

1945

Present: Soertsz A.C.J. and Canekeeratne J.

TENNEKOON, Appellant, and PODISINGHO *et al*, Respondents.

360—D. C. Ratnapura, 7,317.

Prescription—Co-owners—Transfer by one co-owner of his share—Deed of transfer disputed and ignored by the other co-owners—Transferee's position as regards prescription.

AD, G and AN were the owners of a land in the proportion of $\frac{1}{2}$, $\frac{1}{4}$ and $\frac{1}{4}$ respectively. AD sold his $\frac{1}{2}$ which devolved on P who had also inherited AN's $\frac{1}{4}$. P, shortly before his death in 1928, executed a deed P8 transferring his interests to two of his heirs M and H. The latter sold the $\frac{1}{2}$ share derived from AD to plaintiff in 1943. The other heirs of P disputed the validity of the deed P8 in 1928, and, together with M and H, possessed the land on the footing of their intestate shares.

In an action by the plaintiff in 1943 to vindicate title to the half share conveyed on P8—

Held, that although the deed P8 was genuine and validly executed, it was not made effective by possession on the part of the transferees and their successors. Possession continued in disregard of P8 and had so continued for 15 years after P8 had been executed. Consequently, it was not in reality a case in which the defendants-respondents, had acquired a prescriptive title, but rather a case in which their title and possession were held in disregard of and unaffected by P8.

A PPEAL from a judgment of the District Judge of Ratnapura.

H. V. Perera, K.C. (with him A. C. Gunaratne), for the plaintiff, appellant.

H. W. Jayewardene for the defendants, respondents.

Cur. adv. vult.

July 25, 1945. SOERTSZ A.C.J.—

It is agreed between the parties to this case that the land in suit belonged to Adanhmy, Giraetana and Anohamy in the proportions of $\frac{1}{2}$, $\frac{1}{4}$ and $\frac{1}{4}$ respectively. Adanhmy conveyed his interests to Lokuetana, who by P1 of 1886 conveyed his half share to Punchirala. Punchirala was one of the six children of Anohamy. The other five children were daughters and Punchirala, taking up the position that his sisters had forfeited their inheritance by marrying in *deega*, purported in 1928 to sell the half share he had purchased and Anohamy's $\frac{1}{4}$ share, that is $\frac{3}{4}$ in all

to Heenhamy and Maddumahamy who, in turn, sold a half share, that is to say the half share Punchirala had acquired on P1, to the plaintiff. It is to that half share that the plaintiff seeks to be declared entitled.

The defendants, respondents, impeached Punchirala's deed to Heenhamy and Maddumahamy and set up a prescriptive title to the half share involved in it and also claimed to share in Anohamy's $\frac{1}{4}$. The trial Judge found that Punchirala's deed was duly executed and that it passed title to Heenhamy and Maddumahamy, but he also held that the defendants, respondents, had acquired a prescriptive title thereto. It is this finding in regard to a title by prescription that is challenged on appeal. There is evidence to show that the respondents disputed the validity of Punchirala's deed to his nephews, Heenhamy and Maddumahamy, soon after his death, and the respondents' case is that in consequence of that dispute, this deed was ignored and all Punchirala's nephews and nieces shared his $\frac{1}{4}$. The plaintiff and his vendors, however say that after about three years the dispute raised by the other nephews and nieces was given up and Maddumahamy and Heenhamy possessed Punchirala's $\frac{1}{4}$. The learned trial Judge found that Punchirala's deed was ignored and the $\frac{1}{4}$ was possessed by all the nephews and nieces and that they acquired a prescriptive title to the shares they should have got but for Punchirala's deed. At the hearing of this appeal, I was inclined to the view that, this being a case in which co-owners, were seeking to establish a prescriptive title against other co-owners, it would require overwhelming evidence to establish such a title. But, this is not the ordinary kind of case involving the question of a prescriptive title among co-owners for the question is whether Punchirala's deed was ignored and possession held on the footing of the shares that would have devolved but for Punchirala's deed. In regard to that question, there is clear evidence that the deed given by Punchirala was impeached directly he died. Peerishamy one of the plaintiff's witnesses was constrained to admit in cross-examination that "Punchirala's $\frac{1}{4}$ share after his death was possessed by all his nephews and nieces". This witness appears to have bought a share of the land on the basis that Punchirala's deed was ignored—a very strong circumstance in favour of the respondents' case when it is borne in mind that this witness took a prominent part in and about the execution of Punchirala's deed. Maddumahamy did not advance the plaintiff's case at all. He said "I cannot remember who worked the field from 1928 to 1940". Then there is the evidence of the Vel Vidane supported by the documents 2D4 and 2D5 which refutes the plaintiff's case that Heenhamy and Maddumahamy possessed the large shares they claimed.

In this state of the evidence, I do not think we shall be justified to disturb the findings of the trial Judge.

The appeal is dismissed with costs.

CANEKERATNE J.—I agree.

Appeal dismissed.