

1963 Present: H. N. G. Fernando, J., and T. S. Fernando, J.

WARIS PERERA and others, Appellants, and A. PABILINAHAMY,
Respondent

S. C. 475/60—D. C. Panadura, 6602

Co-owners—Incapacity of one co-owner to exclude another from any particular portion of the common land—Action between two co-owners for possessory decree in respect of a specific portion—Maintainability.

It is not generally open to a person having title only to an undivided share of a land, but who has been in occupation of a specific portion of the land to oust another co-owner from that portion by suing for a possessory decree.

APPEAL from a judgment of the District Court, Panadura.

C. Thiagalingam, Q.C., with B. J. Fernando, for the Defendants-Appellants.

H. W. Jayewardene, Q.C., with N. R. M. Daluwatte, for the Plaintiff-Respondent.

Cur. adv. vult.

October 1, 1963. H. N. G. FERNANDO, J.—

The Plaintiff in this action claimed to have been in possession of a divided portion of land of an extent of about half an acre. Alleging that the Defendants had wrongfully removed a part of the barbed wire fence and constructed a hut on one side of the land, the Plaintiff has succeeded in obtaining a decree for restoration of possession and for the ejection of the Defendants.

Although the Defendants had claimed in their Answer that they had been in exclusive possession of the piece of land, they relied at the trial only on the alternative claim that this land is a part of a larger land of which they are co-owners. The Plaintiff's evidence on this matter was as follows :—

“ I am the plaintiff in this case. I know the land in respect of which I have filed this action. The name of that land is Mahawatta. Mahawatta is a larger land. The extent of the entire land Mahawatta is 22 acres. Mahawatta consists of a number of lots and there are names to those lots. Mahawatta has been possessed as separate portions. I have possessed my portion for over 25 years. The other portions of Mahawatta have also been possessed as separate portions. Since I came to know things it was possessed like that. The portion I claim is a separate portion of Mahawatta in extent about half an acre.”

Later she stated that the Defendants possessed other separate portions of Mahawatta.

In order to prove the commencement of her possession, the Plaintiff produced the deed P1 of 1933 which conveyed to the Plaintiff and her brother an undivided 3 upon 360 shares of two lands, and it was the Plaintiff's case that her vendors had prior to that conveyance cleared and fenced off this particular portion and thereafter placed the Plaintiff in possession of it.—The title of the Plaintiff's vendor was so uncertain that the description for the conveyance P1 was taken from a deed borrowed from some other person. The evidence to which I have referred constituted an admission, and not a challenge, of the Defendants' position that the land in question was part of a larger land at least until about 1933, and that the Defendants had shared in that larger land.

On these facts, the learned District Judge had to decide whether it is open to a person having title only to an undivided share of a land, but who has been in occupation of a specific portion of the land, to oust another co-owner from that portion by suing for a possessory decree. The exceptional circumstances in which a possessory decree may be granted as against a co-owner are set out in the judgment in *Alwis v. Pieris Appuhamy*¹, and the present facts do not fall within the exceptions there mentioned. But that judgment did not take into consideration the earlier decision in *Perera v. Perera*², upon which the learned Judge has relied, and I am glad of the opportunity to consider it—

In the last mentioned decision, Gratiaen J. pointed out that “the plaintiff, with or without justification had been in possession of the land asserting that he was the solo owner and refusing to recognize as valid any claim of the Defendants to be his co-owners”, and there was a finding of fact that the plaintiff had been in undisputed possession of the entire land until the time of the ouster.—The ouster had therefore been achieved by persons whose claim to be co-owners was not in fact acknowledged by the *de facto* possessor. I myself have no difficulty in agreeing that in such circumstances the Plaintiff was rightly held to have satisfied the subjective test of possession *ut dominus*.

In the instant case, however, the Plaintiff's entry into possession of the specific portion of the larger land cannot be regarded as having been *ut dominus*, because of the following admissions:—

- (1) That the title transferred by her vendors was only to an undivided interest in a larger land ;
- (2) That the vendors only cleared the portion shortly before the transfer and the Plaintiff's entry ;
- (3) That the Defendants own shares in the larger land, although they are in possession of separate portions.

¹(1956) 59 N. L. R. 518.

²(1949) 39 C. L. W. 100.

In these circumstances a finding that the Plaintiff was in fact in possession with the intention of holding and dealing with the portion as her own is not in my opinion justifiable, for there was no basis upon which the Plaintiff could in good faith assume that the transfer gave her an exclusive right to possess the portion. Her right to possession was clearly referable to her title as a co-owner, and her possession as such was not disturbed during the many years when she *appeared* merely to be exercising that right. The defendants interfered only in 1958, when the Plaintiff commenced to construct a foundation for a large house on the land. Indeed the alleged ouster was not in respect of the entire portion of the land, but took the form only of the erection of a hut between the foundation and the road.

It is trite law that until co-ownership is dissolved by partition or by prescription, it is not open to one co-owner to exclude another from any particular portion of the land. If in the present case the vendors to the Plaintiff had in 1933 cleared this portion of land and, not having sold it, had thereafter used it in the manner in which the Plaintiff actually did, it would clearly not have been open to those vendors to obtain a possessory decree against these defendants. And since their transfer to the Plaintiff was in terms a transfer of an undivided share and not of a divided portion, the Plaintiff cannot to my mind claim to be in a position superior to that of their vendors.

The case before me is in any event distinguishable on other grounds from that of *Perera v. Perera (supra)*. Since the Plaintiff in *Perera v. Perera* denied the fact of co-ownership, the Defendants' right to possession could only have been determined after an investigation of the claim of title set up by the Defendants. In the present case, on the contrary, the Plaintiff has admitted the claim of co-ownership of the larger land, and the Defendants are *prima facie* entitled as co-owners to a right of possession of the disputed portion. This right cannot now be denied to the Defendants except after an investigation of the claim of title by exclusive possession *set up by the Plaintiff*. The principle applied in *Perera v. Perera* that "the purpose of a possessory suit is not to adjudicate upon questions relating to title" prevents the Courts in the present case from investigating the claim of title here set up by the Plaintiff.

I would allow the appeal and dismiss the Plaintiff's action with costs in both Courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.