Present : Bertram C.J., Porter J., and Garvin A.J.

1923

LUCIHAMY *v.* HAMIDU *et al.*

217—D. C. Kurunegala, 6,850

Partition action—Intervention—Prescription—Period up to date of intervention to be counted—Amended plaint relates back to date of original plaint.

An action for partition cannot be said to have been brought as between the original parties and an intervenient until he has intervened, and the plaintiff may count the period up to the intervention for purposes of prescription as against the intervenient.

When an amended plaint or statement of claim is filed, it is considered for all purposes as relating back to the date of the original plaint or statement of claim.

Plaintiff instituted this action on March 6, 1918, for partition. The ninth defendant claimed a 6-acre block under a Crown grant of December 14, 1908, and he was added as ninth defendant on May 8, 1919. It then transpired that the 6-acre block was not included within the boundaries given in the plaint by an oversight. Plaintiff amended his plaint on June 19, 1919, and ninth defendant filed his statement of claim on July 3. The ninth defendant never possessed the block either before or after the Crown grant.

Held, that plaintiff was entitled to count his possession up to the date of the intervention of the ninth defendant for purposes of prescription.

1923.

Lucihame v. Hamidu

THE facts are set out in the judgment.

Samarawickreme (with him *Peri Sunderam*), for the ninth defendant, appellant.

E. W. Jayewardene, K.C. (with him *H. V. Perera*), for the respondents.

December 14, 1923. BERTRAM C.J.—

This is a partition action which raises an important question in the law of prescription.

The facts may be very briefly stated as follows:—The plaintiff brought the action against the defendants for the partition of certain land which it was claimed their family had possessed on what is described as a "village title" under a deed executed in the year 1886 and under certificates of quiet possession issued in the year 1908. Certain other lands were comprised in the action, but as the question of law referred to does not affect these lands, they may be left out of account for the time being. The plaint was filed on March 6, 1918. A survey was ordered, and when it was proceeding the ninth defendant (on May, 1919) appeared upon the land and claimed a certain portion of it, referred to as the 6-acre block, under a crown grant dated December 14, 1908. Plaintiff declares that he had never heard of this crown grant until that time and that he was unaware that the claimant had any claim to the land. The claimant was thereupon added as the ninth defendant on May 8, 1919. It then transpired that the 6-acre block claimed by this intervening defendant was not, as a matter of fact, included within the boundaries of the land which was the subject of the action. Plaintiff had imagined that he had included it, and thought that the land came within the limits of his certificates of quiet possession. He was accordingly given leave to amend his plaint so as to include the land, and the amended plaint was filed on June 19, 1919. The ninth defendant filed his statement to claim on July 3, 1919.

It appeared that the certificates of quiet possession above referred to were issued about the same time as the ninth defendant's Crown grant, as the result of a settlement of Crown lands in the district at which the 6-acre block was claimed both by the plaintiff's family and by the father of the ninth defendant. The plaintiff's family also claimed the adjoining land in respect of which certificates of quiet possession were issued. The learned District Judge finds as a fact that when the certificates of quiet possession were issued to plaintiff's family, they imagined that they had been awarded all that they claimed, and said that they knew nothing about the Crown grant which about the same time was issued to ninth defendant's father. He finds as a fact that neither ninth defendant nor his father ever possessed the 6-acre block for a day either before or after the Crown grant.

I cannot help feeling that there is much to criticise in the learned Judge's finding, but he came to this conclusion after a very careful consideration of the facts. He considered all the contending circumstances. He visited the land and formed his own conclusions as to the age of the trees thereon. No view that might be taken of the facts is free from difficulty. In all the circumstances of the case, I do not feel justified in overruling his conclusions.

Nevertheless, there is a substantial difficulty in the way of the plaintiff. There is a certain amount of evidence that this 6-acre block was at one time chena. It was situated in the Kandyan Provinces. If it had been chena it was Crown land at the time when it was so cultivated, for plaintiff cannot rely on either of the statutory modes of proof of title prescribed by Ordinance No. 12 of 1840. In this view of the facts it was Crown land at the date of the grant to ninth defendant's father, and even assuming that the plaintiff's family occupied the land at the time of, and subsequent to, that grant, ten years had not elapsed at the date of the original plaint in this action, March 6, 1918. The learned Judge finds as a fact, if I understand him rightly, that the land was never at any time chena. I am not sure that this finding is the result of a very close examination of the facts. It is not necessary for us, however, for the present, at any rate, to consider whether this finding was justified, because plaintiff raises another point. Although ten years had not elapsed at the date of the filing of the original plaint, ten years had elapsed at the date when the ninth defendant had intervened in the action. The plaintiff claims that he is entitled to count his possession up to that time for the purpose of repelling the ninth defendant's attack. He raises a further point connected with the above. The 6-acre block, was, as a matter of fact, not included in the original action, and only became included on the amendment of the plaint on June 19, 1919. At that date also the necessary ten years had elapsed.

The case thus raises a very important question, viz., the manner in which section 3 of our Prescription Ordinance, No. 22 of 1871, applies to partition actions, in which by the nature of the case parties are from time to time added to the record, sometimes at long intervals after the original plaint.

The second of the above points may be easily disposed of. Plaintiff is seeking to treat his claim to the 6-acre block as though it was postponed to the date of the amended plaint. He is not entitled to do so. It has been settled both by local and by English decisions that when an amended plaint or statement of claim is filed, it is considered for all purposes as relating back to the date of the original plaint or statement of claim. In *Weldon v. Neal* [1] an amendment of a statement of claim was disallowed, on the ground that it sought to include fresh claims which at the time of the

[1] *1887) 19 Q. B. D. 394.*

1923.

BERTRAM C.J.

Lucihamy v. Hamidu

amendment was barred by the Statute of Limitations, although not barred at the date of the writ. Lord Esher M.R. said : " If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. We have the converse case in our own books (see *Morris v. Dias* [1]). In that case, after the institution of an action on a promissory note, the plaint was amended by the addition of an alternative count for goods sold and delivered. It was there held that the period of limitation must be reckoned up to the date of the original summons, and not up to the date of the amendment. " This new cause, " said Withers J., " relates back to the date of the original writ. "

The first point, however, namely, that the period of prescription runs up to the date of the inclusion of the ninth defendant in the action is of greater difficulty and importance.

The question is purely a question of interpretation. It depends on the meaning to be attached to the words of section 3 of the Prescription Ordinance. Mr. Samarawickreme contends that if the words of the section be carefully examined, it will be seen that the material date for the purpose of all questions of prescription is the date of the " bringing " of the action. A decree in a partition suit, like a decree in any other action, for all purposes speaks as to the date of action brought. It is the right of all parties, at that date, which the decree defines. Where it is a defendant who sets up the plea of prescription he insists that this is perfectly clear. Proof of " possession for ten years previous to bringing of such action " entitles him to " a decree in his favour with costs. " Similarly, he maintains, the position is not less clear where a plaintiff or intervenient sets up a plea of prescription: " Proof of such undisturbed and uninterrupted posession, as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs. " Let us assume, argues Mr. Samarawickreme, that the words " hereinbefore explained " refers to the parenthetical explanation enclosed in brackets earlier in the section. This does not matter. The important words are " such possession. " " Such possession " means possession in the first place for ten years ; and, in the second place, possession for ten years previous to the bringing of the action.

There is no doubt a certain plausibility in the contention that a person who invokes the assistance of the Court for a claim to a portion of land at a given date must be content to have his position defined,

[1] *(1892) 2 C. L. R. 185.*

either as against the original defendants or as against any person subsequently brought into the action, as at the date when he so invokes the assistance of the Court. But the question is not so simple as this. There must be the same measure for all parties. What is the position of a person brought into a partition suit several years after its commencement? He may have been in possession all the time. Is he not entitled to count his possession up to the time when he is actually assailed? But virtue of that position he may have acquired a title in the interval between the original institution of the action and his own inclusion in it. Is he to lose that title? Why should he be deprived of it because of the institution of legal proceedings of which he had no knowledge? Ought he not to be allowed to count his possession, if necessary, up to the last moment? But if he is allowed this privilege, the same privilege must be allowed in the corresponding case to the plaintiff in the action. The plaintiff himself may be in a similarly embarrassed position. He may, as in the present instance, have brought an action on a basis which he thought was unassailable. He may have been ignorant of any possible contentious title in the case, yet, when the action has proceeded for some years, a person may present himself claiming a documentary title which he could only oust by prescription. At the time when this person assails him, he may have acquired a prescriptive title against the assailant. Why should he be deprived of this title? If he canont assert it in this action, he can never assert it at all, because the decree in the partition suit would dispose of the question for all time.

The material words which we have to interpret for the solution of this difficult question are the words "the bringing of such action." Are these absolute, or are they relative terms? Is an action brought for the purpose of all defendants, whether original or subsequent, at the date when the plaint is filed as against the original defendants? Or, must we take into consideration the date of the joinder of the subsequent defendants for the purpose of determining when the action must be considered as having been brought against them? In other words, when is an action considered to be brought as against subsequently added defendants? After very careful consideration I have come to the conclusion that an action can only be considered to be "brought" as against a subsequent defendant when he is actually included in the action.

It is interesting to find that this is in fact the view which has been taken in India. Section 22 of the Indian Limitation Act (No. 9 of 1908) is as follows: "Where, after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party." In *Nundi v. Dossee* [1], *it* was observed that "although the earlier Limitation Act of 1887 had not come into

[1] *(1881) I. L. R. 7 Cal. 284.*

1923.

BERTRAM C.J.

Lwoihamy v. Hamidu

operation when the suit was instituted, yet the law embodied in section 22 of that Act was applicable to a case like the present even before the Act was passed, namely, that after the institution of a suit like the present for the recovery of land held by several persons against one of such persons, if a new defendant is added, the suit should, as regards him, be deemed to have been instituted when he was so made a party." See also *Abdul Karim v. Mauji Hausraj.* [1] It is probable, however, that the reference to the previous law on the subject is a reference to the statutory, and not to what may be described as the common law.

A similar view has been taken in two local cases. In *Chinnatamby v. Chanmugam*,[2] it was held by Hutchinson C.J. and Wood Renton J. that if a creditor of two joint-debtors allows his action against one of the debtors to be prescribed, he cannot recover from the other, whom he has in the meantime sued alone, by joining at a later stage of the action, as added-defendant, the party whose debt is prescribed. In the other case (*Corea v. Pieris* [3]) Wood Renton and Grenier JJ. declined to accept the proposition that the point when the Statute of Limitation takes effect is the date of the institution of the action and not that of the addition of a new party. But it must be admitted that the line of reasoning by which the Court came to this conclusion is not altogether clear.

There is, however, another point of view from which this question can be approached. If section 3 is carefully studied, it will be seen that it contemplates not any action, but an action of a special nature. It contemplates an action relating to land in which a dispute as to title is in issue. It contemplates a person who desires to be quieted in his possession to prevent encroachment or usurpation, or to establish his claim to the land in some other manner. The object of his raising the plea of prescription is to obtain a decree in his favour with costs. Now a partition action is, ordinarily speaking, not an action of this character. It has always been recognized as having a peculiar nature. *Voet* (*10, 1, 3*) refers to it as an action in which all the parties have the double capacity of plaintiff and defendant :

> *In ea singulæ personæ duplex ius habent, puta, agentis, et eius cum quo Agitur.*

It has been repeatedly referred to in our books as an action in which every party is really a plaintiff. See *Assena Marikar v. Lebbe*,[4] *Saram Appuhamy v. Martinahami*,[5] and *De Silva v. De Silva.*[6] Ordinarily speaking, the action is not brought to resolve a question of title ; its object is increased convenience of possession. In the present instance when the action first started, there was no question of title. It was only when the ninth defendant intervened that a

[1] *(1876) 1 Bom. 295.*
[2] *(1909) 1 C. L. R. 134.*
[3] *(1906) 9 N. L. R. 276.*
[4] *(1878) 1 S. C. C. 19.*
[5] *(1909) 12 N. L. R. 102.*
[6] *(1916) 3 C. W. R. 318.*

question of title arose. It has been held by the Privy Council in *Ponnmama v. Arumogam*[1] that a partition action may in fact be an action for the recovery of land, but, as was pointed out in another case (*Hassen Hadjiar v. Levane Marikar*[2]), it is not necessarily an action of that character. It may not be so in its origin, but it may at any moment become such an action. It would thus seem that a partition action only becomes an action of the class which the section contemplates when a dispute as to title actually arises and this naturally directs one's attention to the question, what is the meaning of the word "action" ?

When a person intervenes in a partition suit and has his name added as defendant and files a statement of claim against the plaintiff, the question is whether such a proceeding may not legitimately be considered (as Mr. Samarawickreme put it) "an action within an action." Certainly this point of view would give effect to the real intention of the section, which is, that when a dispute as to title arises, either party should be able to have that dispute determined in his favour on proof of ten years' possession up to the date when it came into Court. If, however, the view suggested above that an action is not to be considered to be "brought" against a person until he has been made a party to it is sound in law, it will not be necessary for us to consider this alternative point. It is nevertheless one which if occasion arise, might receive further consideration. This appears to have been the point of view adopted in *Senathi Raja v. Brito.*[3]

There is a local authority which ought not to pass unnoticed. If Mr. Samarawickreme's contention were right, then it would seem that the bringing of a partition action (such action not being an abortive action, but one carried to its conclusion) would automatically interrupt the running of prescription with reference to any person who either originally was or might subsequently become a party to the action. This has been expressly held not to be the case in *Don Juan v. Boucher.*[4]

The other questions arising in the case are pure questions of fact. I see no reason to question the findings of the District Judge, and I am therefore of opinion that the appeal must be dismissed, with costs.

PORTER J.—I agree.

GARVIN A.J.—

This was a proceeding under the Partition Ordinance, and was instituted on March 6, 1918. The plaintiff sought to partition a certain land, allotting half to himself and the remaining half to one Appu Naide. The preliminary decree was entered on August

[1] *(1905) 8 N. L. R. 223.*
[2] *(1912) 15 N. L. R. 275.*
[3] *(1922) 4 Law Rec. 149.*
[4] *(1859) 3 Lor. 271.*

1923.

GARVIN A.J.

Lucihamy v. Hamidu

20, 1918, and a commission was on October 3 of the same year issued to a surveyor to partion the lands. Then Appu Naide died, and his widow and children were substituted in his place. When the surveyor went to the land it was found that a block of land referred to in the proceedings as the 6-acre block fell outside the boundaries and description of the subject to be partitioned set out in the plaint. On May 8, 1919, the Commissioner's report and survey were filed, and on the same day one Hamidu Arachchi, who claimed this block, was admitted into the case and given time to file his statement of claim.

On May 20, 1919, the plaintiff moved to amend his plaint to give effect to his original intention to include this 6-acre block in the description of the land to be partitioned. This was opposed by Hamidu Arachchi, who now appears on the record as the ninth defendant, but the amendment was ultimately allowed.

Thereafter the proceedings resolved themselves into a conflict between the ninth defendant, who claimed the 6-acre block, and the other parties on the record who resisted his claim. The ninth defendant based his claim on a Crown grant dated December 14, 1908.

The learned District Judge held that the plaintiff Appu Naide and their predecessors in title had acquired a prescriptive title to the 6-acre block, and dismissed the ninth defendant's claim. From that decision the ninth defendant appeals.

I agree with my Lord the Chief Justice and my brother Porter that the Judge's findings of fact should not be disturbed. The appeal, however, is pressed on the ground that inasmuch as the ninth added defendant had a good title on December 14, 1908, ten years had not elapsed "previous to the bringing of the action" within the meaning of section 3 of the Prescription Ordinance on March 6, 1918, which it is contended is the date on which the action was brought. If May 9, 1919, the day on which the intervenient was made a party to the action, or any date thereafter be taken to be the date "of the bringing of the action," the necessary period of ten years is complete, and his claim fails.

The first position taken up by learned counsel for the appellant was that the effect of the amendment of the plaint made in pursuance of the order of May 20 was to include the 6-acre block in the original plaint as at and from the date on which that plaint was filed.

Now, it is clear that it was the intention of the parties that the 6-acre block was to form part of the subject to be partitioned, and it was their belief that the description given in the plaint of the land to be partitioned did in fact include the 6-acre block.

The amendment was in effect a rectification of a misdescription of the land which the parties intended to be the subject of partition. Such a rectification must surely date as at an from the date of the original plaint.

But even if the amendment be regarded as an act whereby the plaintiff sought deliberately to add to the land which he orginally intended should form the subject of partition, it must, I think, in law be treated as if it had been included as at the date of the acceptance of the original plaint.

The ninth added-defendant, it is true, was admitted at a date anterior to the making of the amendment, but it is obvious that he was there to claim something which, whatever the intention of the parties to the original action may have been, did not in fact fall within the description of the subject to be partitioned. At that date there was no part of the subject matter of the action in which he had the slightest interest. It was not till after the amendment was made that there was anything included in the subject matter of the action to which he had an interest or intended to prefer a claim. His intervention must therefore date from some point of time subsequent to the amendment. In the result the parties are in exactly the same relative positions which they would have occupied if the 6-acre block had been included in the plaint which was accepted on March 6, 1918.

The ground is thus cleared for the consideration of the question whether the action which as between the original parties was undoubtedly instituted on March 8, 1918, must, as against the claim of the intervenient which as I have said must be taken to date from some day after May 20, 1919, be also deemed to have been brought on March 8, 1918. The answer involves the interpretation of section 3 of Ordinance No. 22 of 1871.

The first part of this section deals with the right of a defendant to a decree in his favour upon proof of ten years' possession of the character referred to in the section previous to the bringing of the action. There is here a clear indication that the action contemplated is an action against a specified defendant. Similarly, the section confers on a plaintiff who has had ten years' adverse possession previous to the bringing of his action against a person who challenges his title or infrings any of his rights as owner to a decree in his favour. In this instance also what is contemplated by the use of the word action is a proceeding by a plaintiff against a specified defendant. In such cases the date of the institution of proceedings must be taken to be the date up to or previous to which ten years' adverse possession must be established.

Now the date on which a party is added is surely the first moment of time from which it can be said that there is a proceeding against him at the instance of the plaintiff. Upon what principle can it be said that his rights as against the plaintiff or any other party to the action should be ascertained at any date other than the actual date on which the plaintiff commenced legal proceeding against him.

1923.

GARVIN A.J.

Luithamy v. Hamidu

The contention of counsel for the appellant leads necessarily to the result that the institution of any action within the contemplation of section 3 would operate as an interruption of the running of prescription, not only against the defendant against whom a proceeding was pending, but as against any person who may at any date thereafter be added as a party defendant. Where such an action is a partition action, the effect of the argument is that its institution stops the running of prescription in favour of any and everybody even though they may be strangers to the action.

But no authority has been cited for the proposition that upon the institution of a partition action in respect of a land the running of prescription is effectually stopped. It is a proposition the consequence of which I should not care to contemplate. I do not think such a result was ever intended or contemplated by the framers of Ordinance No. 22 of 1871. Indeed there are judgments of this Court which, if they are not exactly in point, are at least indicative of the fact that the view favoured by this Court is opposed to the contention of counsel for the appellant, *vide Don Juan v. Boucher* (*supra*) *and Corea v. Pieris* (*supra*).

It is said that the requirement of section 3 that possession for ten years previous to the beginning of the action is necessary to entitle the plaintiff or the defendant, as the case may be, to a decree in his favour is in recognition of a general principle that the rights of parties to the action must be determined as at the date of the action. Assuming this to be correct., no authority was cited for the extension of this principle so as to affect rights which have accrued subsequent to the institution of an action to persons who were not parties to the action as originally constituted, but were added as parties at a later stage. It would, indeed, be strange that a person added as a party to a pending action for a declaration of title should be debarred from pleading a sound title which accrued to him subsequent to the institution of the action as originally constituted.

If the contention of counsel is sound, then the application of this principle will debar proof by the intervenient in a partition case of an independent title based on Crown grant, merely because this grant bears a date subsequent to that on which the partition action was instituted. It is sought to escape from this situation by limiting the application of the principle to titles by prescription. But if the principle as extended by counsel applies at all, it must apply to all titles acquired subsequent to action whether by prescription or grant.

But whether the theory underlying section 3 be that, the institution of an action against a defendant is to be deemed to be an interruption of the running of prescription, or whether the section be only an application of the principle that the rights of the parties to an action must be ascertained and determined as at the date

of the action. I think that the date of the "bringing of an action" against an added party must be the date on which he was so added. Until then no action had in fact been brought against *him*. In this view an action for partition cannot be said to have been brought as between the original parties and an intervenient until he has intervened.

Moreover, a partition action is a proceeding of a special character. In practice it often involves a contest as to title ; in theory it is merely a proceeding by one or more admitted co-owners against the remaining co-owners to obtain relief from the inconvenience of undivided possession. It has been repeatedly pointed out that in such a proceeding each party whether he be plaintiff or defendant on the face of the record partakes of the character of plaintiff and also of defendant.

In this case plaintiff and defendants are in the position of defendants resisting the claim of the intervenient. Up to that point they were co-owners in complete agreement as to their respective rights. It is the intervenient, the ninth defendant-appellant, who is assailing the rights of all of them. He does so on the strength of a Crown grant. As defendants to the proceeding by the ninth added-defendant-appellant, they have proved that they have had adverse and uninterrupted possession of the 6-acre block for approximately eleven years previous to this challenge of their title, and claim a decree in their favour. To this decree I think they are entitled under the provisions of section 3 of Ordinance No. 22 of 1871.

I would therefore dismiss this appeal, with costs.

Appeal dismissed.