

1945

*Present: Soertsz A.C.J. and Canekeratne J.*

SUBRAMANIAM, Appellant, and SIVARAJA *et al.*,  
Respondents.

32—D. C. *Pont Pedro*, 1,786.

*Prescription—Co-tenants—Exclusive possession by one for over sixty years—  
No express declaration of sole claim—Presumption of ouster.*

It is not necessary, in order to prove that a tenant in common has claimed the whole property exclusively, that it should be proved that he made an express declaration to that effect: for it may be shown clearly by acts as well as words. Where one enters and takes the profits exclusively and continuously for a very long period under circumstances which indicate a denial of a right in any other co-tenant to receive them, as by not accounting with the acquiescence of the other co-tenants, an ouster may be presumed.

**A** PPEAL from a judgment of the District Judge of Point Pedro.

*H. V. Perera, K.C.* (with him *H. W. Thambiah*), for the twentieth defendant, appellant.

*S. J. V. Chelvanayagam* (with him *N. Kumarasingham*), for the plaintiff, respondent.

*N. Nadarajah, K.C.* (with him *P. Navaratnarajah*), for the ninth and tenth defendants, respondents.

*A. C. Nadarajah*, for the eighteenth defendant, respondent.

*S. Mahadevan*, for the nineteenth defendant, respondent.

*Cur. adv. vult.*

October 26, 1945. CANEKERATNE J.

An action for partitioning the divided southern half-share of the land called Veerolai in extent 9 lachams 14½ kulies was instituted by the plaintiff on January 22, 1943; he averred that his father, Kandiah, purchased one-eighth share of the land in 1923 and that he died leaving six children, the plaintiff and the first to fifth defendants; he claimed 1/48th share and allotted 148th share to the first to fifth defendants and the remaining shares to ten persons: sixth to eighth, tenth, twelfth and fourteenth to nineteenth defendants. All these parties live in the neighbourhood of the premises in dispute.

The plaintiff's case was that one Kanthar Kathirkamar became entitled to this portion of land on a deed executed in 1801 and that a half-share passed to his grandson, Arumugather, by a deed executed in 1805. These deeds being instruments executed before February 1, 1840, ought to have been registered before February 1, 1875, according to the provisions of Ordinance No. 6 of 1866 (Chapter 102); as they were not registered the deeds were not receivable in evidence and must be left out of account in considering the title of the parties; this point was not disputed at the argument. The other half-share devolved, according to plaintiff, on Arumugather, Sithampara, Candar and Valliar. Candar, it is said, made a gift of his eighth-share to his grand-daughter, Sinnapillai, in 1879 and she transferred this share to her husband, Paramu. Sithampara was said to have gifted his share verbally to his daughter, Kalalapeddiyar, from whom it passed to her son, Sandrasegara; on the death of the latter it devolved on his children, Parupathy and Sidamparapillai: in execution of a writ against the brother and sister this one-eighth share was purchased by Paramu. The one-fourth share that Paramu was entitled to ultimately passed to the nineteenth defendant.

The premises were surveyed by a Commissioner appointed by the Court on March 18, 1943. According to the Surveyor's Report, the extent of the land was 9 lachams 2 kulies and there were 10 houses and sheds and a number of trees on it—20 coconut trees about 80 years old, 9 coconut trees 10 to 15 years old, 7 coconut trees about 5 years old, 21 arecanut trees about 5 to 10 years old, 5 lime trees, a velumpili tree, 7 pomegranate trees, 5 murunkai trees, 3 of them were about 40 years old, an elanthai tree about 20 years old, 6 margosa trees one of which was about 40 years old, 4 other trees and a number of plaintain bushes. The land was enclosed by a live fence about 10 to 15 years old which was covered with cadjans on three sides and on the fourth side with zinc sheets and cadjans. The report shows that Nagamma, widow of Subramaniam, claimed the entire property as her's and the plaintiff who was present at the survey stated that the houses and sheds (1 to 10) and all the plantations, except the elanthai trees and margosa trees, belong exclusively to the nineteenth defendant.

On March 18, 1943, Nagamma, the twentieth defendant, made an application to intervene in the action; this was allowed and a statement of claim was filed by her on May 21, 1943. She stated that the extent of the portion of land in dispute was 9 lachams 15½ kulies; she claimed the entire land on an independent title and averred that she and her

predecessors were in exclusive possession of this portion for nearly sixty years. According to her Moothar Velan and Wally were each entitled to  $11/52$  shares of this portion of land; Velan's share devolved on his son Murugar and Wally's share on her daughter, Walliar. Murugar, according to the statement, married Walliar and on the death of these two persons their shares,  $11/26$ , passed to their son, Ambalavanar. The latter was said to have purchased  $2/26$ th share in July, 1858. His son, Paramanathar, according to the statement, succeeded to the half-share of his father. Later he acquired the other half-share. The twentieth defendant ultimately became entitled to the entire land owned by her father, Paramanather; she had transferred the land to the nineteenth defendant in December, 1941, and had obtained a re-transfer of it in February, 1943.

The learned Judge accepted the title as set out in the plaint and declared the parties mentioned by the plaintiff to be entitled to the premises. It was conceded, he said, that the coconut trees and the other trees belong to the twentieth defendant and that she had appropriated the produce from these trees. He allotted all the improvements which the twentieth defendant would have been entitled to (*i.e.*, the houses marked 1, 2, 3, 4, 5, 6, 7, 8 and 9, and the cultivated plantations) to the nineteenth defendant on account of the deed of transfer in her favour.

The only contest was between the plaintiff and his associates, the first to eighteenth defendants on the one side and the twentieth defendant on the other. There were four pedigrees filed: it is hardly possible to place much reliance on these; some have obviously been made by persons who had no special means of knowledge and with the object of fitting the case propounded by the party. The evidence led afforded no justification for making a definite assertion as regards the identity of the original owners of the land.

The twentieth defendant is a woman sixty years old. She was born on the land and has been living there ever since; her father, Paramanathar, died about thirty-eight years ago; he started making improvements on this land about twenty years prior to his death. That the twentieth defendant and her father have been in possession of the land for about sixty years was not seriously disputed by the contesting parties. Two circumstances were referred to by them as showing an intention to assert their rights—one, the fact that the names of some of the co-owners mentioned by the plaintiff had their names inserted in the Assessment Register of the Sanitary Board for the years 1918, 1924 and 1937; this is not a point of any importance; there is no inquiry instituted by the taxing authority for the purpose of ascertaining which of several claimants to a land is in actual occupation of certain denominations of immovable property; generally a person producing a deed in his favour can get his name inserted. The other, the statement of the plaintiff that he cut the green leaves from the land once in three years and removed them for purposes of manure. The leaves were obtained from the suriya and the margosa trees; the former were on the boundary fence of the land. The plaintiff is thirty-two years old; the evidence does not disclose when his father died or when he first cut the leaves. One can hardly take this unconvincing assertion of the plaintiff seriously. Paramanathar was

actually in possession of the land for at least some years before 1886. A fourth share was sold in execution of a judgment entered against K. Kantapper, his wife, and C. Chittampara and purchased by Paramanather in October, 1886: he also purchased  $\frac{1}{4}$  share sold in execution of a writ against K. Kadiramar. In October, 1886, he obtained the deeds giving him title to these shares. He remained as sole owner and made improvements on the land; his possession became openly and notoriously adverse to others.

Nothing is more common than for adverse parties in ejection to claim under the same title, yet the entry of one party is not the entry of the other, but upon the assumption that they are co-tenants in the same title and interest. They may be sharers in that interest in very different degrees and proportions, but still there must be a co-tenancy to establish the privity. There can be no doubt that the appellant had sole physical possession in the sense that she was able to take and appropriate the profits and to exclude all others; there can be no doubt that she showed a determination to exercise that physical power on her own behalf. The sole enjoyment of a property by a tenant in common is not of itself an ouster of his co-tenant, the possession of one being the possession of all. It is not necessary, in order to prove that a tenant in common has claimed the whole exclusively, that it should be proved that he made an express declaration to that effect, for it may be shown clearly by acts as well as words. Where one enters and takes the profits exclusively and continuously for a very long period under circumstances which indicate a denial of a right in any other to receive them, as by not accounting with the acquiescence of the other tenants, an ouster may be presumed. The evidence of the plaintiff makes it clear that the co-tenants did not attempt to take any share or portion of the produce; the explanation, a feeble one, adduced for this inactivity is because she was paying the taxes. Her name appears in the Assessment Register continuously from the year 1901; the tax or rate for the years 1901 to 1930 varied from 12 cents a quarter to 45 cents; in 1931 the tax was 60 cents a quarter, in 1935 75 cents and in 1937 it was one rupee and five cents for a quarter. These circumstances lead to the inference that the other co-tenants acquiesced in the appellant taking the rents and profits without accounting to the others for this great-length of time, and the others were deterred from openly ascertaining any claim but from time to time made a feeble pretence of co-ownership by placing their names on the Register. The proper inference to be drawn from the evidence in the circumstances of this case is that the twentieth defendant has acquired a right by prescription to the portion of land in dispute.

I, therefore, reverse the judgment of the District Court and dismiss the plaintiff's action. The appellant is entitled to the costs of action and of the appeal and these should be paid by the contesting parties (the plaintiff, and the ninth, tenth and eighteenth defendants).

SOERTSZ A.C.J.—I agree.