1949 *Present:* **Gratiaen J. and Pulle J.**

PONNA, Appellant, *and* MUTHUWA *et. al.*, Respondents

S. C. 308—D. C. Kandy, 1,397

Partition Ordinance—Two adjacent portions of same land—Separate ownership—Common boundary not clearly demarcated—Partition action maintainable—Action for definition of boundaries—In what circumstances it will lie.

A person conveyed by two deeds the northern one-third share of his land to the plaintiff and the southern two-third share to the first defendant mentioning as the common boundary two landmarks which were thirteen feet away from each other within the limits of the land. Although it would have been practicable to demarcate a boundary so as to separate an area representing an exact one-third on the north from an area representing two-thirds on the south in such a manner that the two landmarks stood on the common boundary, this result could have been achieved in an infinite variety of ways.

Held, that plaintiff was entitled to bring an action for partition and that an action for definition of boundaries did not lie.

The common law remedy of an action for definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by some subsequent event. It cannot be sought for the purpose of *creating* on some equitable basis a line of demarcation which had never been there before.

APPEAL from a judgment of the District Court, Kandy.

L. H. de Alwis, with *G. C. Niles*, for the first defendant appellant.

N. E. Weerasooria, K.C., with *S. Canagarayer*, for plaintiff respondent.

Cur. adv. vult.

November 15, 1949. GRATIAEN J.—

This is an action for the partition of the land depicted in the Plan No. 400 filed of record. It is common ground that until 13th October, 1930, the entire land belonged to Rajapakse who was the father of the plaintiff and the first defendant. On that date Rajapakse executed two deeds. By the deed marked 1 D 1 he conveyed to his child the first defendant:—

"All that southern portion being ⅔ shares in extent one amunam paddy sowing from and out of the land called Ehelagahamulahena (presently garden) of one Yelamunam, &c., which said southern portion is bounded on the north by the rock and the lolu tree forming the boundary of the remaining ⅓ share of the land, on the east by Galheeriya, on the south by the Gahena of Ukkigehena, and on the west by the ditch, together with the plantations and everything appertaining thereto".

To the plaintiff he conveyed by the contemporaneous deed P4:—

"All that northern ⅓ part or share in extent two pelas paddy sowing from and out of land called Ehelagahamulahena (now a garden) of Yelamunams (6 or 7 pelas) in extent in the whole situate at Galabawa aforesaid which said northern ⅓ part or share being bounded on the north Gala, east by Galheeriya, south by the rock on the limit of the remaining ⅔ share of this land and lolu tree.

The first defendant disputed the plaintiff's claim to have the entire land partitioned on the ground that the deeds 1 D 1 and P4 transferred specific parcels of land falling within defined boundaries. There is no doubt that if this be the correct interpretation of the conveyances the present action would not lie, as "ownership in common" is a prerequisite to the institution of proceedings under the Partition Ordinance. Against the interpretation relied on by the first defendant, however, the plaintiff argues that the deeds operated only as conveyances of undivided shares in the land. The learned District Judge upheld the latter view and entered an interlocutory decree for partition on the terms set out in his judgment. The present appeal is from this decision.

Certain facts are not in dispute. Rajapakse continued to possess the entire land until he died in 1933. The rock and the "lolu" tree referred to in the deeds stand thirteen feet away from each other within the limits of the land, and it would doubtless have been practicable to demarcate a boundary so as to separate an area representing an exact one-third on the north from an area representing $\frac{2}{3}$ on the south in such a manner that these landmarks stood on the common boundary. But this result could have been achieved in an infinite variety of ways. In point of fact, no boundary had been demarcated or even selected for demarcation during Rajapakse's lifetime. After he died the first defendant took possession of the entire property on behalf of himself and the plaintiff, to whom a proportionate share of the produce was duly handed over. Apart therefore, from the legal effect of the deeds 1 D 1 and P4, no question of either party having acquired a title by prescription to a defined allotment of the land arises for consideration. The decision in this appeal turns solely upon the proper interpretation of the deeds to which I have referred.

In each of the deeds three of the boundaries are indicated with sufficient precision but the fourth boundary is not so clearly described that it could be precisely located by reference only to the language of the document itself. Mr. de Alwis contends that in such a situation the proper remedy is to bring an action for definition of boundaries and to invite the Court to order a demarcation on some equitable basis designed to implement the wishes of the grantor. Certain decisions of this Court were cited to us, but though they help to elucidate a general principle the facts in those cases are clearly distinguishable. In *Jalaloon v. Cassim Lal* [1] two co-owners had entered into a formal deed of partition whereby they agreed to divide the common land, each party possessing a defined allotment for himself. The deed expressly provided that the boundary separating these two allotments should be demarcated so as to give effect to the proposed partition. It was held that in those circumstances either party could seek the intervention of the Court to have the boundary demarcated should disagreement arise as to how the agreement should be implemented. The present case is very different. There is no express or implied contractual obligation imposed on either the plaintiff or the first defendant which the Court could be invited to enforce. Nor do I think that the common law remedy of an action for definition of boundaries is appropriate. The *actio finium regundorum*

[1] *(1914) 2 Bal. Notes of Case 9.*

only lies for defining and settling boundaries between adjacent owners "whenever the boundaries *have become uncertain*, whether accidently or through the act of the owners or some third party. (*Vote 10.1.1*). *Maria v. Fernando* [1]. Such proceedings in my opinion, presuppose the prior existence of a common boundary which has been obliterated by some subsequent event. The remedy cannot be sought for the purpose of *creating* on some equitable basis a line of demarcation which had never been there before. The true basis of the remedy, as in England, is that there is "a tacit agreement or duty between adjacent proprietors *to keep up and preserve* the boundaries between their respective estates". (Story on Equity (third edition) p. 259). When confusion arises as to the precise location of the common boundary, the Court enforces a specific performance of the implied engagement or duty imposed by the common law.

I now proceed to consider the submission that the deeds 1 D 1 and P4 only created undivided interests in the larger land in the proportions specified in the respective conveyances. In so deciding the learned District Judge purported to follow the ruling of this Court in *Senanayake v. Selestine Hamine* [2]. Mr. Weerasooriya concedes that this case is not precisely in point because the conveyance which was there interpreted purported to deal only with "an *undivided* eastern portion, in extent two acres" of a larger land. In such a deed, as Bertram C.J. pointed out, "It is clearly impossible to give effect to a word of locality introduced into a grant of an undivided share, and such a word is in itself of no legal significance".

Were it necessary to lay down any general principle for the purpose of deciding the effect of a deed whereby an owner of land purports to convey to someone a share in it, I would say that where the words of description contained in the grant are sufficiently clear with reference to extent, locality and other relevant matters to permit of an exact demarcation of all the boundaries of what has been conveyed, then the grant is of a *defined* allotment. If, however, the language is insufficient to permit of such a demarcation, the grant must be interpreted as conveying only an undivided share in the larger land. The authority which seems to approximate most closely to the facts of the present case is *Dingiriamma v. Appuhamy* [3] where a person had gifted to one of the parties "a $\frac{2}{3}$ share towards the southern side from and out of" a larger allotment of land. This deed was held, for want of sufficient particularity in respect of metes and bounds, to convey only an undivided share in the land.

Applying the test of precision which appears to me to be called for in such cases, I have taken the view that Rajapakse by the deeds 1 D 1 and P4 conveyed to his two children only undivided shares in the proportions of $\frac{2}{3}$ to $\frac{1}{3}$ respectively. It may perhaps have been his intention to make a grant of specific allotments of land, but that intention cannot be effectively implemented in the absence of a clear direction in the documents as to the line of the common boundary contemplated for the proposed division. Indeed, neither deed would be capable of due

[1] *(1913) 17 N. L. R. 65.* [2] *(1923) 23 N. L. R. 481.* [3] *(1914) 4 C. A. C. 44.*

registration as an instrument dealing with a *divided* portion of land because the particular boundaries have not been "clearly and accurately defined" as required by section 14 (2) of the Registration of Documents Ordinance (Cap., 101). Nor would it be possible in a *rei vindicatio* action to comply with the provisions of section 41 of the Civil Procedure Code which requires the land to be described " by reference to physical metes and bounds ".

As has been pointed out by Bertram C.J. in *Senanayake v. Selestina Hamine* [1], the only remedy available to a party whose undivided share has words of locality attached to it is to ask in partition proceedings for an order in the decree that, if possible, the portion allotted to him should be in the direction indicated. This special relief has in fact been granted to the first defendant by the learned District Judge.

I would dismiss the appeal with costs and affirm the decree except that the costs of the contest in the lower Court should be borne by each party. The question which arose with regard to the interpretation of the deeds was properly raised for the decision of the trial Judge and did not in any event involve the plaintiff in additional expenditure.

PULLE J.—I agree.

Appeal dismissed.