VITHANA

v.

JANE NONA

COURT OF APPEAL.
GOONEWARDENE. J. AND VIKNARAJAH, J.
C.A No. 244/79 (F); No. 245/79 (F).
D.C. HORANA No. 297/P.
JANUARY 27, 1988.

Partition action – Community of goods – Property acquired before marriage – Alienation after termination of community.

(1) Under Roman Dutch Law where there is community of goods (communio bonorum) on marriage all the property of the husband and wife come *ipso jure* into community and they are under the management of the husband until the community is terminated by death of either party. There is no distinction between property acquired before marriage and property acquired after marriage. But community of property in regard to property acquired before marriage can be excluded if there is a valid ante-nuptial contract in writing.

The Matrimonial Rights and Inheritance Ordinance of 1876 (Cap. 57) which came into effect on 29th June 1877 abolished community of property between husband and wife married after 29th June 1877.

Although the property had been acquired before marriage by the husband, upon the death of his wife the community ended and the surviving husband became entitled to a half share and the other half goes to the heirs of the deceased spouse (other than the husband).

(2) An alienation of all the common property by a husband married in community after the death of his wife cannot be sustained unless it be for the benefit of the community. Thus a husband can sell in order to pay the debts but there must be evidence that the sale is for such payment. There is no presumption that when there is a sale it must have been to pay the debts.

Hence a sale by the surviving husband of the whole of the property held lately in community will pass title only to his half share. Acquiescence on the part of the heirs will not give the heirs title to the whole land.

(3) The boundaries of the corpus sought to be partitioned show that one of the ancestors had separated off his share and it lay on the east of the corpus.

Cases referred to:

1. *Amaris Appu v. Sadiris Perera (1884) Wendts Rep. 34.*

APPEAL from judgment of the District Court of Horana.

A. C. Goonaratne Q.C. with *Mrs. S. Jayalath* for 5th defendant-appellant in C.A. 244/79.

D. H. Balachandra for 2nd defendant – appellant in C.A. 245/79.

Dr. H. W. Jayewardene, Q.C. with *Lakshman Perera, H. Amarasekera and Miss T. Keenawinna* for plaintiff–respondent.

Cur. adv. vult.

March 4, 1988.

VIKNARAJAH, J.

In this case the plaintiff-respondent is seeking to partition the divided western one third portion of the land called Baduwatte alias Bogahawatte which according to the schedule to the plaint is bounded on the north by Pulleperumegewatte, on the east by another portion of this land belonging to Matara Arachchige Siman Perera and others on the south by road and on the west by Sooriarachchigewatte containing in extent 0A. 1R. 11P. This land is depicted as lots 1, 2 and 3 in Preliminary Plan No. 3073 marked P1 and the extent according to plan is 0A. 1R. 04.40P. At the trial lots 2 and 3 were excluded from the corpus and Lot 1 is the corpus.

According to the plaint the original owner of this land was Meegahage Girigoris Perera who became entitled to the said land on deed No. 25534 dated 16.8.1889 (P3) and the said Girigoris Perera by Deed No. 37131 dated 27.1.38 (P4) coveyed the said land to his grand daughter Tisserahamy and her husband Martin Peiris who conveyed his 1/2 share to his wife Tisserahamy by deed No. 1503 dated 8.3.40 (P5) and thus Tisserahamy became entiled to the entirety of the said land. Tisserahamy by deed No. 45 dated 2.5.73 (P6) has conveyed the entire land to Anulawathie the 1st defendant and she had conveyed by deed No. 85 dated 1.4.74 (P7) 1/10 share to Jane Nona the plaintiff. According to the plaint the plaintiff is entitled to 1/10 and 1st defendant 9/10.

The 2nd defendant appellant in his statement of claim claimed that he is entitled to a 3/24 share of this land. According to the 2nd defendant this land was owned originally by Mataraarachchige Lewis Perera and that the same devolved on his only child Paulu Perera who died leaving three children namely (1) Coronis Perera (ii) Andiris Perera and (iii) Simon Perera and the 2nd defendant claims his share through Simon Perera. The 2nd defendant produced deed No. 5814 dated 24.11.1865 (2D1) according to which Coronis Perera and Dochchihamy and Hendrick Perera (the last two being the widow and son of Andiris Perera) conveyed a 2/3 share of this land (excluding the 1/3 share of Simon) to Amaris Perera and Thegis Perera.

Amaris Perera had seven children viz., Seemon, Simon, John, Julian, Elizabeth, Ana and Charlis. By P3 dated 10.9.1889 Amaris Perera and his son John conveyed the land which is the corpus in this case to Girigoris. Plaintiff has pleaded title from deed P3 of 1889. According to deed P3 of 1889 Thegis's share has been sold on writ issued in case No. 19807 and Amaris has purchased that share and the vendor on P3 is Amaris. In fact the title cited in P3 is the deed No. 5814 (2D1) of 1865. It will be seen from the land described in P3 that the eastern boundary is the land belonging to Siman. In deed 2D1 which the 2nd defendant produced the share of Simon has been expressly excluded. When the 2nd defendant gave evidence he stated in cross examination that Siman's portion has not been surveyed in the Preliminary Plan. According to Plan P1, the eastern boundary is given as land formerly belonging to Matara Arachchige Simon. Thus the land of Siman from whom the 2nd defendant claims title is on the eastern side and does not form part of the corpus. The finding of the learned District Judge is that Siman's share from whom the 2nd defendant claims title is on the eastern side and does not from part of the corpus in this case. According to the 2nd defendant's pedigree the 3rd defendant is also entitled to a share through Simon but 3rd defendant has not claimed a share in this case. I see no reason to interfere with the findings of the learned District Judge with regard to the claim of the 2nd defendant appellant. I hold that 2nd defendant appellant is not entitled to any share in the corpus in this case. Therefore the appeal of the 2nd defendant appellant fails.

Counsel for 5th defendant appellant submitted that Amaris, when he sold this land on 10.9.1889 by P3 to Girigoris was married in community of property, the date of marriage being 31.5.1870 (vide

marriage certificate 5D2) and that when Amaris's wife Simona died on 22.05.1889 (vide death certificate 5D4) the community came to an end and Amaris had no right to convey the entire property because he was entitled to only a half share the other half share having vested in the seven children of Amaris. According to the pedigree of the 5th defendant the children of Amaris conveyed 6/14 share by 5D4 dated 25.6.1932 to Cornelis Perera and thereafter through deeds 5D5 and 5D6 the 5th defendant became entitled to 6/14 share.

Learned Counsel for plaintiff respondent submitted,

(1) that this land was acquired by Amaris before he got married and therefore this property did not come into community when Amaris got married.

(2) even if the property came into the community on marriage, Amaris had a right to dispose of the property after the death of his wife in order to pay any debts and that it can be presumed that this property was sold for payment of debts.

(3) that when Amaris sold the property by P3 in 1889 the family of Amaris had acquiesced in it because it was only in 1932 by 5D4 the children of Amaris sought to convey a 6/14 share.

The following facts are undisputed:

(i) the property was acquired by Amaris by 2D1 on 24.11.1865

(ii) Amaris married Simona on 31.5.1870 (5D2)

(iii) Simona died on 22.05.1889 (5D3)

(iv) Amaris conveyed the entire property by P3 on 10.9.1889.

I shall now deal with the first submission viz., that as this property was acquired before marriage, the property did not form part of the community of property when Amaris got married.

Walter Pereira in his book Laws of Ceylon 1913 Edn. at page 237 states as follows:

"Community of goods under the Roman Dutch Law takes place immediately on the completion of the marriage and once introduced, it can in no wise be afterwards done away with".

"The community extends to everything possessed by the parties on each side at the time of marriage or acquired by them during marriage whether by inheritance, legacy, donation or otherwise. No property of any kind is excepted."

With regard to consequences of community at page 238 the same writer says:

"The consequence of the community of goods are as follows:-(1) The goods of both parties at the marriage as well as those after acquired are during the marriage common. (2) The property during the marriage is under the control and disposition of the husband. (3) All debts contracted before the marriage are common and must be paid out of the common estate. (4) At the death of either of the parties this community of goods ceases ipso jure. (5) The common goods of the husband and wife are then divided into two parts one half is assigned to the survivor and the other half given over to the heirs of the deceased party."

At page 239 the writer states:

"Upon the death of the surviving parent before a division is made the community ceases and does not continue with the step parent. When the community is continued the husband if he be the survivor does not retain the powers which were vested in him during the wife's life time. His alienation by mortgage or sale cannot be sustained unless it be for the benefit of the community and he has obtained the sanction of the relatives of the children and the authority of the Judge."

R. W. Lee in his book "An Introduction of Roman Dutch Law", third Edn. dealing with this subject of community of goods at page 67 states as follows:-"

"By the common law of Holland in the absence of ante nuptial contract marriage creates ipso jure a community of goods (communio bonorum) between the parties....."

At page 68

"The effect of community where it exists is to create a joint fund under the administration of the husband consisting (with some exception) of all the property of both the spouses as well existing at the time of the conclusion of the marriage as after acquired. It

extends to all property of the spouse wherever situated immovables as well as movable, and to jura in personam or rights arising from obligations as well as to jura in rem".

At page 69

"Community begins when marriage begins, i.e., as soon as the necessary rites or ceremonies have been performed; it persists during its continuation and ends upon its dissolution. Thereupon the common fund is divided ipso jure into two equal shares one of which vests in the surviving spouse without regards to the amount which such spouse may have contributed, the other of which vests in the testamentary or intestate successors of the deceased."

Thus it would appear that there is no distinction between property acquired before marriage and property acquired during marriage. Under Roman Dutch Law where there is community of goods on marriage all the property of the husband and wife come into the community and they are under the management of the husband until the community is determined by death of either party.

Community of property in regard to property acquired before marriage can be excluded if there is a valid ante nuptial contract in writing.

In the instant case Amaris was married on 31.5.1870 and his wife Simona died on 22.05.1889.

The Matrimonial Rights and Inheritance Ordinance of 1876 (Chap. 57) came into effect on 29th June 1877. By section 7 of this Ordinance community of goods between husband and wife, married after the proclamation of the Ordinance was abolished.

Section 4 of this Ordinance provides that the respective matrimonial rights of any husband and wife with regard to property or status arising under or by virtue of any marriage solemnized before the proclamation of this Ordinance and all rights which any other person may have acquired or become entitled to under or by virtue of any such marriage shall be governed by such law as would have been applicable thereto if this Ordinance had not been passed, thus the rights of children of Amaris has to be determined by the Roman Dutch Law which was in force before the Matrimonial Rights and Inheritance Ordinance came into operation.

I hold that property which is the subject matter of this action formed part of the community of property when Amaris got married to Simona on 31.5.1870 and on the death of Simona on 22.05.1889 the community terminated and Amaris was entitled to a half share and the other half share vested in the children of Amaris. The submission of Learned Counsel for respondent therefore fails.

I shall now deal with the second submission, viz., that Amaris has a right to sell the common property after the death of his wife Simona in order to pay debts.

An alienation by a husband after the death of his wife cannot be sustained unless it be or the benefit of the community. Thus, a husband can sell in order to pay the debt, but there must be evidence that the sale is for payment of debt. There is no presumption that when there is a sale it must have been to pay the debts.

It was held in the case of *Amaris Appu v. Sadiris Perera* (1) where the surviving spouse of a marriage contracted in community of goods had granted a personal debt bond for the amount of principal and interest due to the same obligee upon an older bond of the deceased spouse it was held that the entire property of the community was liable to sale in execution of the judgments obtained upon the survivor's bond though the children of the marriage were no parties to it or to the action founded upon it.

Dias J. in this case stated,

> "A purchaser under the above circumstances doubtless takes an imperfect title and in the language of the Supreme Court in *Edirmanasingham's case* (Vanderstraten 264) the plaintiff bought from the Fiscal an imperfect title subject for its validity to the proof on his part that the sale was for payment of the debts".

In the instant case Amaris sold the entire land by P3 of 10.9.1889 to Girigoris for Rs. 120/ and according to the attestation this money was paid to Amaris. This an outright sale. There is nothing in the deed P3 to suggest that sale was for the purpose of payment of debts or that the proceeds were utilised to pay any debts. In the absence of such evidence it cannot be said that the sale P3 was for the purpose of paying debts.

The second submission on behalf of respondent also fails.

Finally it was submitted on behalf of respondent that there was acquiescence by the family members of Amaris in that the sale by Amaris on P3 was in 1889 and the family members did not deal with the property till 1932 when the children conveyed their 6/14 share by deed 5D4 to Cornelis Perera.

When community of property terminated on the death of Simona on 22.05.1889 the community case to an end and ipso jure half share vested on the children of Amaris and Amaris could have conveyed only a half share by P3. By acquiescence Amaris cannot acquire title to the entire land.

The third submission made on behalf of plaintiff respondent also fails.

Learned Counsel for plaintiff-respondent submitted that in any event Girigoris had prescribed to this land. This land was jungle land apart from five or six jak trees. The learned trial Judge had held that there was nothing in this land to possess apart from the few jak trees, because the land was jungle land. I do not think the plaintiff can base any claim on prescription.

The learned trial Judge had in his judgment stated that the deeds 5D4, 5D5 and 5D6 on which the 5th defendant claims title relate to some other land because the extent given in those deeds is one rood and five perches and the boundaries are different. According to the schedule in 5D4, 5D5 and 5D6 the northern boundary is Ihalawatte, eastern boundary is another portion of this land, southern boundary is road and west by Sooriyaratchi's land. If one looks at the preliminary plan P1 the northern boundary is given as Ihalwatte formerly Pulleperumagewatte (which is the boundary given in P3), the eastern boundary is given as formerly belonging to Siman and others, a portion of this land, south by road, west by Sooriarachchigewatte. The boundaries in the Plan P1 correspond to the boundaries given in 5D4 and to the boundaries given in P3. The extent of the land according to the Preliminary Plan P1 is one Rood and four point four nought perches and the extent given in 5D4 is one rood five perches.

The Judges finding that the deeds 5D4, 5D5 and 5D6 referred to a different land is a misdirection.

I hold that the land referred to in 5D4, 5D5 and 5D6 is the identical land referred to in P3 and the Preliminary Plan P1 which is the corpus sought to be partitioned.

I hold that parties are entitled to the corpus in the following shares–

Plaintiff – 1/14

1st Defendant – 7/14

5th Defendant – 6/14

I set aside that part of the judgment of the learned District Judge which relates to the 5th defendant-appellant.

I order that lot 1 in plan P1 be partitioned between the plaintiff 1st and 5th defendants according to the shares set out above. Parties are entitled to the plantations in proportion to the soil shares.

Plaintiff is entitled to costs of partition and survey from 1st defendant and 5th defendant pro rata.

2nd defendant is ordered to pay to plaintiff Rs. 400/ as costs of contest in the District Court.

Plaintiff is ordered to pay to 5th defendant Rs. 400/ as costs of contest in the District Court. I direct that Interlocutory Decree be entered accordingly.

The appeal of 2nd defendant appellant is dismissed with costs.

The appeal of 5th defendant appellant is allowed with costs payable by the plaintiff.

GOONEWARDENA, J. – I agree.

Appeal of 5th defendant appellant allowed (CA 244/79).

Appeal of 2nd defendant appellant dismissed (CA 245/79).