1957 *Present :* Weerasooriya, J., and Sansoni, J.

SABARATNAM *et al.*, Appellants, *and* KANDAVANAM, Respondent.

*S. C. 124—D. C. (Inty.) Point Pedro, 4,431*

*Deed—Sale by two or more persons of their shares of a land—Failure of one of them to sign the deed—Binding effect of deed.*

*Co-owners—Transfer of entire property by a co-owner—Transferee's rights—Prescription—Ouster.*

(i) A, B and C purported to sell to D by the same deed an undivided 8/32 share of a land. The 8/32 share consisted of the 6/32, 1/32 and 1/32 shares of A, B and C respectively. Although the deed of sale (P1) recited C as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. Subsequently A transferred the entirety of the land to E. In the present action instituted by D claiming 7/32 share as against E—

*Held*, that the failure of C, one of the intended executants, to sign the deed P1 did not have the effect of not binding the other parties who executed it.

(ii) Where a person who is in possession of property as a co-owner transfers the entirety of the common property to a stranger but continues to be solely on the land, his continued possession, though covertly on behalf of the transferee, is not adverse to the other co-owners in the absence of evidence of ouster by him of the other co-owners.

[1] *(1911) A. D. 133.*

APPEAL from an order of the District Court, Point Pedro.

*C. Thiagalingam, Q.C.*, with *A. Nagendra*, for the 1st and 2nd defendants-appellants.

*S. J. V. Chelvanayakam, Q.C.*, with *K. Rajaratnam*, for the plaintiff-respondent.

*Cur. adv. vult.*

March 4, 1957. WEERASOORIYA, J.—

In accordance with our previous order the proceedings were remitted to the District Court to enable the plaintiff-respondent to produce the duplicate of deed No. 11385 dated the 20th October, 1911, which is in the custody of the Registrar of Lands. This deed has now been produced marked P1A, and the learned District Judge has held that the presumption in section 90 of the Evidence Ordinance relating to the due execution and attesting of it may be applied. We see no reason to disturb that finding.

This deed purports to be a sale of certain interests in the land in suit, aggregating an undivided 8/32 share, in favour of one Velar Kandiah, by Sathasivampillai (who is the predecessor in title of the 2nd defendant-appellant) in respect of an undivided 6/32 share, and Nagalingam and Sivasambu each in respect of an undivided 1/32 share. Meenatchipillai the mother of Sathasivampillai also joined in the conveyance in respect of her life interest over the share of Sathasivampillai. Although the the deed recites Sivasambu as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. The claim of the plaintiff-respondent to the balance undivided 7/32 (or 42/192) share rests mainly on this deed.

We were invited by learned counsel for the defendants-appellants to hold that the failure of Sivasambu to sign the deed has the result that it is not binding even on those parties who executed it since, according to his submission, the parties who executed it must have done so on the faith that it would be executed by Sivasambu as well, and he invoked the English rule of equitable relief as stated by Jessel, M.R., in *Lake v. South Kensington Hotel Co.* [1] (and for which the earlier case of *Bolitho v. Hillyar* [2] is also an authority) that "if two persons execute a deed on the faith that a third party will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two". But even if this rule is applicable in an appropriate case I do not see how it can be availed of by the defendants-appellants who were not parties to the deed. Moreover, it was held in *Ex parte Harding* [3] that such equity "must be alleged and proved". No issue regarding this was raised at the trial, nor is there any evidence that the other parties executed the deed on the faith that Sivasambu himself would do so. Hence

[1] *(1879) 11 Ch.D. 121 at 125.* [2] *(1865) 34 Beav. 180.*
[3] *(1879) 12 Ch.D. 557 at 564.*

counsel's submission that the deed is not binding on the parties who executed it cannot be accepted.

In view of this deed it clearly would not be open to the 2nd defendant-appellant to take up the position that Sathasivampillai was the solo owner of the land in suit or acted under that belief. The 2nd defendant-appellant is the daughter of Sathasivampillai, and on the occasion of her marriage to the 1st defendant-appellant, Sathasivampillai, ignoring the other co-owners, purported to convey the entirety of the land to her by way of dowry on deed 2D1 of the 15th August, 1920. The trial Judge held, in regard to such of the interests of Sathasivampillai conveyed on 2D1 as had already been sold on P1A, that 2D1 by reason of its prior registration prevailed over P1A, and this finding has been accepted by the plaintiff-respondent. But apart from those interests Sathasivampillai had, at the time of the execution of 2D1, certain other undivided interests as well, and these undoubtedly passed under 2D1. The only question remaining for decision is whether by reason of the alleged exclusive possession of the entire land by the 2nd defendant-appellant after the execution of 2D1 she has prescribed against the other co-owners.

The principle is now well recognised that where a co-owner purports to sell the entire common property to a stranger and the latter enters into possession claiming title to the entirety, prescription begins to run at once and uninterrupted possession over a period of ten years results in the acquisition of a prescriptive title to the land. Most of the cases affirming this principle are referred to in *Kanapathipillai v. Meerasaibo et al.*[1] where, however, it was held that the principle did not apply if the stranger was aware that his vendor was only a co-owner. Relying on these decisions learned counsel for the defendants-appellants contended that despite the fact that Sathasivampillai was only a co-owner of the land, the principle referred to would apply in the present case as the 2nd defendant-appellant is in the position of a stranger to whom the entirety of the land had been transferred and there is no evidence that she had knowledge of the true capacity in which her father Sathasivampillai was in possession of the land nor should such knowledge be inferred merely from her relationship to Sathasivampillai.

The evidence regarding the possession of the land subsequent to the execution of 2D1 is by no means satisfactory. According to those witnesses called by the defendants-appellants who claimed to be in a position to speak to possession, the land was a barren one which could not be cultivated except "once in a way", for about three or four years one Mandalam was in occupation of it, ostensibly under Sathasivampillai, and another person called Ponniah had been running a boutique on a portion of it for many years. It is clear, however, that during this period the other co-owners had no reason to think that the land was otherwise than in the occupation of Sathasivampillai, and in his capacity as a co-owner, whoever may have been actually on the land from time to time. The 1st defendant-appellant himself stated that he commenced

[1] *(1956) 58 N. L. R. 41.*

possessing the land (on behalf of the 2nd defendant) only after Sathasivampillai's death which, it is clear, took place within ten years of the institution of the action. Even if the possession of the land by the 2nd defendant-appellant from that point of time onwards be regarded as adverse to the other co-owners (and I express no opinion on this question) the period is insufficient for her to have acquired a prescriptive title to it. But she would have acquired such a title if her possession through Sathasivampillai during the period subsequent to the execution of 2D1 is held to be adverse to the other co-owners.

The present case is, however, different from any of the earlier cases in which the principle relied on by learned counsel for the defendants-appellants was applied, as in each of them the stranger himself would appear to have entered on possession of the land after the sale to him. The *ratio decidendi* of those cases seems to be that the possession of a stranger in such circumstances is in itself sufficient notice to the other co-owners of the adverse nature of it. The same cannot, in my opinion, be said of a stranger who possesses the land through the very co-owner who sold it to him (even conceding that he was ignorant of the fact that his vendor had no title to the entirety of it).

In the case of *Fernando v. Podi Nona* [1] it was stated by Gratiaen J. that where "a stranger enters into possession of a divided allotment of property, claiming to be sole owner, although his vendor had legal title to only a share, *Corea v Appuhamy* [2] 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". Having regard to the evidence in the present case it is manifest that the continued occupation of the land by Sathasivampillai after the execution of 2D1, though covertly on behalf of the 2nd defendant-appellant, was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title.

The effect of the decision of the Judicial Committee of the Privy Council in *Corea v Appuhamy* (*supra*) is that where a person who is in fact a co-owner is in possession of the whole of the common property, then in the absence of evidence of ouster by him of the other co-owners, his possession is referable to the right which he has to the enjoyment of the land by virtue of his being a co-owner, and it cannot, therefore, be regarded as adverse to the other co-owners. Notwithstanding that 2D1 purported to be a conveyance of the entire land, the 2nd defendant-appellant acquired only certain undivided intersts on that deed and her possession of the land thereafter through Sathasivampillai was consistent with her rights as a co-owner. There is no room, therefore, for holding that her possession of the land up to the time of Sathasivampillai's death was adverse to the other co-owners.

The appeal is dismissed with costs. The plaintiff-respondent will, however, pay the defendants-appellants their costs of the proceedings

[1] *(1955) 56 N. L. R. 491.* [2] *(1913) 15 N. L. R. 65.*

in which, in terms of our previous order, the plaintiff-respondent was given an opportunity of producing the duplicate of deed No. 11385 dated the 20th October, 1911.

SANSONI, J.—

I agree and only wish to add some observations on two submissions made by Mr. Thiagalingam. They are :—

(1) that deed P1A was ineffective because Sivasambu, one of the intended executants, did not sign it ; and

(2) that even though Sathasivampillai was a co-owner when he executed the deed 2D1 in favour of his daughter the 2nd defendant, prescription began to run in her favour from that point of time as it was a deed executed by a co-owner in favour of a stranger for the entire land, and Sathasivampillai's possession thereafter was his daughter's possession.

On the first point the rule enunciated by Jessel, M.R., in *Luke v. South Kensington Hotel*[1], to which my brother has referred, has been criticised by the House of Lords in *Lady Naas v. Westminster Bank Limited*[2], where it was held that the rule was expressed far too widely. Lord Russell of Killowen, at page 391 said :—

" I do not think that the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party, and owing to the non-execution by another person named as a party to the deed the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed ".

Lord Wright and Lord Romer were in substantial agreement with this view, and the latter said at page 410 :—

" The equitable principle that they lay down is that where, owing to the non-execution of a deed by one of the parties, the others who have executed it would by the application of the common law rule be bound by a covenant or transaction different in kind from that which it was their intention to enter into, they can be relieved in equity from the results of their execution of the deed "

These opinions show that the appellants who are no parties at all to the impugned deed P1A cannot derive any assistance from this equitable principle.

On the second point it must remembered that so long as Sathasivampillai was in possession of the common land prior to his transfer to his daughter in 1920, he was there as a co-owner. " His possession was in law the

[1] *(1879) 11 Ch. D. 121.* [2] *(1940) A. C. 366.*

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 "— per Lord MacNaghten in *Corea v. Appuhamy* [1]. Assuming, then, that Sathasivampillai continued to be solely on the land and that he intended to be there and possess it on behalf of his daughter from 1920, such possession will not assist the appellants because neither ouster nor its equivalent has been established.

But it is said that although Sathasivampillai could not have prescribed against his co-owners on his own behalf, he was able to prescribe on his daughter's behalf because this was a case where a co-owner transferred the entirety of a common land to a stranger. This is to ignore the very reason of the rule which permits a stranger in such a case to prescribe against the other co-owners. That rule has been stated as follows :—

> " while the possession of one co-owner is, in itself, rightful, and does not imply hostility, 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. . . . When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences "—

see the judgment of Leach, C.J., in *Palania Pillai v. Amjath Ibrahim Rowther* [2]. The rule cannot therefore apply in this case because there was no such possession by the stranger (2nd defendant) as would indicate to Sathasivampillai's co-owners that prescription had commenced to run against them. It is impossible for these reasons to uphold Mr. Thiagalingam's argument that the 1st and 2nd defendants had acquired prescriptive title to this land by reason of Sathasivampillai's possession on their behalf from 1920.

I agree to the order proposed by my brother.

*Appeal dismissed.*