1959 *Present :* **Pulle, J., and T. S. Fernando, J.**

S. J. DIAS and others, Appellants, *and* S. R. DIAS, Respondent

S. C. 176—D. C. Colombo, 6,998/P

Partition action—Conveyance by a co-owner of a divided lot or korotuwa*—Right of transferee to maintain a partition action in respect of the whole land—Co-owners—Amicable partition—All the co-owners must be parties to it.*

Where a co-owner conveys his interest by reference to a particular portion or *korotuwa* of which he has been in possession, the deed can be considered as effective in law to convey his undivided interest in the whole land. In such a case the transferee can maintain a partition action in respect of the whole land.

An amicable partition to be recognized in law must be a division which in law terminates the co-ownership of the property. A plan made at the instance of one or more co-owners purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land. *Githohamy v. Karanagoda* (1954) 56 N. L. R. 250, followed.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *E. S. Amerasinghe* and *D. C. W. Wickramasekera*, for the 1st to 3rd defendants-appellants.

H. W. Jayewardene, Q.C., with *S. D. Jayasundere*, for the plaintiff-respondent.

Cur. adv. vult.

March 25, 1959. T. S. FERNANDO, J.—

The plaintiff instituted this action for a partition of a land described as the divided southern portion of Kahatagahawatte and depicted in plan No. 8439 of 25th March 1954. The original owner of this divided portion was admittedly one Elias Dias, the paternal grand-father of the plaintiff, and the plaintiff claimed to be entitled to 142/336 share of the land and of an old house standing thereon on the strength of a transfer (P 8 of 14th October 1951) made to him by his father Carolis. Carolis who is a son of the original owner had parted with his undivided interests in the soil and in the house in 1918 and 1920 respectively, but had three years later, by transfer P 5 of 1923, purchased from his sister Carlina her interests in the said land. The remaining shares were allotted by the plaintiff in his plaint to the several defendants in this case who were all descendants of the original owner.

The claim for partition was contested only by the 1st defendant James, a brother of Carolis referred to above and a son of the original owner, and by the two sons of James, viz., the 2nd and 3rd defendants, who alleged that their father had gifted to them in divided blocks the land sought to be partitioned. The 1st defendant and his two sons claimed that they were entitled to the land by right of possession adverse to and independent of all others.

The main question in dispute at the trial was whether Carolis, the father and predecessor in title of the plaintiff had by a deed P 9 of 1929, executed by him in favour of his brother James, the 1st defendant, divested himself of all his rights to the land sought to be partitioned. It was apparent that, if this question was answered against Carolis, the plaintiff, being devoid of title, could not maintain any action for partition. Carolis who gave evidence on behalf of the plaintiff took up the position that this deed P 9 related to a transfer, not of interests in the land in question which is the divided southern portion of Kahatagahawatte, but of interests in the land to the north, viz., the northern portion of the same Kahatagahawatte. After a consideration of the evidence, both oral and documentary, the learned trial judge has held against the contesting defendants and ordered interlocutory decree for partition to be entered. The appeal is from this order.

The appeal has been pressed before us both on facts and law. In regard to the main dispute on the facts, while the question was not entirely free from difficulty, we think the trial judge came to the right conclusion when he upheld the contention for the plaintiff that deed P 9 transferred only the interests of Carolis in the land to the north of the land sought to be partitioned, i.e., it dealt with interests in the northern portion of Kahatagahawatte in which too Elias the original owner, as one of the children of Lewis, was entitled to a share. It is hardly necessary to enter upon an examination of all the arguments advanced for the appellants and for the respondent upon this trial, but as the questions of fact were fully argued before us it may be useful to refer here to some of them.

The southern boundary of the land dealt with by P 9 is therein described as " the wall of this land and dewata road " which happens in fact to be the northern boundary of the land sought to be partitioned. The argument for the defendants that this description has been set down in the deed by a mistake was rejected by the trial judge for reasons which are weighty and which we need not repeat.

There is a house standing on the land sought to be partitioned, and P 9 itself purports to convey interests in a house as well. The reference to a house in P 9 was utilised as an argument to show that it dealt with the land sought to be partitioned. The trial judge has, however, accepted the evidence that on the northern portion of Kahatagahawatte too which devolved on all the heirs of Lewis including Elias himself there stood a house which remained on that land, though in a dilapidated state, even at the time of the trial.

The deed P 9 does not refer to the vendor's rights as being referable to the purchase by him of his sister's rights by transfer P 5 of 1923, but purports to be a sale of inherited rights by Carolis, a description which is appropriate to a sale of the interests in the northern portion which he acquired by inheritance through his father Elias.

If, as was contended by the appellants, the deed P 9 was a transfer to the 1st defendant of all the rights of Carolis in the land sought to be partitioned, it was hardly likely that the 1st defendant who did not appear to the trial judge to be a gullible man would have agreed to the transaction that is described as an amicable partition of the southern portion of Kahatagahawatte between Carolis and himself. But this was precisely what the 1st defendant did when two years after his purchase P 9 in 1929 of what he now contends were the interests of Carolis in the southern portion, he signed along with Carolis the survey plan P 6 dated 8th October 1931. The reason advanced by the 1st defendant at the trial that he had to sign this plan as Carolis claimed that he had purchased the rights of their brother Dionis was quite unconvincing, if not altogether false, and was rightly rejected by the trial judge.

In addition to the circumstances adverted to above, there was the somewhat compelling circumstance that in 1934 Carolis had leased to one Samel upon notarial lease P 11 a divided part of the southern portion of Kahatagahawatte which was described as Lot A the subject of the amicable division evidenced by plan P 6. Samel was called as a witness for the plaintiff, and his evidence which the learned trial judge has described as convincing shows that his possession was not disputed by the 1st defendant or his sons. In the face of all these circumstances the appeal on the facts must fail.

As a question of law, it was contended that deed P 8 of 1951 which is the title relied upon by the plaintiff conveyed to him a divided lot which constituted only a part of the land sought to be partitioned and that he could not therefore maintain an action for partition of land which included interests outside this divided lot. In regard to this it must be remembered that the amicable partition evidenced by P 6 was not a partition among all the co-owners entitled to interests in the land at the time it

was effected in 1931. Two at least of the co-owners were not parties thereto, and the 1st defendant himself did not treat this partition as being binding on the other co-owners because he purchased, a month after this partition, the interests of his brother Dionis. An amicable division to be recognised in law must be a division which in law terminates the co-ownership of the property. A plan made at the instance of one or more co-owners purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land.—(See *Githohamy v. Karanagoda* [1]). In regard to the question whether the plaintiff's title deed P 8, though purporting to convey to him a divided lot, can be considered as effective in law to convey to him undivided interests in the whole land, it should be mentioned that this Court has in several cases noted with approval the dictum of De Sampayo J. in *Don Andris v. Sadinahamy* [2] that " it is not uncommon for co-owners to dispose of their interests by reference to particular portions or *koratuwas* of which they have had possession. But if the real intention is to dispose of the interests of the persons in the entire land, this Court has found no difficulty in giving a broad construction to such deeds, and to deal with the rights of the parties on the original footing ". The trial judge has answered the question whether the deed P 8 can support the claim of the plaintiff to partition the land in the affirmative, and here too the learned judge has reached, in my opinion, a correct decision. The appeal therefore fails even on the question of law. I would accordingly dismiss it with costs.

PULLE, J.—I agree.

Appeal dismissed.