WICKREMARATNE AND ANOTHER

v

ALPENIS PERERA

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND JAYALATH, J
C.A. 574/77 (F).
D.C. GAMPAHA 14320/F.
NOVEMBER 18–21, 26, 28 AND 29, 1985.
DECEMBER 02–05, 1985.

Prescription among co-owners–Proof of ouster–Partition action.

In a partition action for a lot of land claimed by the plaintiff to be a divided portion of a larger land, he must adduce proof that the co-owner who originated the division and such co-owner's successors had prescribed to that divided portion by adverse possession for at least ten years from the date of ouster or something equivalent to ouster. Where such co-owner had himself executed deeds for undivided shares of the larger land after the year of the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way inconsistent with common possession.

A co-owner's possession is in law the possession of other co-owners. Every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

Registration extracts are evidence of the particulars entered in the register. The objection that the documents referred to in them should have been produced cannot be taken for the first time in appeal.

Cases referred to:

(1) *Ponnambalam v. Vaitialingam and Another [1978–1979] 2 Sri L.R. 166, 167.*

(2) *Corea v. Iseris Appuhamy (1911) 15 NLR 65.*

(3) *Mohamedaly Adamjee v. Hadad Sadeen (1956) 58 NLR 217, 225.*

(4) *Girigoris Appuhamy v. Maria Nona (1956) 60 NLR 330, 331.*

(5) *Kodituwakku v. Anver and Others C.A. 13/81 D.C. Matara 7475/P, C.A. Minutes of 10.12.1985.*

(6) *Karunaratne v. Sirimalie (1951) 53 NLR 444.*

(7) *Sediris Appuhamy v. James Appuhamy (1958) 60 NLR 297, 302, 303.*

(8) *Danton Obeysekera v. Endoris (1962) 66 NLR 457.*

APPEAL from a judgment of the District Court of Gampaha.

P. A. D. Samarasekera, P.C. with *G. L. Geethananda* for 6th and 7th defendants-appellants.

N. R. M. Daluwatte, P.C. with *Miss S. Nandadasa* for plaintiff-respondent.

Cur. adv. vult.

February 7, 1986.

G. P. S. DE SILVA, J.

This appeal raises once again the recurring question of prescription among co-owners. While the appeal was strongly pressed before us by Mr. Samarasekera, counsel for the 6th and 7th defendants-appellants, Mr. Daluwatte, counsel for the plaintiff-respondent, tenaciously sought to resist the appeal.

The plaintiff sought to partition a "divided and defined allotment of land called Horahena portion" about 1 acre in extent described in the second schedule to the plaint. The entire land called Horagalhena alias Horahena containing in extent 22 acres, 3 roods and 21 perches was described in the first schedule to the plaint. The plaintiff averred in his plaint dated 28.9.67 that the original owner of the entire land described in the first schedule was Carolis; that Carolis on P1 of 1898

transferred an undivided half share of the entire land to Lanchinona who on P2 of 1921 sold an undivided 1/4 share to Abraham. On P3 of September 1936 Abraham sold an undivided extent out of an undivided 1/4 share of the entire land to Don Heras, the predecessor in title of the plaintiff. The essence of the plaintiff's case relevant for the purpose of the present appeal, is set out in paragraphs 4 and 5 of the plaint which read thus:

"(4) The said Don Heras in lieu of his undivided interests in the land described in schedule (I) hereunder *divided and separated* two portions of land and possessed them *exclusively and adversely* and acquired a prescriptive title to the said two lots.

(5) That one of the said lots referred to in the preceding paragraph hereof is more fully described in schedule 2 hereto and forms the subject matter of this action."

It is right to add that the original owner Carolis transferred the balance half share to his son Girigoris on 6D1 executed on the same date as P1. The interests of Girigoris devolved on his children Abraham, Seetinona, Jane Nona, Sara Nona, Delin Nona (1st defendant), William and Laisa Nona (widow). It may be noted that William (to whom reference is made later) was admittedly one of the co-owners of the entire land.

The issues relevant for present purposes are issues Nos. 1 and 2 raised by the plaintiff and issues Nos. 3 and 4 raised by the 6th and 7th defendants. These issues are as follows:

(1) Has Heras in or about 1936 separated off the divided and separate portion of Horagahahena described in the 2nd schedule to the plaint?

(2) Has the said Heras and his successors in title prescribed to the said lot?

(3) Is the plaintiff seeking to partition in this action an undivided portion of the land described in the first schedule to the plaint?

(4) If issue No. 3 is answered in the affirmative, can the plaintiff have and maintain this action?

After trial the District Judge answered issues 1 and 2 in the affirmative and issue 3 in the negative and entered interlocutory decree for partition of the land. This plaintiff was declared entitled to 1/2 share and the balance 1/2 share was allotted to the 1st defendant. The 6th and 7th defendants who sought a dismissal of the action have now appealed against the judgment and decree.

The one submission that Mr. Samarasekera pressed before us is that the finding of the District Judge that the land sought to be partitioned is a divided and separate portion carved out of the entire land described in the 1st schedule to the plaint is clearly insupportable having regard to the evidence. Counsel stressed the fact that the plaintiff has failed to produce a deed of partition or cross conveyance, or any plan indicative of a partition. Although one of the witnesses claimed that there was a survey and a division of the land, no surveyor who effected such division was called to give evidence. What is more, counsel urged that the documentary evidence in the case completely contradicts the theory of the alleged division and separation and that the oral evidence falls far short of the proof required to establish the fact that Heras had prescribed to the land sought to be partitioned as against all the co-owners of the larger land. In short, Mr. Samarasekera submitted that there was in law no separation or division of the entire land and the evidence at best showed that some of the co-owners possessed different portions of the land purely for convenience of possession.

On the other hand, Mr. Daluwatte argued that the question before us is a pure question of fact and that this court should not disturb pure findings of fact; that the oral evidence accepted by the trial Judge established a case of separation and division of the entire land; that the absence of a deed of partition or cross conveyance or a plan of partition only goes to the weight of the evidence; that the mere reference in the deeds to undivided extents of the entire land is not material for what is important is, if I may use counsel's own words, "what happens on the land and not what is done in a Notary's office"; that the several co-owners made no claim before the surveyor at the preliminary survey nor did they prefer any claim thereafter in court; that the 6th defendant who was present at the time of the survey did not state that the corpus is only a portion of a larger land; that one of the admitted co-owners (Gunasekera) of the larger land had gifted a portion of his land to the State to construct a dispensary and that he

had also sold a portion of his land by public auction; that Heras himself gave a portion of his land for the construction of a V.C. road; that the exercise of these rights of ownership by some of the admitted co-owners was not objected to by the other co-owners; that the preliminary plan prepared for this case shows that the corpus was separated by fences from the land of two other co-owners, namely Gunasekera and Pathiraja; that in any event the 6th defendant who is in possession of the corpus is a tenant under the 1st defendant and has no locus standi to take the objection that the corpus is only a portion of the larger land.

Now, on the pleadings and issues it is clear that the plaintiff's case was that the corpus in dispute was prior to 1936 a portion of the larger land described in schedule (1) to the plaint. In or about 1936 Heras separated off the corpus from the larger land and commenced to possess it *adversely* to all the other co-owners of the larger land. In other words, the allegation of the plaintiff was that around 1936 a new corpus, separate and distinct from the rest of the land, came into existence and that Heras as owner of that corpus possessed it at least for a period of 10 years and acquired a prescriptive title thereto. As Mr. Daluwatte himself submitted, the foundation of the plaintiff's case was a unilateral act of separation which was not opposed by the co-owners of the larger land.

However, it is of the utmost significance to note that this was not the approach of the District Judge to the case of the plaintiff. His clear finding was that Heras separated off the corpus in 1936 *with the prior approval* of all the co-owners of the larger land. Here the District Judge was in serious error, for that was not the case of the plaintiff as set out in the plaint and embodied in the issues. What is even more important is that there was no evidence that the separation or the division of the corpus was with the prior appróval of all the co-owners of the larger land. As to who the co-owners of the entire land were, was not a matter which was put in issue at the trial and the result was that no evidence was led on that point. There was a further consequence arising from the erroneous finding on this crucial matter. Since the trial Judge wrongly took the view that the separation of the corpus was with the prior approval of the co-owners, he did not address his mind to the vital question of ouster or something equivalent to ouster. If in fact there was evidence that the separation of the corpus was with the *prior approval of all the co-owners*, then that fact may be sufficient evidence of ouster. In the absence of such

evidence, it was the clear duty of the trial Judge to look for evidence of ouster or something equivalent to ouster. This he failed to do. In the absence of ouster or something equivalent to ouster, possession by one co-owner enures to the benefit of all other co-owners. The principle was succinctly stated by Ranasinghe, J. in *Ponnambalam v. Vaitialingam and Another* (1) in the following terms:

> "The termination of common ownership without the express consent of all the co-owners could take place where one or more parties – either a complete stranger or even one who is in the pedigree – claim that they have prescribed to either the entirety or a specific portion of the common land. Such a termination could take place only on the basis of unbroken and uninterrupted *adverse possession* by such claimant or claimants for at least a period of ten years". (The emphasis is mine)

Admittedly Heras entered into possession of the land in the character of a co-owner. Ever since the decison of the Privy Council in *Corea v. Iseris Appuhamy* (2) it is settled law that –

(*a*) a co-owner's possession is in law the possession of other co-owners;

(*b*) that every co-owner is presumed to be possessing in his capacity as co-owner;

(*c*) that it is not possible for a co-owner to put an end to his possession as co-owner by a secret intention in his mind;

(*d*) that nothing short of ouster or something equivalent to ouster could bring about that result.

The District Judge therefore had to look for an overt act on the part of Heras which brought to the notice of his co-owners that he was since 1936 denying their rights to the corpus. This he failed to do, for he proceeded on the basis that the separation of the lot was with the prior approval of all the co-owners – a basis which, as stated earlier, was not the case of the plaintiff nor was any evidence led of such prior approval.

This was not the only error committed by the District Judge. In reaching the finding that Heras had prescribed to the subject-matter of the action, he acted on the oral evidence of the plaintiff, the 5th defendant, the witness Adiris and certain admissions made by the 6th defendant in the course of his evidence. The effect of the oral evidence at its best was that there was a division of the larger land and that some (but certainly not all) of the co-owners possessed different

portions of the larger land. Although the witnesses claimed that a surveyor effected the division, no surveyor was called nor was any plan of any kind produced in support of any sort of division. Not one plan was produced to show that even a single co-owner has separated off his portion. But the matter does not rest there. The documentary evidence produced on behalf of the contesting defendants clearly and unmistakably negatived the story of the division of the entire land and divided possession. The trial judge, however, summarily dismissed the overwhelming documentary evidence and preferred to accept the oral evidence.

There was here a clear misdirection in the assessment of the evidence. In unreservedly accepting the oral evidence, the District Judge overlooked the fact that oral evidence in a case of this kind could come from partisan sources and that too, long after the dispute had arisen. Such evidence must be critically examined as against documents which were executed long before the dispute arose. The documents are a contemporary record of transactions and they cannot be possibly ignored in the way the District Judge did, particularly when the documents clearly contradict the plaintiff's case of separation and divided possession.

I shall now turn to the relevant documents. The registration extracts marked 6D5 to 6D18 are most revealing. The second transaction in 6D13 shows that Heras himself in 1939 mortgaged an undivided 1/4 share (less certain undivided portions) to one Jan Singho. Thus three years after the alleged separation and division Heras deals with undivided shares of the entire land. Again, 6D14 shows that in 1955 Heras mortgaged to one Charlis Perera Wijesekera an undivided 1/4 share (less certain undivided portions) of the larger land. Once again in 1959 Heras mortgaged an undivided share of the larger land – vide 6D16. Moreover 6D16 shows that the 1st defendant gifts to the 5th defendant an undivided 5 acres out of the larger land in April 1962 and in April 1963 the 5th defendant mortgages the said undivided 5 acres. It must be noted that the 1st and 5th defendants are persons who supported the plaintiff's case and claimed that the land was divided. In short, the registration extracts produced by the contesting defendants furnish clear proof of the fact that several co-owners including Heras, the 1st defendant, the 5th defendant, one Gunasekera and one Pathiraja have dealt with undivided shares of the larger land over a long period of time after the alleged division in

1936. The documents show that even as late as 1959 Heras considered himself a co-owner of the undivided larger land. The first deed in respect of a divided portion of the land was written only in 1963 (P4), that is 4 years prior to the action. It is significant that P4 executed by Heras for the first time refers to the corpus as a "divided portion". If such a division had taken place earlier, then the previous deeds would have referred to the fact of separation and division. The only two deeds which speak of a divided lot are P3 and 1D1 executed in 1963 and 1964 respectively. No other document has been produced to show that any of the admitted co-owners like Gunasekera or Pathiraja have dealt with divided lots. The documents are of great importance as they reflect the state of mind of Heras in particular and of the other admitted co-owners. It would appear that on the documents Heras considered himself to be the sole owner of the corpus only in 1963.

Mr. Daluwatte sought to get over the effect of the documents by submitting that the mere reference to undivided shares is not material. But this is not a case of isolated documents which refer to undivided shares. In the instant case, several deeds have been executed over a long period of time after the date of the alleged division on the basis of undivided shares. The deeds therefore are a very strong item of evidence which runs counter to the theory of a division of the larger land. In my view, had the District Judge carefully considered the documents, as he ought to have done, and given the documents due weight in his assessment of the entirety of the evidence, he could not have reasonably answered the issues relating to prescription in favour of the plaintiff.

At this point it is right to add, that Mr. Daluwatte objected to Mr. Samerasekera relying on the registration extracts in the absence of the documents referred to in the extracts. Mr. Daluwatte submitted that the registration extracts cannot be used as secondary evidence to prove the contents of the documents referred to in the extracts. In my view, there is no merit in this objection raised for the first time in appeal. At the trial these extracts were marked in evidence without objection. These are certified extracts of documents maintained under the provisions of the Registration of Documents Ordinance and the regulations framed under the Ordinance. Section 15 of the Ordinance enacts that the "Registration of an instrument shall be effected by entering the *prescribed particulars* in the proper folio." The particulars are prescribed under the Registration of Documents Regulations

(Subsidiary Legislation, Vol. II, Chap. 117). Mr. Samerasekera relied on the particulars of the transactions entered in the register. These certified extracts were in the forefront of the appellant's case at the trial. There is no question that the plaintiff was fully aware of the purpose for which the registration extracts were produced by the contesting defendants. Having regard to the issues in the case, it cannot be denied that the registration extracts were intensely relevant. (see also the observations of the Privy Council in *Mohamedaly Adamjee v. Hadad Sadeen* (3)). Had the objections now taken by Mr. Daluwatte been taken at the trial, the appellants would have had an opportunity of producing the documents relating to the relevant transactions shown in the extracts. This was not done, and we cannot now permit an objection of this kind to be taken for the first time in appeal.

The oral evidence that some of the co-owners possessed different portions of the entire land is not inconsistent with co-ownership. In this connection the observations of Sansoni, J. in *Girigoris Appuhamy v. Maria Nona* (4) are apposite:

> "There is no doubt that the land is possessed in different lots by different co-owners but such a mode of possession is in no way inconsistent with common possession. It would have been different if the co-owners had executed deeds for divided shares; some weight would then have been lent to the theory that there had been a division of the entire land many years ago."

The preliminary plan prepared for the present action in 1970 shows that there is a fence on the east separating the corpus from the land of Pathiraja and a fence on the west separating it from the land of Gunasekera. But the point is that there is no evidence at all in regard to the age of the fence. Nor is there any evidence that Heras put up the fences. All that the plan shows is that in 1970 there were two fences on the eastern and western boundaries of the corpus. There is evidence that one of the admitted co-owners, namely Gunasekera, gifted a portion of the land he was in possession to the State to construct a dispensary. This gift is not very different from the case of a co-owner selling his undivided interests in the land. The position may have been somewhat different if there was evidence that the State paid compensation for the acquisition and the entire compensation was appropriated by Gunasekera. There is no such evidence. Mr. Daluwatte relies on the evidence that Gunasekera sold by public

auction a portion of his land. But the 5th defendant has stated that the auction sale was only in 1971, that is after the institution of this action. In any event, an auction sale would afford only a good starting point for prescription. Although Mr. Daluwatte stressed the fact that no other co-owners made a claim before the Surveyor or filed a statement of claim, it seems to me that little importance could be attached to this fact. There may be several reasons for the failure of the co-owners to prefer a claim. Some of them may be living away from the village in which the land is situated. Some others may not have had notice of the action for varying reasons. Still others may be in possession of an extent more than their entitlement and would prefer to remain silent. No case was cited before us where a court has attached any importance to the failure of co-owners to prefer a claim in court or before the Surveyor. Mr. Daluwatte contended that the 6th defendant lacked locus standi to raise the objection that the corpus was an undivided portion of the larger land for the reason that he got rights on 6D3 after the institution of the action and that he was no more than a tenant under the 1st defendant. Apart from the fact the question of locus standi was not put in issue at the trial, the lack of locus standi in the 6th defendant is not an infirmity which in any event affects the 7th defendant who is the other appellant before us.

This being a partition action, there are certain duties cast on the court quite apart from objections that may or may not be taken by the parties. As rightly observed by Jameel, J. in *Kodituwakku v. Anver and Others* (5):

> "..... in addition to the duty that is cast on the court to resolve the disputes that are set out by the parties in their issues, the court has a *supervening duty* to satisfy itself as to the *identity of the corpus* and also as to the title of each and every party who claims title to it."

Therefore the fact of division, separation and adverse possession pleaded in paragraphs 4 and 5 of the plaint must be proved to the satisfaction of the Court. This is not a matter which could be decided by the failure of the co-owners to prefer their claims or on the basis of the lack of locus standi on the part of the 6th defendant. As stated by Gratiaen, J. in *Karunaratne v. Sirimalie* (6) the Court must be satisfied that the "rights of possible claimants who are not parties to the proceedings have not been shut out accidentally or by design". It is in evidence that William, an admitted co-owner, was not allotted a portion in the alleged division in 1936. William is closely connected to

Heras. Heras was married to William's sister and William was married to the sister of Heras. William could not have lost his rights in the absence of evidence of ouster or something equivalent to ouster.

It seems to me that the entirety of the evidence led in the case shows that at the most some of the co-owners were in possession of divided lots not as a permanent mode of possession, but for mere convenience of possession. A division of the land on the basis of convenience of possession does not result in the termination of co-ownership.

> "Very clear and strong evidence of ouster among co-owners is called for and separate possession on grounds of convenience cannot be regarded as adverse possession for purposes of establishing prescriptive title.....Every co-owner is in law entitled to his fractional share of everything in the co-owned property including the soil as well as plantations, but in practice it is not possible for every co-owner to enjoy his fractional share of every particle of sand that constitutes the common property and every blade of grass and every fruit from trees growing on the land without causing much inconvenience to himself as well as the other co-owners. To avoid this for the sake of convenience, co-owners possess different portions of the common land.....", per Sinnetamby, J. in *Sediris Appuhamy v. James Appuhamy* (7).

Mr. Daluwatte stressed the fact that the oral evidence showed that two of the admitted co-owners, namely Gunasekera and Pathiraja were in possession of separate and divided lots. But the deeds they executed as shown by the registration extracts do not indicate that they considered themselves owners of divided lots. In fact the question whether Gunasekera and Pathiraja separated off portions of the larger land and possessed them as their own, was not a matter which arose for decision at the trial. As stated earlier, it was not the plaintiff's case that there was an amicable division of the entire land amongst all the co-owners.

The District Judge as well as Mr. Daluwatte relied very strongly on the case of *Danton Obeysekera v. Endoris* (8). That was a case where an *outsider* bought about 2 roods from two co-owners and separated off such portion "not for mere convenience of possession and as a temporary arrangement". What is more, there was evidence of two plans, one made in 1938 and the other in 1948 which strongly

supported the separation of the lot and was also evidence of ouster. The plans showed that the lot in dispute was possessed as a separate entity. In the appeal before us, there is a total lack of evidence of this nature.

The best answer to the plaintiff's case of separation of the lot in dispute and the division of the land are the deeds executed by Heras himself. It was only as late as 1963 that Heras executed for the first time a deed (P4) on the basis that he was the sole owner of the corpus. In short, the deeds of Heras himself disprove the plaintiff's case, not to mention the deeds of the other co-owners. The evidence does not disclose an ouster and there is nothing to warrant a presumption of ouster.

am therefore of the view that the District Judge was in error when he answered issues 1 and 2 in favour of the plaintiff and issues 3 and 4 against the contesting defendants. I hold that the plaintiff has failed to establish that the corpus sought to be partitioned is a separate and divided portion of the larger land. Therefore this action cannot be maintained. I accordingly set aside the judgment and interlocutory decree and dismiss the plaintiff's action. The plaintiff-respondent must pay the defendants-appellants the costs of appeal fixed at Rs. 210.

JAYALATH, J.—I agree.

Appeal allowed.