

1942

*Present : Jayetileke J.*PUNCHI *et al.* *v.* BANDI MENIKA.91—C. R. *Matale*, 5,233.*Prescription—Co-owners—Sale by one of whole land—Adverse possession.*

Where one co-owner conveys the entire premises held in common and the grantee enters into possession under the conveyance claiming title to the whole premises,—

Held, that the possession of the grantee was adverse to the other co-owners.

A PPEAL from a judgment of the Commissioner of Requests, *Matale*.

H. V. Perera, K.C. (with him *R. C. Fonseka*), for defendant, appellant.

H. W. Thambiah, for plaintiff, respondent.

Cur. adv. vult.

September 18, 1942. JAYETILEKE J.—

This is an action brought by the plaintiffs under section 247 of the Civil Procedure Code to have a half share of a field called *Imbulgahacumbura* declared bound and executable for the satisfaction of a decree entered in action No. 21,517 of the Court of Requests, *Kandy*, against one *Kiri*, the legal representative of one *Puncha*.

It is common ground that one Sella and his sister, Punchi, were entitled to the field in equal shares. By deed No. 35 dated October 27, 1924 (D 5), Punchi transferred the entire field to one Dissanayake, ignoring the rights of Sella to a half share. By deed No. 1,515 dated November 14, 1925 (D 4), Dissanayake transferred it to Sumangala Thero, who died leaving as his sole heir one Dingiri Banda. By deed No. 22,395 dated June 13, 1926 (D 3), Dingiri Banda transferred it to Saranankara Nayake Thero who, in turn, transferred it to the defendant by deed No. 2,226 dated August 16, 1934 (D 1). Sella transferred his half share to Puncheda by deed No. 260 dated June 22, 1927 (P 1). The defendant claimed the entire field by prescription.

The learned Commissioner held that the possession of the defendant and his predecessors in title was not adverse to Sella and Puncheda and entered judgment for the plaintiffs. He seems to have been of the opinion that the defendant was a co-owner of the field and that on the evidence that was placed before him he would not be justified in presuming an ouster against Puncheda.

Counsel for the defendant contended that Dissanayake's possession was adverse to Sella from the very commencement as he entered into possession as sole owner of the field and not as a co-owner.

The evidence of Dissanayake shows that he purchased and entered into possession of the field upon the assumption that his vendor was the sole owner and that the deed in his favour gave him a sound title.

There is nothing in the evidence to indicate that he was aware that Sella was entitled to a half share of the field or that in any way he partook of the title of his vendor. His possession cannot, in these circumstances, be said to be subordinate to the title of Sella.

The evidence that was led by the defendant leaves no room for doubt that from the year 1924 Dissanayake and his successors in title regularly got the field cultivated and took the profits exclusively and continuously for a period of 14 years under circumstances which indicate very clearly a denial of a right in any other person to receive them.

Indeed neither Sella nor Puncheda asserted title to any portion of the field at anytime. On principle it seems to me that the possession of Dissanayake and his successors in title must be regarded as adverse, however defective their title may be.

The point under consideration has not been the subject of any judicial decision. There is, however, a chapter dealing with the possession of co-tenants in *Angell on Limitations of Actions at Law*, which throws considerable light on the problem. The learned writer seems to be of the view that when one of several tenants in common conveys the entire premises held in common and the grantee enters into possession under the conveyance claiming title to the whole premises, such possession is adverse to the co-tenants of the grantor and consequently at the expiration of the period of limitation they will be barred.

This view is, in my opinion, manifestly correct. I would set aside the judgment appealed from and dismiss the plaintiffs' action with costs in both Courts, including the costs of the previous appeal.

Appeal allowed.