1946 *Present :* **Howard C.J.**

BANDARA, Appellant, *and* SINNAPPU *et al.*, Respondents.

171—C. R. Ratnapura, 1,244.

Co-owners—Possession of specific portions of the common land by the various co-owners—Title by prescription.

Where a Gan Panguwa consisted of gardens, deniyas and chenas and it was established that these deniyas were assweddumized by the various co-owners and possessed separately by them without interference by the other co-owners for a period of over twenty years—

Held, that each co-owner acquired a title by prescription to the specific portion in his possession.

APPEAL from a judgment of the Commissioner of Requests of Ratnapura.

H. V. Perera, K.C. (with him *G. P. J. Kurukulasooriya*), for the plaintiff, appellant.—This is a case where one co-owner merely cultivated a field and took the produce to the exclusion of the other co-owners. Nothing short of ouster or something equivalent to an ouster is sufficient for one co-owner to dispossess another. In *Cadija Umma v. Don Manis Appu* [1] the Privy Council held that one co-heir's possession enures to the benefit of his co-heirs, unless ouster or something equivalent to an ouster is proved. This was followed in *Ummu Ham v. Koch* [2], where it was held that mere possession and execution of deeds were not sufficient to constitute an ouster. See also *Fernando v. Fernando and another* [3]. It is a question of fact in each case, and the question whether from long continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case. In this case the respondent has only put the land to its natural use, and it should be distinguished from a case where the nature of the land is altered, as for the digging of plumbago—See *Sideris v. Simon* [4].

N. E. Weerasooria, K.C. (with him *H. Deheragoda*), for the defendants, respondents.—In this case the respondents have assweddumized the land, and a case of assweddumizing should be distinguished from mere cultivation and the taking of natural produce; as assweddumization involves the conversion of high land into low land it should be analogous to the digging of plumbago.

There is also evidence that the respondents were possessing this land in lieu of their undivided interests in other lands of the same "ganpanguwa", and that other co-owners were similarly possessing other lands in lieu of their undivided shares. This type of possession is often attributable to an express or tacit division of family property among the heirs and is sufficient to prove an ouster—*Mailvaganam v. Kandaiya* [5]. Whether this division is done by arrangement or not, under such circumstances one co-owner can prescribe against the other within a period of ten years—*De Mel v. De Alwis* [6]. Ouster can also be presumed where one co-owner enters a land and takes the profits exclusively and continuously for a very long period—*Subramaniam v. Sivaraja* [7].

H. V. Perera, K.C., in reply.—An improving co-owner is entitled to the fruits of the improvements effected by him—*Podi Sinno v. Alwis* [8]. Hence plaintiff could not in law enjoy the fruits of the improvements made by the defendants.

Cur. adv. vult.

June 20, 1946. HOWARD C.J.—

The appellant in this case appeals from a judgment of the Commissioner of Requests, Ratnapura, dismissing his action with costs. The appellant sought to be declared entitled to 1/24th share of a field called Wereney Cumbure Ihala Asseddumdeke which was described in the schedule to the

[1] *(1938) 40 N. L. R. 392 at p. 396.*
[2] *(1946) 47 N. L. R. 107.*
[3] *(1944) 27 C. L. W. 71.*
[4] *(1945) 46 N. L. R. 273 at p. 275.*
[5] *(1915) 1 C. W.R. 175.*
[6] *(1934) 13 C. L. Rec. 207 at 209.*
[7] *(1945) 46 N. L. R. 540 at p. 543.*
[8] *(1926) 28 N. L. R. 401.*

plaint. The Commissioner held that the plaintiff is entitled to 1/24th share of the lands specified in the plaint, but the defendants have acquired title to lot 1 by prescription. The evidence established that three brothers by name W. A. Vidane, W. A. Madduappu, and W. A. Punchirala were entitled to a ½ share of the field in question. W. A. Vidane who was thus entitled to ⅛th died, leaving two children Naidehamy and Dingirihamy. Naidehamy's 1/12th share devolved on his two children Dantahamy and Kaluhamy. Dantahamy's 1/24th share devolved on his sole child Menikhamy who died leaving Siriwardenahamy who by deed No. 5550 of February 7, 1914 (P 1), sold this 1/24th share together with other lands to Punchimahatmaya. The latter sold this 1/24th share with other lands by deed 1171 of June 16, 1937 (P 2), to the plaintiff. The defendants traced their title to Kaluhamy who died leaving the first defendant and three others. The first defendant maintained that in lieu of a part of his undivided interest in the Weerasinghe Aratchillage Gan Panguwa he entered into possession of Wereney Cumbure Deniya, which is lot 1, about 20 years ago, assweddumized it and has been in exclusive possession of it ever since. By deed No. 15124 of November 30, 1931 (D 1), the first defendant sold lot 1, known as Pambeyakumbura, after it was assweddumized, to his son in-law and daughter, the second and third defendants, who have been in possession ever since. The plaintiff not only claimed the land in question by virtue of his paper title but also maintained that he and his predecessors in title had been in possession of lot 1. This contention was rejected and in my opinion rightly rejected by the Commissioner. The latter has accepted the evidence of the first defendant that he entered into possession of lot 1 as co-owner of Weerasinghe Aratchillage Gan Panguwa, that he started assweddumizing it little by little without any interference by any other shareholders of the Gan Panguwa, that certain co-owners of chenas and fields of this Gan Panguwa had been in the habit of possessing certain lands exclusively in lieu of their shares in all the lands, that lot 1 was possessed by him in that manner, and that he has been in exclusive possession of this lot for over 20 years without any interference by any one else. There is no doubt ample evidence to support the Commissioner's findings of fact in regard to the previous history of lot 1. Thus Punchimahatmaya, the plaintiff's predecessor in title, states on p. 15 as follows :—

> "This panguwa is in extent about 300 acres. I am a Kandyan. If there are deniyas the various co-owners assweddumize them and possess separately. Similarly they possess chenas also. I do not know who assweddumized those lots but when I bought they were fields. There were Vel Vidanes at that time also. They used to make a list of the fields and the cultivator."

Again at pp. 13 and 14 Bandara, another of the plaintiff's witnesses, states as follows :—

> "Weerasinghe Aratchige Gan Panguwa consisted of gardens and deniyas and chenas, The whole panguwa is about 200 to 300 acres."

The first defendant on p. 17 states :—

> "The land in dispute was a chena. When I first entered it was overgrown with pamba and weraniya sticks. Because of the pamba jungle

it was called Pambagahakumbura. When the Land Commissioner came I gave Pambakumbura to this field. I entered this land about 40 years ago and started assweddumizing it. I have not completed assweddumizing it. There are about one laha yet to be assweddumized. For the last 40 years I am assweddumizing. After I started assweddumizing I did not allow any co-owners to possess it . . . .

When that was put about 12 lahas had been assweddumized and after that I assweddumized the rest. My brothers have assweddumized. Dodampe Mudalihamy has assweddumized. His mother is Lokuetana. Lokuetana is Punchirala's daughter or Naidehamy's daughter. She is not a descendant of Vidane, Madduma Appu or Punchirala. Mudalihamy has assweddumized Suduwelikandedeniya. He has also planted ½ acre of Gonnamaladeniya pahalakella and adjoining these he has assweddumized 5 lahas. The two portions of high land and the field of Suduwelikandegodella is 1½ acres high land and 3 pelas paddy. That Mudalihamy did not allow any other co-owner to possess."

and again at p. 18 :—

"It is not correct to say that I entered this land 20 years ago as stated in my answer. The other shareholders had other lands to assweddumize. I have assweddumized the entirety of this chena and deniya. There is one laha more to be assweddumized."

On pp. 22 and 23 Thomas Singho states as follows :—

"I know this land in dispute for the last 30 years. When I came to know it first this land was in deniya. This first defendant assweddumized this deniya. He may have taken 10 or 15 years to assweddumize the whole field. He used to assweddumize it year after year. No one else possessed this field for the last 30 years besides first defendant and his son-in-law. Plaintiff never possessed. In 1942 plaintiff claimed this field for the first time. This land belongs to Weerasinghe Aratchillage Panguwa. This panguwa may be about 100 acres both high and low. There are other co-owners of this Panguwa. They assweddumize different portions and possess them. Wastuhamy is possessing 'Gode Deniye Kumbura' which he assweddumized. It is about 6 lahas in extent. Menikrala also has assweddumized in two places and he is possessing them. First defendant is possessing the land called Godadeniyewatta in its entirety. Appuhamy is possessing the land called "Godedeniye Udahakella". The chenas are also worked by different co-owners in different blocks. I live within ¼ mile of this field in question. I have worked this field also for 2 years as cultivator under first defendant. These years first defendant took the landowner's share."

It has, therefore, been established that (*a*) the lot in dispute was part of a panguwa of 200 to 300 acres consisting of gardens, deniyas and chenas, (*b*) that these deniyas were assweddumized by the various co-owners and possessed separately by them without interference by the other co-owners for a period of over twenty years. The question, therefore, arises as to whether this possession is sufficient in law to confer on the 2nd and 3rd defendants a title by prescription. Mr. Perera has contended that it

does not inasmuch as there has been no ouster and the possession of the defendants is that of their co-owners. In support of this contention Mr. Perera has relied on the cases of *Ummu Ham v. Koch* [1], *Sideris v. Simon* [2], *Fernando v. Fernando* [3], and *Cadija Umma v. Don Manis Appu* [4]. All these cases followed the well known Privy Council case of *Corea v. Appuhamy* [5]. Mr Perera, however, concedes that, on the principle established in *Podi Sinno v. Alwis* [6], the defendants as improving co-owners would be entitled in a partition action to the fruits of the improvements effected by them. In spite of Mr. Perera's contention I am of opinion that it is impossible to distinguish the facts in this case from those in *De Mel v. De Alwis* [7], the headnote of which is as follows :—

> " Each of two co-owners of two contiguous lands was entitled to an undivided half share of the first land, and an undivided third of the second. One of them allocated to himself the entirety of the first land and a portion of the second adjoining the first. The remaining portion of the second land passed into the exclusive possession of the other co-owner. The portions thus allocated were roughly the equivalents of their respective fractional interests in the two lands. Each of the areas thus separated was incorporated with certain interests of which each co-owner was sole owner. These consolidated areas were possessed as distinct and separate lands for well over ten years. In the action between the representative in interest of one co-owner and the successors in title, by purchase, of the other, the trial Judge rejected the plea of prescription on which the defendant relied. In appeal this judgment was reversed.
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> *Held :* That, where co-owners enter into possession of a specific portion of a land and remain in exclusive and adverse possession thereof for a period of ten years, each co-owner acquires a title by prescription to the specific portion in his possession. "

The dictum of De Sampayo J. in *Mailvaganam v. Kandaiya* [8], is also very much in point so far as the facts of this case are concerned. This dictum is as follows :—

> " The Commissioner has found that possession has all along been with the plaintiff and his predecessors in title and that Sabapathy from whom the 1st defendant derives title never had any possession, but he has not given effect to that finding on the ground that there was no ouster of Sabapathy, who was a co-owner. It seems to me that the Commissioner has misunderstood the nature of ouster required for the purpose of prescription among co-owners and of the evidence necessary to prove such ouster. There is no physical disturbance of possession necessary—it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among the heirs, and the adverse character of exclusive possession may be inferred from circumstances. "

[1] *(1946) 47 N. L. R. 107.*
[2] *(1945) 46 N. L. R. 273.*
[3] *(1944) 27 C. L. W. 71.*
[4] *(1938) 40 N. L. R. at p. 396.*
[5] *(1912) A. C. 230.*
[6] *(1926) 28 N. L. R. 401.*
[7] *(1934) 13 C. L. R. 207.*
[8] *(1915) 1 C. W. R. 175.*

The judgment of Canekeratne J. in *Subramaniam v. Sivaraja* [1], which deals with the circumstances in which an ouster may be presumed is another decision that supports the principle which Mr. Weerasooria contends is applicable to the facts of this case.

For the reasons I have given I have come to the conclusion that the Commissioner came to the right decision and the appeal is dismissed with costs.

Appeal dismissed.