certainly result in material advantage referred to by the learned District Judge. In my opinion, the evidence in the case does not justify a presumption of ouster. No doubt possession of the separate lots A, B and C by Andiris and his heirs has been for a very long period but this alone is insufficient to establish title by prescription.

As observed earlier the Courts in Ceylon have recognised the possibility of an ouster being presumed from special circumstances accompanied by long continued exclusive possession. It is recognised for instance that an amicable division accompanied by possession in severality of the separate lots for a period of 10 years would put an end to common ownership. Proof of the division must be forthcoming for effect to be given to this principle ; but it may even be possible to infer from long continued possession, though I am not prepared to say that it must always necessarily follow, that there had in the distant past been such a division, if it is established that the allotments possessed by the several co-owners are proportionate to the shares they have in the common property. In the present case even this is not so. Lots A, B and C which the heirs of Andiris claim are in extent certainly more than 1/8th share of the extent of the entire land. Lots A, B and C are approximately four acres while Andiris's 1/8th share should only be 1 1/2 acres. To infer that there has been such a division would in the circumstances be most unreasonable. In a recent case where one co-owner made a plan of a definite portion of the common land and improved and possessed it for a period of about 40 years to the exclusion of other co-owners who possessed other portions of the same land, the Supreme Court took the view that, in the absence of evidence to establish that the other co-owners acquiesced in the preparation of the plan, the production of the plan by itself was insufficient either to establish an amicable partition among the co-owners or to justify a presumption of ouster—*Githohamy v. Karanagoda*[1].

I would accordingly set aside the judgment of the learned District Judge and send the case back for an interlocutory decree for partition to be entered in respect of the entire land depicted in plan Y filed of record. Before this is done, however, the learned District Judge should call for further evidence and satisfy himself in regard to the following matters :

The deed by which Ethan Hamy is alleged to have transferred her interests to Carolis Appuhamy must be produced or there should be other evidence to satisfy the Judge that such a transfer did take place. Likewise, the manner in which Bartin Nona's interests devolved on the 19th and 20th defendants should be established by evidence.

[1] *(1954) 56 N. L. R. 250.*

I would therefore allow the appeal, subject to what I have stated above. The 11th, 12th, 16th and 20th defendants will be entitled to costs of contest and of this appeal payable by the plaintiff and those defendants who contested their claim.

PULLE, J.—I agree.

*Appeal allowed.*