1921.

Present : Bertram C.J.

KIRIMENIKA *v.* MENIKHAMY.

10—C. R. Ratnapura, 16,748.

Informal partition among members of a family—Adverse possession—Permissive agreement—Possession of definite blocks for a long time—Presumption that possession became adverse.

When members of a family make an informal but definite partition of their lands, and each party enters into possession of his share, then the possession of the several shareholders becomes adverse from the date of their doing so, and title by prescription can be acquired.

Where the arrangement is permissive, then each co-owner must be deemed as possessing on behalf of himself and others, unless the arrangement continues so long that on equitable grounds it is presumed that at some point it became adverse. Such a presumption is only drawn upon a consideration of all the circumstances of the case.

THE facts are set out in the judgment.

R. L. Pereira, for appellant.

E. G. P. Jayatilake, for respondent.

July 18, 1921. BERTRAM C.J.—

This is a dispute between two members of a Kandyan family with regard to a land which forms part of the family inheritance. It was at one time possessed by one Ukku Hamy who died leaving eight children. These children by deaths and *diga* marriages were in the course of time, for the purposes of the present case, reduced to two, Bauddahamy and his sister, Ramalhamy, the present first defendant.

The present action is the sequel to another which was tried out between the same parties, namely, C.R. Ratnapura, No. 15,894.

A question of fact has been raised to which it is first necessary to refer. Ramalhamy was originally married in *diga*, but her present claim is made on the basis that she had re-acquired *binna* rights. The learned Commissioner refused to frame an issue on this question, holding that the point had practically been conceded in the previous action. The learned Commissioner was perhaps not technically right in this course, but there can be no doubt, in view of the course taken at the previous action, and the evidence given in the case that Ramalhamy had in fact for years been treated as having re-acquired *binna* rights. She must therefore be so treated for the present case.

There were two family lands, the first Iriyankumbura now in dispute, and the other Meddekumbura, which was the land in dispute in the previous action. The shares of Bauddahamy and Ramalhamy in these two lands were based partly upon inheritance, partly upon transfers from other members of the family, which it is not necessary to particularize. In this way, brother and sister became entitled in respect of Iriyankumbura to shares in the proportion of 3/8 to 5/8 ; and in respect of Meddekumbura to shares in the proportion of 9/16 to 7/16. They, nevertheless, by a sort of tacit permissive arrangement possessed the lands in equal halves, and in the present case Bauddahamy possessed the upper portion, two pelas in extent, and Ramalhamy the lower portion, also of two pelas in extent. This arrangement by which the lands were possessed in halves had prevailed even before the members of the family interested had been reduced to two.

On November 5, 1906, Bauddahamy conveyed his interests in both lands to his step-daughter, Kirimenika, the plaintiff in the present action, purporting in each case to convey a half. Possession continued on the footing already explained. By the action C.R. Ratnapura, No. 15,894, this state of affairs was for the first time disturbed. Plaintiff attacked Ramalhamy and her family by this action and claimed 5/8 of Meddekumbura. Eventually, this action was settled on the basis that plaintiff was entitled to 9/16 and defendant to 7/16. An order on the basis of this settlement was made providing for cultivation of the field in rotation and entitling plaintiff to cultivate the whole of the field for one year, so as to give her the advantage of her additional 2/16.

As I have said the present action is a sequel to that action. Dissatisfied, apparently, with the settlement which entitled Kirimenika to reap the whole of the produce for one year, Ramalhamy determined to reopen the question of Iriyankumbura also. The method she adopted for this purpose was an irregular one. Instead of bringing an action, she took possession of the whole of the produce for one year, and this action was brought by the plaintiff to recover damages for the proceeding and for declaration of title.

The learned Commissioner has found for the defendants, and, in substance, I think, he is right. Defendant is entitled to stand upon her strict legal rights, and if her legal title is investigated it will be found that she is the owner of 5/8 of the land and not of 1/2 ; nor is her position affected by the fact that for many years the land has been possessed in equal shares.

When members of a family make an informal but definite partition of their lands, and each party enters into possession of his share, then no doubt the possession of the several shareholders becomes adverse from the date of their doing so and title by prescription can be acquired, but I do not take it that the arrangement in this case was as definite as that. The learned Commissioner is, I think,

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correct in describing it as a permissive arrangement. On that footing each co-owner must be deemed as possessing on behalf of himself and the others, unless the arrangement continues so long that on equitable grounds it is presumed that at some point it became adverse. Such a presumption is only drawn upon a consideration of all the circumstances of the case. I do not think that a Court could justly draw it in a case like the present where the arrangement related to two lands, and it has already been disturbed in regard to one of them by the voluntary act of the party who now sets up the presumption.

Indeed, the case might be put in another way ; that the plaintiff having repudiated the arrangement in the case of Meddekumbura, and that repudiation having been acted upon, is not entitled to set up the arrangement with regard to Iriyankumbura.

It is, nevertheless, the case that in taking possession of the whole produce for a year Ramalhamy has acted irregularly. The decree, therefore, should be varied declaring the plaintiff entitled to 3/8 of the land, and directing defendant to pay to plaintiff 3/8 of Rs. 54, the value of the crop, that is, Rs. 20·25. The parties should pay their own costs, both here and below.

It is much to be regretted that the family arrangement was ever disturbed, and as defendant is prepared to resume it in both lands, it is to be hoped that this offer will be accepted. Unless this is done or unless some arrangement similar to that in C. R. Ratnapura, No. 15,894, is reached, the only result must be friction. I trust that the learned Commissioner will make some effect to bring about a friendly settlement.

Sent back.

H. R. COTTLE, GOVERNMENT PRINTER, COLOMBO, CEYLON.