*Present :* Sir Charles Peter Layard, Kt., Chief Justice, and Mr. Justice Moncreiff.

1905. *February* 23.

SELENCHI APPUHAMI *v.* LIVINIA *et al.*

*D. C., Negombo,* 4,049.

*Co-owners—Divided possession for over ten years—Prescription—Abuse of Partition Ordinance—Ordinance No.* 10 *of* 1863.

Where the two co-owners of a land divided it into two portions and one of them exclusively possessed and dealt with the northern, and the other with the southern portion, and after such possession for over ten years one of them instituted a partition suit against the other to partition the land—

*Held,* that the partition suit was not maintainable, there being no common possession between the two co-owners, and each party having acquired a prescriptive title to a divided portion.

LAYARD C.J.—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.

*Ram Menika v. Ram Menika,* 2 *S. C. C.* 153, referred to and commented on.

APPEAL by the added parties from a judgment of the District Judge decreeing a partition between the plaintiff and the defendant.

The facts sufficiently appear in the judgment of Layard C.J.

*Morgan de Saram,* for appellants (added defendants).

*H. Jayewardene,* for respondent (plaintiff).

*Cur. adv. vult.*

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It is not necessary for the purpose of this judgment to recite all the facts of the case. The District Judge has very properly held that the plaintiff has failed to prove a paper title. It appears that plaintiff and Cornis Appu under some misapprehension had taken possession of the land, the subject of this partition suit, in 1866 under the belief that they had purchased it from the Crown. The Crown grant on which they relied, however, has been found by the Judge to be in respect of altogether another portion of land. From the first the plaintiff occupied the northern portion of the land and Cornis the southern portion. The plaintiff in his cross-examination admits that in 1884 the land was divided by a surveyor and an amicable partition arrived at, and according to that partition Cornis and his heirs (the defendants) ever since possessed the southern portion and the plaintiffs the northern portion. There can be no doubt about th division and partition in 1884, because the plan made by the surveyor in 1884 is amongst the documents filed in the case, and Cornis

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leased his divided portion in 1893 for twelve years, and the plaintiff's deed of gift of 1896, in which he alleges sole possession of his divided portion (the northern) and refers to the partition of 1884, clearly shows that the land in dispute has not been held in common since 1884 by the plaintiff and Cornis or the latter's heirs. Can the plaintiff in collusion with the defendants be allowed to say that the two portions form one land, and are held in common by the plaintiff and defendants? I think not. It appears to me it would be an abuse of the Partition Ordinance to allow the plaintiff and defendants to use that Ordinance merely to confirm a partition that already had taken place seventeen years before, and which by possession of over ten years had ripened into a prescriptive right in favour of the plaintiff as to his divided portion, and in favour of the defendants, as to their divided portion.

There can only be one object for the bringing of this action, viz., to enable the plaintiff and defendants by a decree of this Court to provide themselves with an indefeasible title against the world, there being absolutely no necessity for further partition, there being really no one land held in common but two divided lands held separately by the plaintiff and defendants. 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. It is however with considerable ingenuity argued by plaintiff's counsel on the strength of the judgment of Sir John Phear reported in 2 *S. C. C.* 153, that there are but two ways in which the undivided joint right of tenants in common over the entirety of a property could be converted into a single exclusive right over a portion of it, viz., by a decree of a Court for partition, or by private mutual cross-conveyances, the latter of which could only be evidenced by notarially attested deeds. It is true that as a general rule the possession of co-partner of co-tenant of portion of the land held in common is not an adverse but a concurrent possession; the original title being the same, the possession of one is the possession of the whole. And however long a period such a user in *quasi*-severalty may endure, it cannot effect any alteration of right, because, as laid down by Sir John Phear, "it is from beginning to end only referable to and an exercise of the common right, an essential ingredient which is that any owner or co-owner is entitled at any time to dissent from the existing arrangement." Sir John Phear in the same judgment also points out very clearly that exclusive possession referable to the consent of the co-owners may sometimes by change of circumstances become a holding adverse and independent of all co-owners such as may by lapse of time give rise to a prescriptive right. It follows that owners in common having

verbally agreed amongst themselves to hold the common property in divided shares in severalty, each co-owner may prescribe in respect of his own divided share, and such prescription will give him an absolute title against his co-owners to the share held by him in severalty. [See *W. Hendrick Perera v. Appusinno* (1).]

It cannot be tolerated that the plaintiff and defendants can after 17 years abandon the amicable partition that they had arrived at in 1884 and acted on for 17 years, and say plaintiff's possession of his divided portion was as co-owner with the defendants' father and themselves, and the defendants' father and their possession of their lot was as co-owner with the plaintiffs, when the possession of the two divided lands was held separately and adversely respectively by the persons holding them to their co-owner or co-owners. The plaintiff's title, if he has established any title to any portion of the land the subject of this suit, is a prescriptive one to a divided portion of it, and he has singularly failed to establish that that portion was held by him in common with the defendants or that the portion allotted to his co-owner in 1884, and separately and adversely held by his co-owner and his heirs ever since that date, belongs to him in common with the defendant.

I have never come across a more manifest attempt to abuse the Partition Ordinance, the object being to obtain a good title for the plaintiff and defendants against all the world, in respect of a land not held by them in common. The plaintiff's action must be dismissed. The plaintiff and the defendants must each bear their own costs in both Courts, and they must pay the added defendants costs of the first trial and of the first appeal and of the third trial and of this appeal (the former judgment of the Supreme Court has already dealt with the costs of the second trial and of the second appeal).

MONCREIFF J.—agreed.

(1) (1885) 7 *S. C. C.* 118.