CHANDRASENA

Vs.

PUNCHI MENIKA AND OTHERS

COURT OF APPEAL
NAWAZ., J.
CA/372/1999F
DC KURUNEGALA 2313/P

Partition—Amicable partition—Cessation of common ownership

The plaintiff, 1st defendant and 2nd to 7th defendants had each by way of a previous partition decree in case No. 11324/P obtained 1/3rd each of the land relevant to the dispute. The plaintiff in this action sought to partition the said portions on the basis that co-ownership was no longer possible. The 1st defendant-appellant and the 2nd to 7th defendants however contended that the co-ownership had ended owing to conduct amounting to amicable partitioning, which included drawing up separate plans and exchanging possession between the said parties. The 1st defendant appealed against the judgment of the District Court which allowed partition as prayed for by the plaintiff.

Held:

1. The evidence on a balance of probability showed that the story of amicable partitioning is more probable and that there is no doubt that the parties had gone into separate and divided possession thereafter.

2. Where a lot or lots of land are separately possessed, the lot separately possessed ceases to be held in common. The plaintiff in this case fell short of establishing common ownership.

3. One need not produce a deed of amicable partition to prove the cessation of co-ownership. Plans may be sufficient indicators as to how the parties began their separate possession.

Cases referred to:

1. CIT v. Rasildal Maneklal AIR 1989 SC 1333 (1335)
2. Hassan v. Romanishamy 66 CLW 112
3. Selenchi Appuhami v. Livinia 9 NLR 59
4. Danton Obeysekere v. Endoris 66 NLR 457

APPEAL from the Judgment of the District Court of Kurunegala.

Lakshman Perera, P. C., with Niluka Dissanayake and Anjali Amarasinghe for the 1A Substituted Defendant-Appellant.

Shanil Rajapakse for the Plaintiff-Respondent.

cur. adv. vult.

June 14, 2019

NAWAZ., J.

The original Plaintiff one Jewathhamy instituted this action to partition a land called "Kosullebulugahamulahena" as depicted in the schedule to the plaint dated 21. 11. 1984. The land was originally partitioned in D. C. Kurunegala Case No. 11324 and it is quite clear from the final partition decree (P1) and final plan (P2) that the original Plaintiff Jewathhamy who was the 4th Defendant got 1 /3rd of the corpus, whilst the 1st Defendant Kiri Mudiyanse and the predecessor in title to the 2nd to 7th Defendants Punchirala also got 1 /3rd share each of the corpus. In other words, all the parties to the case the original Plaintiff, the 1st Defendant and 2nd to 7th Defendants got 1/3rd share each in the land, which interest is traceable

to the final partition decree in D. C. Kurunegala Case No. 11324/P. This position is reflected in the pedigree and devolution of title that was admitted at the trial by the parties but before the commencement of the trial, the original Plaintiff passed away and his widow Punchi Menika was substituted.

Co-ownership among the original Plaintiff, the 1st Defendant and the predecessor in title to the 2nd to 7th Defendants had thus been created over the corpus by virtue of the final partition decree and whilst the original Plaintiff filed this action in order to put an end to this co-ownership in equal shares of 1/3rd each among the parties, the points of contest raised on behalf of the contesting party-the 1st Defendant-Appellant is that parties had long gone into separate possession of distinct lands after an amicable partition effected on 29. 05. 1974 and the corpus itself had been broken up into two lots (Lot 1 and Lot 2) owing to this amicable partition and these two lots had been dividedly possessed by the 1st Defendant (Lot 1) and 2nd to 7th Defendants (Lot 2) for over 10 years until the original Plaintiff filed this instant partition action on 21. 11. 1984.

So whilst the original Plaintiff contended for a partition of the corpus on the basis of co-ownership, the 1st Defendant (the other contending party) agitated that the co-ownership had long come to an end after a lapse of more than 10 years beginning from an amicable partition on 29. 05. 1974. The 2nd to 7th Defendants sailed along with the 1st Defendant-Appellant and their claim was that they had prescribed to Lot 2 in the preliminary plan marked X dated 16. 10. 1985. Put in another way, the original Plaintiff sought the partition of Lots 1 and 2 of the preliminary plan X in equal shares but the 1st Defendant and 2nd to 7th Defendants chorused that co-ownership had long ended and there was only divided possession of Lot 1 by the 1st Defendant and Lot 2 by the 2nd to 7th Defendants.

So the starting point of prescription that the 1st Defendant-Appellant claimed was the amicable partition reached before the Polgahawela Conciliation Board in the Case No. 92/Conciliation/74 on 29. 05. 1974.

In order to establish the fact of amicable partitioning among the parties, the 1st Defendant-Appellant produced three different plans relating to lands commonly owned by the parties to the case and by way of these three plans (1V2, 1V4 and 1V5 all bearing drawn up on the same date namely 29. 05. 1974), parties possibly agreed before the Conciliation Board, Polgahawela on an exchange of their rights in the respective

lands. These three plans 1V2, 1V4 and 1V5 of 29. 05. 1974 show that the parties blocked and partitioned their commonly owned interests and dividedly apportioned them as follows: -

Plans	Subject-matter	Lots
1V2	Corpus of the current partition suit	Divided into:- Lot 8 - 1st Defendant - W. M. Kirimudiyanse Lot 9 - Predecessors of 2nd to 7th Defendants - Punchirala Lot 10 - Roadway
1V4	Wadiyakgalahena	Lot 1 - to Jewathhamy (the Plaintiff) Lot 2 - ගල (Rock) Lot 3 - Roadway
1V5	Kalaotutawahena and Hikdeniye-watte	Lot 4 - Jewathhamy (the Plaintiff) Lot 5 and 6 - Punchirala Lot 7- 1st Defendant

In the table above the amicable partition plan 1V2 relates to the corpus pertaining to this case. Lot8 in 1V2 corresponds to Lot 1 in the preliminary plan X whilst Lot 9 in 1V2 denotes Lot 2 in the preliminary plan. It is clear from the foregoing table that certain lands that were co-owned among the parties were amicably partitioned and plans that were prepared in respect of them had been submitted to the Conciliation Board. The corpus which the original Plaintiff sought to partition by his plaint dated 21. 11. 1984 had been broken up into 2 lots (Lots 8 and 9) on 29. 05. 1974 (almost 10 years and 6 months earlier than the institution of action) and as is clearly reflected in the plan marked as 1V2, Lot 8 was given to the 1st Defendant, whilst Lot 9 was given to Punchirala-the predecessor in title of 2nd to 7th Defendants. It is to be noted that the Plaintiff was not given any rights or interests at all in this corpus but the fact remains that the original Plaintiff chose to come to Court 10 years and 6 months after the amicable partition as reflected in 1V2 to seek judicial partition of the land depicted in the preliminary plan X on the basis of co-ownership. I must highlight at this stage that there seems to have been family arrangements among the parties and just as the Plaintiff was not given any rights in 1V2 which shows the current corpus into Lot 8 and Lot 9, the original Plaintiff was given rights in a land called Wadiyakgalahena. Lot 1 in the amicable Partition plan marked as 1V4, which bears an extent of 3 Acres, 1 Rood and 2 Perches. was exclusively given to the Plaintiff and no others.

If these transactions among the parties were to be given a true meaning, it could boil down that the parties to this case are relatives who exchanged lands among themselves, when there was common ownership over the lands. If one looks at the table, one can see that the parties have given up possession in one lot and gained possession in one or two lots. If one takes the original Plaintiff Jeewathhamy himself, he got Lot 1 of 1V4 for himself and no others asserted ownership to this Jot. This simply means that the other co-owners gave up Lot 1 for what they got in other lots. I look upon this family arrangement as not only an amicable partition but an exchange.

An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another. Some Indian cases have just emphasized the meaning of an exchange-see (Income Tax Law) CIT v. Rasildal Maneklal. 1

The Random House Dictionary (the Unabridged Edition) defines "Exchange" to mean "to part with some equivalent; to give up for something else; to replace by another or something else; to give and receive reciprocally; to give to and receive from each other."

The Plans 1V2, 1V4 and 1V5 all relate to Polgahawela Conciliation Board Case No. 382. All the 3 plans bear the date 29. 05. 1974 and have been executed by Surveyor W. C. S. M. Abeysekara. As shown in the table above, 1V2 refers to a land called 'Bulugahamulahena' consisting of Lots 8, 9 and 10. This is the subject matter of the partition where the original Plaintiff claimed co-ownership, where the Defendants argued that the co-ownership had long ended. It was argued before this Court that the 1st Defendant who got Lot 8 in Plan 1V2 had prescribed to Lot 1 In the Plan marked as 1V3 by the Surveyor lndrakumara Pathiraja bearing No. 93/22 in view of the settlement that took place in the Conciliation Board Case No. 382. It was strenuously contended by the learned President's Counsel for the 1A substituted Defendant-Appellant that the amicable settlement and partition occurred on 29. 05. 1974 as shown by 1V2, 1V4 and 1V5.

It has to be noted that the Plaintiff instituted this action on 21. 11. 1984 after a lapse of 10 years. The question arises whether there is evidence to show that the 1st Defendant who got Lot 1 of both the Preliminary plan X and 1V3 has prescribed to this land. The attention of this Court was drawn to certain items of evidence of adverse possession on the part of

the 1st Defendant. At page 70 of the Appeal brief, the substituted Plaintiff· Respondent Punchi Menika admitted that at the time of giving evidence she had been living in Wediyakgalahena, which had been exclusively given to Jeewathhamy-the Original Plaintiff-see the above table opposite the Plan indicated as 1V4. She also stated at page 70 that none of the Defendants were enjoying any possession of Wediyakgalahena. This shows that others had given up their rights in this land and taken possession of their lots amicably agreed upon.

Thereafter the attention of the substituted Plaintiff-Respondent was drawn to the Preliminary plan marked as X. She clearly admitted in the cross-examination that the 1st Defendant was in possession of Lot 1 of the preliminary plan. She also admitted that Lot 2 was in the possession of the 2nd- 7th Defendants. Her answers suggest that the Defendants were in exclusive possession of Lots 1 and 2 of the Preliminary Plan. Her answers amount to an admission that they had begun their exclusive possession consequent to the amicable partition. The evidence at page 70 of the Appeal brief is an admission on part of the substituted Plaintiff that the respective Defendants were in possession of Lot 1 and 2 of the Preliminary Plan bearing No. 1252 marked as X. This would not have been possible unless Jeewathhamy her predecessor in title had given up rights in the subject matter.

Even though this Plaintiff tried to change her stance at times, her attempt to become inconsistent has to be discounted as an afterthought. After all, a civil case is decided on a preponderance of evidence and it need not be proved beyond reasonable doubt. The question in a civil case is which story is more probable and on a balance of probabilities it is clear that the story of amicable partition is more probable and there is no doubt that the parties had gone into their separate and divided possession thereafter. A period of 10 years had elapsed since then.

I would now turn to the evidence of the substituted Plaintiff-Respondent Punchi Menika at page 71, wherein she admits that there was a settlement at the Conciliation Board. She specifically admits to the exchange of lands namely, Wediyakgalahena had been given to the original Plaintiff and the subject matter of this partition action had been given to the 1st Defendant Kirimudiyanse and Punchirala whilst Hikdeniyawatta was given to 3 people. She specifically admitted this apportionment and thus there is proof that distinct and separate possession had commenced to the

exclusion of one another. At page 72 of the appeals brief, she responded to a suggestion that the lands were exchanged at the Conciliation Board in the affirmative and thereafter she also stated that they had been in separate possession of Wediyakgalahena. This evidence clearly shows that there had been an amicable partition of the lands including the subject matter of this action and consequent to such partitioning, they had gone their separate ways and possessed their distinct lands separately.

Once again at page 73, there is evidence that on Lot No. I of the corpus of the partition suit, the 1st Defendant had built a house and the preliminary plan marked X at page 143 shows this house. When the amicable partition took place, the partition plan 1V2 does not refer to a house. It is consequent to 1V2 that the 1st Defendant took possession of Lot 1 of the corpus of the partition suit and it is thereafter that the 1st Defendant had put up the house. This is admitted by the substituted Plaintiff-Respondent at page 73 of the brief. This all shows that there had been an amiable partitioning of the land and the 1st Defendant separately possessed Lot 1 of the Preliminary Plan X filed in the case. Nobody builds on a land unless he possesses the land ut dominus. There was no objection to the 1st Defendant building on the lot. The Plaintiff could not even explain what were the plantations on the land and has referred to plantations, which are not depicted in the report to plan marked X. This shows that her claim to the land is slender.

In the same way, the 4th Defendant has also admitted that he had been in possession of a divided lot. The 4th Defendant admitted that the Plaintiff had been given a different land called *Wediyakgalahena*.

In the evaluation of the evidence as to the respective rights of the parties, it would appear that the learned District Judge of *Kurunegala* has paid scant attention to the fact of amicable partition and the divided possession thereafter of the parties. I would emphasize that there is an admission on the part of the substituted Plaintiff-Respondent that there had been separate possession of these separate Lots and the fact that there is unequivocal admission on the part of the Plaintiff-Respondent to the effect that she and her family had been in separate possession of Wediyakgalahena shows that her family has itself acted upon the amicable partitioning. The sum total of the evidence given in the case shows that common ownership had long terminated and the plans 1V2, 1V4 and IVS clearly show and attest to this fact.

The 1st Defendant-Appellant got Lot 1 in Plan marked X at page 143 which is equivalent to Lot 8 in Plan marked 1V3 which was prepared for the purpose of the Conciliation Board.

One need not produce a deed of amicable partition to show that there had been such a partition. The plans are sufficient indicators as to how parties began their separate possession. At some point, the substituted Plaintiff-Appellant stated that her family had possession of Lot 1 of the preliminary plan near a well. In my view this evidence is not sufficient to show conclusive proof of possession. In Hassan v. Romanishamy, 2 Basnayake C. J. (with Sirimane J. agreeing) stated that the mere statement of a witness, "I possessed the land" or "we possessed the land" and "I planted bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section.

The court culpably failed to evaluate the testimony in cross-examination of the Plaintiff, which proved the case of termination of co-ownership as asserted by the Defendants. Thus it is clear that the Court failed to take cognizance of evidence, both oral and documentary. This resulted in a failure to investigate title that is mandatorily enjoined upon a District Judge in a partition suit and there has been a failure to take into account some of the case law pertaining to amicable partition.

The case of Selenchi Appuhami v. Livinia3 is directly in point. The facts of the case were: The land was one land at the beginning. But the co-owners possessed it into portions-just like what we encounter in this case. One co-owner possessed the northern portion and the other co-owner possessed the southern portion. After the land had been possessed in divided portions for over 10 years, one of the co-owners instituted an action for partition of the land. The Supreme Court (Layard C. J. with Moncrieff J. agreeing) held that the partition action was not maintainable since there was no common possession between the two co-owners because each party had acquired a prescriptive title to a divided portion of the land. In other words the Supreme Court held that each co-owner had acquired title by prescription to the specific portions of the land that he had possessed separately-there was no common possession-common possession being a sine qua non for partition.

The case of Danton Obeysekere v. Endoris4 is also overwhelmingly compelling. In that case a portion of a co-owned land was separated off and was possessed separately for well over the prescriptive period. Sansoni J. held that the lot that was possessed separately ceased to be held in common with the rest of the land. The conclusion that was reached was that those who possessed a portion of the land separately were entitled to claim prescriptive title to it.

So the pith and substance of the case law is that where a lot or lots are separately possessed, the lot separately possessed ceases to be held in common. If one of the parties then purports to institute a partition suit in such a situation Layard C. J. declared in Selenchi Appuhami v. Livinia (supra) "The action is a manifest attempt to abuse the Partition Ordinance, the object being to obtain a good title against all the world in respect of a land not held by the parties in common."

At page 60 of the judgment Layard C. J. observed, "Now, the most important essential to be alleged and established in a partition suit is that the land sought to be partitioned is held in common, and failing that being established the suit cannot be maintained."

The Plaintiff fell far short of establishing common ownership and her claim must be perforce dismissed. In the circumstances I would proceed to set aside the judgment dated 20. 01. 1999 and allow the appeal. The Plaintiff's action would thus stand dismissed.

Appeal allowed.

Judgment by: A.H.M.D. Nawaz, J.

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