1955 *Present :* **Gratiaen J. and Gunasekara J.**

R. S. FERNANDO *et al.*, Appellants, *and* K. PODI NONA *et al.*, Respondents

S. C. (Inty.) 124—D. C. Colombo, 5,140/P

Co-owners—Prescription—Adverse possession—Distinction between possession by a co-owner and possession by a stranger.

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* (1911) 15 N. L. R. 65 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.

C, who was entitled to only an undivided 1/10 share of a land, entered into a notarial agreement with a stranger, M. By this agreement, C, purporting to be sole owner, employed M to cultivate the entire land as planter for a period of six years expiring on August 21, 1877, after which C undertook to separate a half of the land and the new plantations and to grant the same (i.e., the soil as well as the plantations) to M. M carried out his part of the agreement, but C did not apparently execute a formal conveyance of any part of the common land to M in implementation of his contractual obligation. Nevertheless, the land was in fact divided up into two allotments, Nos. 1 and 2, and lot 2 and the plantations standing on it were openly and exclusively occupied *ut dominus* by M and his heirs after the expiry of the six-year period.

Held, that M and his heirs acquired prescriptive title to the entirety of lot 2, although its area far exceeded the extent which C had legal title to convey to a stranger.

APPEAL from an order of the District Court, Colombo.

F. R. Dias, with *H. L. de Silva*, for the 30th, 31st and 32nd defendants appellants.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiffs respondents.

Cur. adv. vult.

May 19, 1955. GRATIAEN J.—

The plaintiff in this case was granted an interlocutory decree for the partition of two contiguous allotments of land marked A and B in the plan No. 4148 filed of record. The surveyor reported that Lot B was in the possession of the 8th defendant and of the appellants who were accordingly added as parties to the action. They claimed no interests in lot A, but asked that Lot B should be excluded from the partition for reasons which I shall later explain.

Lots A and B had originally formed part of a single land, a little over three acres in extent, belonging to two brothers named Nandochchi and Samichchi in equal shares. In due course Nandochchi's share passed by inheritance to his five children one of whom was named Cornis.

On 22nd August, 1871, Cornis, who in fact had legal title to only an undivided 1/10 share, entered into a notarial agreement 30D1 with a stranger called Maththa. By this agreement, Cornis, purporting to be sole owner, employed Maththa to plant the entire land (described as "sufficient to plant 150 coconut trees") in coconuts and other crops.

Maththa was to cultivate the property as planter for a period of 6 years expiring on 21st August, 1877, after which Cornis undertook " to separate a half of the land and the new plantations and to grant the same (i.e., the soil as well as the plantations) to Maththa ".

Maththa carried out his part of the agreement, but Cornis does not appear, in implementation of his contractual obligation, to have executed a formal conveyance of any part of the common land to Maththa. Nevertheless, the land was in fact divided up into two allotments and lot B (or at least a substantial part of it) and the plantations standing on it were exclusively occupied by Maththa after the expiry of the 6 year period referred to in 30D1. The learned Judge was also satisfied that Maththa, and members of his family after him, " built on this portion and raised other plantations on it ". Nor did Cornis or his co-owners or their respective successors in title exercise proprietary rights over lot B since 1877. It is in these circumstances that the appellants and the 8th defendant, claiming under Maththa, asked for the exclusion of this allotment from the proposed partition.

The learned Judge's decision that both lots A and B, treated as an entity, should be partitioned was based on the following findings :—

(*a*) that Maththa had prescribed only to an undivided 1/20 share of the entire land (i.e. one half of the 1/10 share to which alone Cornis had legal title) ;

(*b*) that, as Maththa occupied lot B under what must be regarded as a derivative title from a co-owner, neither he nor persons claiming under him could prescribe against the other co-owners unless the presumption laid down by the Judicial Committee in *Corea v. Appuhamy* [1] could be rebutted.

With great respect, I think that it is permissible to take a more realistic view of the legal position resulting from the continuous, exclusive occupation of lot B (or at least a defined part of it) by Maththa and his family ever since 1877. In the facts of this case, the same consequence follows whether or not Cornis, in terms of his contractual obligation, had executed a formal conveyance to Maththa of a separated portion of the land and plantations in consideration of services rendered by the latter as planter. In either event, what is significant is that in 1877 Maththa went into possession claiming as of right to enjoy a defined portion of the land *ut dominus*, whereas Cornis and his co-owners were content to exercise proprietary rights over lot A alone.

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 declarations 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* [2], *Hamidu Lebbe v. Ganitha* [3].

[1] *(1911) 15 N. L. R. 65.* [2] *(1918) 21 N. L. R. 12.*
[3] *(1925) 27 N. L. R. 33.*

There is, however, no room for the application of presumptions or of 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 to 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 ".

If Cornis, pretending to be and believed by Maththa to be the sole owner, had in fact conveyed lot B to him on that basis, the case would have been covered by the decision of Schneider J. and Garvin J. in *Mohamed Marikar v. Kirilanaya* [1]. Similarly, in *Punchi Singho v. Bandara Menika* [2], Jayetileke J., sitting alone, held that where one of the co-owners purports to sell the entire property, and the purchaser enters into possession claiming title to the entirety, prescription begins to run at once. This principle, though acknowledged as correct, was distinguished on the facts by Howard C.J., sitting alone, in *Cooray v. Perera* [3] and subsequently by the present Bench in *Kobbekaduwa v. Seneviratne* [4]. At a later date it was expressly followed by two of the three Judges who decided *Sellappah v. Sinnadurai* [5].

We have not been referred to any decision of this Court where the rule laid down in *Mohamed Marikar v. Kirilanaya* (supra) and *Punchi Singho v. Bandara Menika* (supra) has been expressly dissented from.

After we reserved judgment, Sansoni J. has referred me to certain decisions of the Indian Courts where a stranger purporting to have purchased the entire land from a person who was in fact only a co-owner, has been held to hold adversely against the other co-owners for purposes of prescription. In *Bhavrao v. Rakhmin* [6] 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* [7]. " While the 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* ".

These observations are in accord with certain passages in *Angell on Limitations* (6th ed.) mentioned by Jayetileke J. in *Punchi Singho v. Bandara Menika* (supra). The text book refers at page 443 to a judgment of Mr. Justice Story in an American case where the defendant, a stranger, had a deed of the whole estate but his legal title was valid only as to an undivided 1/4 in common with others ; but he made an actual entry into

[1] *(1923) 1 T. C. L. R. 158.*
[2] *(1942) 43 N. L. R. 547.*
[3] *(1944) 45 N. L. R. 455.*
[4] *(1951) 53 N. L. R. 354.*
[5] *(1951) 53 N. L. R. 121.*
[6] *I. L. R. 23 Bom. 137.*
[7] *(1942) 55 Madras L. W. 532.*

the whole land, and claimed the whole in fee, that is to say, he entered as sole owner and his possession was openly and notoriously adverse to the true owners of the balance 3/4 share. Story J. held that the date of his entry claiming to be sole owner was a good starting point for prescription. "Acts, if done by a stranger, would *per se* be a disseisin, whereas acts if done by a co-owner are susceptible of an explanation consistently with the real title".

The true test now becomes clear. Where a stranger enters into possession of a divided allotment of property, 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 the present case, the conduct of Maththa and his successors in title was quite unequivocal, and must have clearly indicated that he claimed lot B (or at least the defined portion of it exclusively occupied by him) as sole owner adversely to Cornis and all others. The area of lot B far exceeded the extent which Cornis had legal title to convey to a stranger, and it is not unreasonable to assume that he entered into the planting agreement as agent for all the co-owners. In the result, Maththa and his heirs have long since acquired prescriptive title to the entirety of the divided allotment.

I have so far assumed that Cornis had in fact granted a conveyance (which cannot now be traced) of a larger interest in the land than he himself enjoyed. If, on the other hand, Maththa had entered into occupation of the divided allotment relying on the rights promised him under the planter's agreement but without an actual conveyance, his possession would have been equally adverse to the co-owners. *Theivanapillai v. Arumugam* [1] and *Silva v. Lechiman Chetty* [2].

For these reasons, I would set aside the judgment under appeal and hold that the interlocutory decree for partition must be confined to so much of the land as was not occupied by Maththa and his successors-in-interest. The learned District Judge has not given a definite finding as to whether this portion takes in the whole of lot B or only a defined part of it. I would therefore send the record back with a direction that this issue should be decided and that an interlocutory decree must then be entered for the partition of the rest of the land depicted in plan No. 4148 among the co-owners claiming title in accordance with the pedigree proved by the plaintiff.

The appellants are entitled to the costs of this appeal and of the contest in the lower Court. The costs of the further inquiry which we now direct will be costs in the cause, and the other costs must be borne *pro rata* among the co-owners of lot A and of any portion of lot B which may be included in the ultimate partition.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *(1912) 15 N. L. R. 358.*

[2] *(1923) 23 N. L. R. 372.*