Ponnambalam v. Vaitialingam and another

COURT OF APPEAL.
RANASINGHE, J. AND TAMBIAH, J.
C. A. (S.C.) 237/73 (I)—D. C. JAFFNA 539/P.
MARCH 27, 30, 1979.

Co-owners—Partition action—Claim by defendants that corpus amicably divided and so possessed—Prescription—Principles applicable.

Held

The question whether a co-owner has prescribed to a divided lot as against the other co-owners is one of fact and is to be determined by the circumstances of each case. The mere reference to undivided shares in deeds executed after the alleged date of division does not have the effect of restoring the common ownership of a land which has been dividedly possessed and where such divided portions have become distinct and separate entities. The learned trial Judge had in this case correctly found that the corpus had been divided and separately possessed to the exclusion of the other co-owners for about 30 to 40 years prior to this action and accordingly dismissed the action holding that at the time of its institution the corpus was not owned in common.

Cases referred to

(1) *Corea v. Iseris Appuhamy, (1911) 15 N.L.R. 65 ; 1 C.A.C. 30.*
(2) *Tillekeratne v. Bastian, (1918) 21 N.L.R. 12 (F.B.).*
(3) *Abdul Majeed v. Ummu Zaneera, (1959) 61 N.L.R. 361 ; 58 C.L.W. 17.*
(4) *Hussaima v. Ummu Zaneera, (1961) 65 N.L.R. 125 ; 64 C.L.W. 7.*
(5) *Danton Obeysekera v. Endiris, (1962) 66 N.L.R. 457.*
(6) *Simon Perera v. Jayatunga, (1967) 71 N.L.R. 338.*
(7) *Nonis v. Petha, (1969) 73 N.L.R. 1 ; 78 C.L.W. 33.*
(8) *Jayaneris v. Somawathie, (1968) 76 N.L.R. 206.*
(9) *Perera v. Kularatne, (1972) 76 N.L.R. 511.*
(10) *Belin Nona v. Petara, (1972) 77 N.L.R. 270.*
(11) *Hamidu Lebbe v. Ganitha, (1925) 27 N.L.R. 33 ; 6 C.L. Rec. 159 ; 3 Times L.R. 102.*
(12) *Sideris v. Simon, (1945) 46 N.L.R. 273.*
(13) *Mensi Nona v. Neimalhamy, (1927) 10 C.L.Rec. 159.*
(14) *Girigoris Appuhamy v. Mary Nona, (1956) 60 N.L.R. 330.*

APPEAL from the District Court, Jaffna.

C. Thiagalingam, Q.C., with *V. Arulampalam, for the plaintiffs-appellants.*
C. Ranganathan, Q.C., with *K. Sivanathan*, for the 2 (*a*), (*b*) and (*c*) defendants-respondents.

Cur. adv. vult.

June 8, 1979.

RANASINGHE, J.

The plaintiffs-appellants (hereinafter referred to as plaintiffs) who are husband and wife respectively instituted this action to have the land called and known as Ella Silum and other parcels, 20 lms in extent and described in the schedule to the plaint partitioned as between the plaintiffs and the 1st to 3rd defendants.

The contesting defendants, who are the 2a—2c, and the 3rd defendants-appellants, have taken up the position that the corpus had been amicably divided over 60 years ago, and has ever since

the said division been dividedly possessed and that it is now not commonly owned, and that, therefore, the plaintiffs' action should be dismissed.

The learned trial judge has upheld the position taken up by the contesting defendants and has accordingly dismissed the plaintiffs' action.

This appeal therefore raises once again the question of prescription among co-owners, a question which has come up over and over again before our Courts and has received careful and exhaustive consideration both by the Supreme Court and by Their Lordships of the Privy Council.

The co-ownership of a land owned in common could be terminated broadly in one of two ways—either through Court or out of Court. Common ownership could be brought to an end by an action instituted in Court for a partition in terms of the provisions of the Partition Act. The best evidence of such a termination would be the Final Decree entered by Court. Termination of common ownership without the intervention of court could be in one of two ways : either with the express consent and the willing participation of all the co-owners, or without such common consent. An amicable division with the common consent of all the co-owners can take one of two forms : a division given effect to by the execution of a deed of partition or of cross-conveyances which said notarial documents would then be the best evidence of such a termination or an internal division and the entry into separate possession of the divided allotments by the respective co-owners to whom such lots were allotted at such division. In the case of a partition by court and an amicable division by the execution of the necessary deeds, the common ownership ends forthwith. In the case, however, of an internal divisions effected by the co-owners with the express common consent of them all, the common ownership does not in law come to an end immediately. In such a case common ownership would, in law, end only upon the effluxion of a period of at least ten years of undisturbed and interrupted separate possession of such divided portions. Proof of such termination will depend on evidence, direct and or circumstantial, and is a question of fact. 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. Here too proof of such termination would be a question of fact depending on evidence, direct and or circumstantial.

I shall, before I proceed to deal with the facts and circumstances of the case, set down the relevant principles of law which are applicable to a case such as this.

Any discussion of the principles relating to prescription among co-owners must necessarily commence with the judgment of Their Lordships of the Privy Council, delivered in 1911 in the case of *Corea v. Iseris Appuhamy* (1) where it was clearly and authoritatively laid down : that a co-owner's possession is in law the possession of other co-owners : that every co-owner is presumed to be possessing in such capacity : that it is not possible for such a co-owner to put an end to such possession by a secret intention in his mind : that nothing short of ouster or something equivalent to ouster could bring about that result. Thereafter in the year 1918, in the case of *Tillekeratne v. Bastian* (2) a Full Bench of the Supreme Court was called upon to apply the principles laid down in *Corea v. Iseris Appuhamy* (*supra*) and consider, inter alia, the meaning of the English law principle of a " presumption of ouster ", and it was held : that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse : that it is a question of fact, whenever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before the institution of the action. Thereafter the question has been considered over and over again by the Supreme Court, and in the year 1959, in the case of *Abdul Majeed v. Umma Zaneera* (3) in a very lucid and exhaustive discussion of the principles relating to prescription among co-owners and the presumption of ouster, which had been laid down up to that point of time by both the Privy Council and the Supreme Court concluded : that the inference of ouster could only be drawn in favour of a co-owner upon proof of circumstances additional to mere long possession : that proof of such additional circumstances has been regarded in our Courts as a sine qua non where a co-owner sought to invoke the presumption of ouster. This case thereafter went up in appeal to the Privy Council, and the Judgment of the Privy Council is reported (4). Although their

Lordships regretted having to advise Her Majesty to dismiss the appeal, Their Lordships were nevertheless content to accept the relevant principles of law, as expounded by the Supreme Court.

I shall now refer to the judgments reported after the judgment (4) referred to above which have dealt with the question.

In the case of *Danton Obeysekera v. Endiris* (5), Sansoni, J. held that where an outsider bought a 2/3 share, about two roods in extent of a co-owned property, from two co-owners and separated off such portion, not as a temporary arrangement for conveniences of possession, but more likely as a permanent mode of possession, and possessed it for over twenty years, the lot so separated off ceased, with the lapse of time and exclusive possession, to be held in common with the rest of the land, and that those who so possessed it were entitled to claim that they have prescribed to it. This decision does not, in my opinion, in any way offend against the principle referred to by (H. N. G.) Fernando, J. The additional circumstance that was required was supplied by the 1st defendant's prosecution of the 2nd defendant for destroying the barbed wire fence which had been erected to separate off the portion which was then being separately possessed by the 1st defendant.

The subsequent Judgments of Siva Supramaniam, J. in *Simon Perera v. Jayatunga* (6) at p. 431 of the Privy Council in the case of *Nonis v. Peththa* (7), of Weeramantry, J. in *Jayaneris v. Somawathie* (8), of Pathirana, J. in *Perera v. Kularatne*, (9), and of H. N. G. Fernando, C.J. in *Belin Nona v. Petara* (10), which have also dealt with the question of prescription among co-owners, have not expressed any views which in any way, tend to deviate from the principles made explicit in the judgments of the Supreme Court in the case of *Abdul Majeed v. Ummu Zaneera* (*supra*) and approved by the Privy Council.

It has also been laid down that the question whether a co-owner has prescribed to a particular divided lot as against the other co-owner is one of fact and has to be determined by the circumstances of each case—(2), (11), (12), (3), (5), (6) at p. 343. It is also now settled law that the mere reference to undivided shares in deeds executed after the alleged date of division does not have the effect of restoring the common ownership of a land which has been dividedly possessed and where such divided portions have become distinct and separate entities —(13), (14) at p. 332; (6) at 343.

The principles applicable are, therefore, quite clear and unambiguous and have been authoritatively laid down; but,

as it very often happens, the real difficulty arises only in their application to the facts and circumstances which are established in a particular case.

I shall now proceed to consider whether, having regard to the principles set out above, the learned trial judge's finding that the corpus sought to be partitioned had been amicably divided and, had been dividedly possessed for a long period of time prior to the commencement of the proceedings and that the corpus had, therefore ceased to be owned in common at the time the plaintiff instituted this action.

As already stated, the position of the contesting defendants in this case is that the amicable division had taken place about 60 years ago. No witness is available to them to give direct evidence with regard to the said division which the contesting defendants claim had taken place. They, therefore, rely on circumstantial evidence to establish their claim.

The learned trial judge has found that the parties, who are said to be entitled to interests in the corpus, have in fact been separately possessing the several lots depicted in the Plan X; that the said parties have so possessed the several lots dividedly to the exclusion of the other co-owners; that such exclusive possession has gone on for about 30-40 years prior to the institution of this action; that the fences separating the various lots are very old live fences; that the said fences are boundary fences and not "screen fences". These findings of the learned trial judge are supported by the evidence placed before him at the trial and there does not seem to be any good reason to interfere with the said findings of the learned trial judge.

It is also clear that lot 7 on which the well stands has been separately fenced in, and that access has been provided to this lot from all the other lots 2, 4, 8, 10 and 11 along well defined path-ways.

The learned trial judge has also found that, prior to the dispute raised by the plaintiff, shortly before the commencement of these proceedings, to the construction of a kitchen by the contesting defendants on lot 4, substantial buildings had been put up by the contesting defendants on lot 4 without any protest from the plaintiffs. The 1st defendant has also thereafter constructed a building on lot 4. The 1st plaintiff who has been in

possession of lot 2 stated that he himself has built a house on lot 2, and that before that house was constructed by him, there was on that same lot an old house in which his grandmother and also his parents had resided.

It also transpired in evidence that the 1st defendant, who is said to have been allotted lot 11, had removed the southern boundary fence of lot 11 and amalgamated lot 11 in Plan X with lot 12, which is a portion of the land lying to the south of lot 11 and which also belongs to the 1st defendant. The learned trial judge has stated that, when the 1st defendant carried out such amalgamation, there had been no protest from the plaintiffs and that such silence on the part of the plaintiffs was because they, considered lot 11 to be the exclusive property of the 1st defendant.

The deeds P2 of 1917, P3 and P4 both of 1935, and P5 executed only a few days before the plaintiff came in to court in June, 1961, deal with undivided shares in the corpus. Whilst P2 has been executed as far back as 1917 which is the year in which the amicable division referred to by the contesting defendants is said to have taken place, P3, which has been executed in 1935 is in the chain of title of those who have been in possession of lot 11 which, as already stated, had been separately possessed by the 1st defendant. Even though evidence was placed on behalf of the plaintiffs that other co-owners too had exercised acts of possession over lot 11, such evidence has not been accepted by the learned trial judge. The deed P4, like P5 referred to above, figure in the pedigree of those who have been in possession of lot 2. The learned trial judge has taken the view that the references to undivided shares in these deeds do not militate against the position put forward by the contesting defendants, and that such descriptions have been made not with reference to the actual mode of possession but as a result of the notaries merely following the descriptions in the earlier title deeds. Having regard to the circumstances of this case, I do not think that the view taken by the learned trial judge could be said to be untenable.

The additional circumstances which, according to the principles referred to earlier, is required in a case of this nature has also, in my opinion, been established in this case by the contesting defendants. The contesting defendants produced marked 2D1 a certified copy of a complaint made by the 1st plaintiff in this case, on 21.2.1958, against the deceased 2nd

defendant to the Rural Court of Chankani, in Case No. RC/C/CRM 1054, that the said 2nd defendant has failed and neglected to fence the southern boundary fence of the 1st plaintiff's dwelling land, in breach of Rule 46 of the Village Committee Rules of 3.2.1928, and the said 2nd defendant has therefore committed an offence punishable under section 26(1) Rural Courts Ordinance 12 of 1945. According to an entry dated 25.3.1958, appearing on the face of the said document D1 itself, the 1st plaintiff had thereafter informed court, that, as the said 2nd defendant had erected the fence, he was withdrawing the case ; and that the 2nd defendant has then been discharged. According to the Plan 'X' the lot possessed by the 1st plaintiff and on which he resides, is lot 2, and to the south of lot 2 is lot 4 which was possessed by the said 2nd defendant. The southern boundary of the 1st plaintiff's dwelling land would, therefore, be the boundary between lots 2 and 4 in Plan 'X'. The 1st plaintiff, on being questioned with regard to the said case, admitted having filled it but denied that he described the fence in question as a "boundary fence". His position is that he himself called it a "screen fence" but that the Chief Clerk, who had written out the complaint (the original of 2D1) had described it as a "boundary fence" without his authority. The learned trial judge has disbelieved the 1st plaintiff's evidence on this point. The 1st plaintiff s description of the fence which had been erected to separate lot 2 from lot 4 in Plan X, shows that these lots have been so separated off "not as a temporary arrangement for convenience of possession but more likely as a permament mode of possession". As already stated, once the said 2nd defendant re-erected the fence in question, the 1st plaintiff had withdrawn the case. It appears to me that the 1st plaintiff's acts as embodied in 2D1, gives a clear indication of the nature and the character of the possession of the various lots, depicted in Plan 'X' by the respective co-owners.

On a consideration of these facts and circumstances, I am of opinion that the learned trial judge's finding that the corpus was not, at the time of the institution of this action, owned in common is correct and should be affirmed.

The appeal of the plaintiffs'-appellants is accordingly dismissed with costs.

TAMBIAH, J.—I agree.

Appeal dismissed.