

1944

*Present: Howard C.J.*COORAY, Appellant, *and* PERERA, Respondent.

197—C. R. Panadure, 9,043.

Prescription—Sale of entirety of property by a co-owner—Possession by transferee—Proof, adverse possession by ouster.

Where a person obtains a transfer of the entirety of a property from a co-owner, his possession is that of a co-owner, and it does not become adverse without proof of ouster or something equivalent to ouster.

A PPEAL from a judgment of the Commissioner of Requests Panadure.

L. A. Rajapakse, K.C. (with him *M. Ratnam*), for the defendants, appellants.

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*), for the plaintiffs, respondents.

Cur. adv. vult.

June 5, 1944. HOWARD C.J.—

The defendants in this case appeal from an order of the Commissioner of Requests, Panadure, entering judgment in favour of the plaintiffs. In so doing the learned Commissioner held that Don James, a co-owner of the land in dispute who gave a donation of the lands to the defendants by deed D 1 dated November 25, 1911, did not intend to transfer or convey title to the entirety of the field in question. The learned Commissioner also held that the defendants' evidence as to possession, even if accepted, did not show that they had been in possession for more than thirty years. The defendants were co-owners of the field and as such their possession could not be adverse to that of the plaintiffs who were also co-owners. The latter had title to one-third share of the land and the defendants were not justified in preventing them from cultivating this share.

It has been contended by Mr. Rajapakse on behalf of the defendants that Don James by D 1 transferred to the defendants the whole of the field in question donated to him and Laisahamy by deed P 1 of 1877.

Further the defendants entered into possession of the whole field by virtue of D 1. In these circumstances the possession by the defendants was adverse to that of the other co-owners. If, therefore, the defendants had proved ten years' undisturbed and uninterrupted possession they would on the authority of *Punchi v. Bandi Menika*¹ be entitled to judgment. But, in my opinion, the learned Commissioner was correct in the conclusion at which he arrived that Don James did not convey title to the entirety of the field in question. The principle formulated in *Punchi v. Bandi Menika* (*supra*) is not, therefore, applicable.

There remains for consideration the question whether the Commissioner was correct in treating the defendants as co-owners with Laisahamy and holding that they must prove possession for more than thirty years. In so finding he has no doubt applied the principles laid down in *Corea v. Appuhamy*² and *Tillekeratne v. Bastian*³. In the former case the law was laid down by the Privy Council in the following terms:—

“ His possession was in law the possession of his co-owners. It was 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.”

The Privy Council, in spite of over thirty years *de facto* possession, refused to uphold the defendants' title by prescriptive possession. In *Tillekeratne v. Bastian* (*supra*) a claim by prescription based on possession for more than forty years was upheld. I would also refer to a passage from the judgment of Lord Dunedin in *Brito v. Muttunagayam*⁴ where in the course of a reference to *Corea v. Appuhamy* (*supra*) he said as follows:—

“ In that case, it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parcener, Lord Macnaghten, who delivered the judgment, cited the dictum of Wood V. C. in *Thomas v. Thomas*⁵: ‘ Possession is never considered adverse if it can be referred to a lawful title.’ ”

Applying the principles to which I have referred to the facts of the present case, I have to answer the question as to whether the defendants' possession can be referred to a lawful title. They only obtained a portion of the field from Don James, but as that portion was an undivided share they were entitled to exercise rights of possession over the remaining portion as co-parceners of the other co-owner. Their possession can, therefore, be referred to a lawful title. In these circumstances they are not entitled to succeed unless they have proved ouster or something equivalent to ouster. This they have not done. The judgment of the Commissioner is therefore in accordance with the law and the appeal is dismissed with costs.

Appeal dismissed.

¹ 43 N. L. R. 547.

² 15 N. L. R. 65.

³ 21 N. L. R. 12.

⁴ 20 N. L. R. 327.

⁵ (1855) 2 K. & J. 83.