1967 *Present :* **Tambiah, J., and Siva Supramaniam, J.**

G. SIMON PERERA, Appellant, *and* D. J. JAYATUNGA *et al.*, Respondents

S. C. 1/66 (Inty.)—D. C. Panadura, 8551/P

Partition action—Amicable division of property without execution of deeds—Prescription as between the co-owners thereafter—Ouster—Quantum of evidence.

The question whether a co-owner has acquired prescriptive title to a divided lot as against the other co-owners is one of fact and has to be determined by the circumstances of each case.

A land was owned in common by members of one family. An undivided one-third share of it was purchased by one B, an outsider, who was already the owner of an adjoining land. Thereafter, without execution of any deeds there was an amicable division among the co-owners in pursuance of which B possessed a divided lot exclusively for nearly thirty years in lieu of her undivided share. She had not only annexed this lot to her own adjoining land but had also separated it off from the rest of the common land by erecting a parapet wall of a permanent nature.

Held, that there was sufficient evidence of ouster and that B had acquired, as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division.

APPEAL from an order of the District Court, Panadura.

C. Thiagalingam, Q.C., with *Ralph de Silva*, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *S. W. Walpita*, for the 2nd defendant-respondent.

Cur. adv. vult.

June 20, 1967. TAMBIAH, J.—

I am in agreement with the views expressed by my brother Siva Supramaniam J. It is unnecessary to recapitulate the facts which have already been dealt with by him, but I wish to add my own observations on the question of law raised by Mr. Thiagalingam.

The question as to whether a co-owner has prescribed to a particular lot is one of fact in each case. The rule laid down by Their Lordships of the Privy Council in *Corea v. Appuhamy* [1] and in *Brito v. Mutunayagam* [2] that if possession is referable to a lawful title it cannot be treated as adverse, is however modified by the theory of counter presumption set out in *Tillekeratne v. Bastian* [3] by a Full Bench of this Court.

In *Tillekeratne v. Bastian* (supra) Bertram C.J. succinctly stated the principle as follows (at page 24) :—

" It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable, in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

[1] *(1911) 15 N. L. R. 65.* [2] *(1918) A. C. 895, 20 N. L. R. 327.*
[3] *(1918) 21 N. L. R. 12.*

In *Hameedu Lebbe v. Ganitha* [1] it was contended that the ruling in *Tillekeratne v. Bastian* (supra) was inconsistent with the decision in *Brito v. Mutunayagam* (supra). However, in that case, the Divisional Court held that there was no inconsistency in the principles laid down in these two cases. Where a co-owner seeks to establish prescriptive title against another co-owner by reason of long and continued possession it is a question of fact depending on each case for a court to decide whether it is reasonable to presume an ouster from the exclusive possession by a co-owner for a long period of time. This principle had been applied in *Rajapakse v. Hendrick Singho* [2].

The limits of the rule that possession by a co-owner is not adverse possession was defined in *Culley v. Deod Taylerson* [3] as follows :—

> "Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster.....and if the jury finds an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety."

This dictum was cited with approval by Viscount Cave who delivered the opinion of the Privy Council in the case of *Varada Pillai v. Jeevarathnammal* [4].

In the instant case, the learned District Judge has found that after Baby Nona purchased a share there had been an amicable division among the co-owners in pursuance of which Baby Nona possessed lot 3 in plan X filed of record as her exclusive property. She not only annexed this lot to the land on the East, which was her property, but also constructed a wall, which is in the nature of a permanent structure to a length of 144 feet and possessed this portion exclusively without paying any rent or acknowledging title in others for a period of nearly thirty years.

In view of these findings the learned District Judge has legitimately come to the conclusion that there has been an ouster and the second defendant and his predecessors have exclusively possessed this land for the prescriptive period from the time of ouster. There is no reason for us to disturb this finding of fact.

For these reasons I hold that the learned District Judge was right in excluding lot 3 from the land sought to be partitioned in this case and I dismiss this appeal with costs in both courts.

[1] *(1920) 27 N. L. R. 33.* [3] *(1959) 61 N. L. R. 32.*
[2] *(1840) 11 Ad. & E. 1088 ; 9 L. J. Q. B. 288 ; 3 P. & D. 539.*
[4] *(1919) A. I. R. (P. C.) 44 at 47.*

SIVA SUPRAMANIAM, J.—

This is an appeal from the order of the District Judge excluding a divided portion from the land sought to be partitioned on tho ground that the 2nd defendant who had originally been a co-owner of the land had acquired prescriptive title to that portion subsequent to an amicable division of the land.

Lots 1–5 on plan No. 654 (marked X) depict the land sought to be partitioned in this case. The land comprising these lots (hereinafter referred to as the said land) is shown as divided lot 2 on plan 1D3.

It is common ground that Kossinage Podinonahamy became entitled to the said land as well as to the land shown as lot 3 on the said plan 1D3 upon deed No. 1209 dated 21.9.1919 (P1). By deed No. 18326 of 26.12.1919 (1D1), she transferred an undivided 2/3 share of the said land to R. V. Don Jamis and R. V. Dona Nonahamy (3rd defendant). By deed No. 18327 of the same date she transferred her interests in the divided lot 3 to Baby Nona (7th defendant) wife of Don Haramanis (6th defendant). By deed No. 8744 dated 14.3.1934 (2D1) R. V. Dona Nonahamy transferred her 1/3 share in the said land to the aforesaid Baby Nona who by deed No. 13167 of 15.6.1961 (2D2) donated her rights to P. D. Ariyawardena (2nd defendant) subject to life interest in favour of herself and her husband. R. V. Don James died in 1954 leaving as heirs to his 1/3 share the afore-mentioned R. V. Dona Nonahamy and Kossinage Podinonahamy both of whom by deed No. 462 dated 3.9.1959 (1D2) donated that share to Don Themis Jayatunge (1st defendant). By deed No. 12026 of 14.8.1958 (P2) Podinonahamy transferred a 1/3 share (which remained after the execution of 1D1) to Turin Perera who by deed No. 16682 of 14.12.1962 (P3) transferred the same to Simon Perera, the plaintiff. The plaintiff instituted this action for a partition of the said land on the basis of the afore-mentioned shares and interests.

It is in evidence that Babynona was an outsider while the other co-owners were members of one family. When she purchased a 1/3 share of the said land she was already the owner of the eastern land (the divided lot 3 of plan 1D3). The 2nd defendant's case was that by common consent of the co-owners the said land had been amicably divided in 1935, that Babynona's share had been separated off from the rest of the land and that thereafter Babynona had exclusively possessed lot 3 (on plan X) along with the eastern land as her separate property and had acquired prescriptive title to the said lot. After the separation of a divided lot in lieu of her interests, Babynona had erected a parapet wall along part of the boundary between lots 2 and 3 (on plan X) and a barbed wire fence along the remainder of the boundary. The 2nd defendant claimed an exclusion of lot 3 (on plan X) from the land sought to be partitioned. The learned trial Judge upheld the contention of the 2nd defendant and ordered the exclusion of lot 3.

Learned Counsel for the appellant canvassed the correctness of the finding on the following grounds :—

(*a*) That the alleged amicable division was of no avail in law and could not form the starting point of prescription by Babynona, as James, one of the co-owners, was of unsound mind at that time and was incapable of giving his consent to such division.

(*b*) That the possession of lot 3 by Babynona was referable to lawful title and was therefore not adverse to the other co-owners.

(*c*) That no deeds were executed to confirm the alleged division, and

(*d*) Podinonahamy and Nonahamy dealt with undivided shares of the land even after the date of the alleged division.

As regards ground (*a*) learned Counsel for the appellant relied on certain answers given under cross-examination by Nonahamy (3rd defendant), Haramanis (6th defendant) and a witness named Don Davith.

Nonahamy's evidence was as follows :—

XXd. "Q. He (Don James) was as a matter of fact insane ?

A. Yes.

Q. A good time of his life he was chained to a bed ?

A. Yes."

Haramanis stated as follows :—

XXd. "Q. She (Nonahamy) gave evidence stating right through that her brother was insane.

A. He was not insane all throughout.

Q. He was most of the time insane ?

A. Now and then he was insane."

Don Davith gave the following evidence :—

XXd. "Q. For what period of time was James insane ?

A. About 25 years.

Q. He died in 1954 ?

A. Yes.

Q. He was mad from 1929 ?

A. Yes."

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To Court.

Q. From 1929 till he died he was mentally unsound ?

A. From 1930 he was a little better in his senses.

XXd. Q. You stated he was right through ill ?

A. He became insane in about 1912 or 1913. From 1930 he was a little better."

It is not possible to draw an inference from the evidence quoted above that in 1935, at the time of the alleged amicable division of the land, James was of unsound mind and was incapable of giving his consent to such division or that prescription could not begin to run against him by reason of such incapacity. The burden was on the plaintiff to establish such incapacity. The question should have been specifically raised as one of the points of contest between the parties. Even at the stage at which the evidence referred to above was given by the witnesses, the plaintiff refrained from raising it as a point of contest. The vague evidence given by the witnesses under cross-examination was insufficient for the plaintiff to discharge the burden that lay on her. The learned trial Judge was therefore justified in not adverting to this question in the course of his judgment, before arriving at his finding on the issue of prescription.

It was also submitted by learned Counsel for the appellant that in his pleadings the 2nd defendant had not mentioned James as one of the persons who had given his consent to the amicable division. But the sworn testimony of Nonahamy, Haramanis and Don Davith was that all the co-owners were parties to the amicable division and this testimony has been accepted by the trial Judge.

The question whether one of the co-owners has acquired prescriptive title to a divided lot is one of fact and has to be determined by the circumstances of each case. A reference to undivided shares in deeds executed after the date of the alleged division is not conclusive of the question (vide *Danton Obeyesekere v. Endoris*[1]). An amicable division among the co-owners can be the starting point of prescription although no cross conveyances or other document have been executed by them. Unlike a fence, a parapet wall is of a permanent nature and the fact that Babynona and Haramanis constructed a parapet wall 144 feet in length (though not covering the entire length of the boundary) between their divided portion and the rest of the land and that they incorporated that divided portion with the eastern land of which they were owners and exclusively possessed the whole as one entity for nearly 30 years are circumstances from which ouster of the other co-owners from the divided lot can reasonably be inferred.

In the instant case, as stated above, the trial Judge has, in addition, accepted the evidence that the exclusive possession of the divided lot was after an amicable division of the land by the co-owners.

[1] *(1962) 66 N. L. R. 457.*

There is a further circumstance which strengthens the case of the 2nd defendant. The transfer deed P 3 in favour of the plaintiff describes the share purchased by her as follows :—

> " The undivided 1/3 share belonging to Pulikkuttige Haramanis Baas being excluded, an undivided half share of the soil of the remaining undivided 2/3 share."

The deed P2 in favour of the plaintiff's vendor by Podinonohamy described the excluded portion as being on the eastern side.

Learned Counsel for the appellant laid stress on the fact that the deeds P2 and P3 do not refer to the portion excluded as a divided share. The description in the deeds is, no doubt, inaccurate but apparently what was meant was that a portion representing the undivided 1/3 share was being excluded. This is made clear by the fact that what the plaintiff purchased was not an undivided 1/3 share of the whole land (which would have been the description if the land was still undivided) but " an undivided half of the remaining 2/3 share ", i.e., the portion representing the remaining 2/3 share after the exclusion of Haramanis's share on the eastern side.

It is also clear from the evidence that in 1962 when the plaintiff and the 1st defendant got Surveyor Atureliya to survey the land of which they were the co-owners, they excluded the portion to the east of the parapet wall from the corpus and it was only when the plaintiff found that there was a short fall in the extent in the corpus to the west of the parapet wall that she decided to take up the position that the whole land was still undivided.

For the foregoing reasons I am of the opinion that the learned Judge was right in excluding lot 3 (on plan X) from the land sought to be partitioned in this case.

I dismiss the appeal with costs.

Appeal dismissed.