MARIA PERERA
v.
ALBERT PERERA

COURT OF APPEAL
B. E. DE SILVA, J. AND G. P. S. DE SILVA, J.
C.A. (S.C.) NO. 426/75 (F)
D.C. KALUTARA NO. L/1997
10, 11 OCTOBER 1983.

Partition — Amicable partition — Ouster — Prescription

Held —

An amicable partition can be a starting-point of prescription even though no deed of partition or cross deeds or other documents have been executed. But inclusive possession by a co-owner for a period of 10 years alone cannot give rise to prescriptive title. There must be the further important element of a " change of circumstances from which an inference could reasonably be drawn that such possession is adverse to and independent of " all other co-owners. There must be proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date ten years before action was brought. Mere exclusive possession for 20 years (by taking the natural produce of the land) on a plan not signed by any of the co-owners to whom the plaintiff claimed lots were allotted cannot constitute proof of ouster. The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster.

Cases referred to :

1. *Ponnambalam v. Vaitialingam and another* (1978-79) 2 Sri LR 166
2. *Obeysekera v. Endoris and others* 66 NLR 457
3. *Simon Perera v. Jayatunga* 71 NLR 338
4. *Nonis v. Peththa* 73 NLR 1
5. *Ram Menika v. Ram Menika* 2 SCC 153
6. *Mensi Nona v. Nimalhamy* 10 Ceylon Law Recorder 159
7. *Abdul Majeed v. Ummu Zaneera* 61 NLR 361

APPEAL from Judgment of the District Judge of Kalutara.

D. R. P. Gunatilaka with *R. S. Tillakaratne* for defendant-appellant.

J. W. Subasinghe, S. A. with *Miss E. M. S. Edirisinghe* for plaintiff-respondent.

Cur. adv. vult

November 18, 1983
G. P. S. DE SILVA, J.

The plaintiff brought this action against the defendant on 2nd May, 1972 for a declaration of title, damages and ejectment in respect of the land described in Schedule B to the plaint. The title set out in the plaint was :—

(a) that on deed No. 55 of 1928, the person called Martin Munasinghe became entitled to an undivided 63/144 shares of the land called Hewawatta alias Mahawatte in extent A1. R2. P0, described in Schedule A :

(b) that the said land was amicably partitioned between the four co-owners in the year 1951 and the said Martin Munasinghe was allotted Lot D in plan 46, dated 12.4.51, and that he entered into possession of the said Lot D and possessed it from 1951 (vide paragraph 3 of the plaint) : the plan of partition was produced marked 'P 2' ;

(c) Martin Munasinghe died intestate, leaving as his heirs, his widow Luvie Perera and four children who sold their rights on P 3, dated 27th February, 1961, to Millie Nona who thus became entitled to Lot D ;

(d) that Millie Nona possessed Lot D and acquired a prescriptive title to it ;

(e) that Millie Nona by P4 of 23rd March, 1971, sold a portion of Lot D (shown as Lot A in plan P1 of 12th April, 1967) to the plaintiff.

After trial, the District Judge entered judgment for the plaintiff and the defendant has now appealed. Mr. D. R. P. Gunatilake, Counsel for the defendant-appellant, pointed out that in paragraph 3 of the amended Answer, the defendant has averred that :—

> " the purported amicable partition mentioned in paragraph 3 is invalid and is ineffective in law as all co-owners, including the plaintiff's predecessors in title, have not joined same and on the ground that no valid deed of partition has been executed. "

Mr. Gunatilake submitted that the foundation of the title relied on by the plaintiff was the amicable partition of 1951 ; that in the absence of a deed of partition or of cross conveyances, the amicable partition did not confer title on Martin Munasinghe to Lot D in the plan P2, and therefore, the entire case for the plaintiff necessarily failed. Counsel's submission was that this being a *rei vindicatio* action, the burden is on the plaintiff to prove his title as set out in the plaint. On the other hand, Mr. Subasinghe, Counsel for the plaintiff-respondent, whilst conceding that the execution of P2, the plan of partition, in 1951, did not terminate co-ownership, strenuously contended firstly that the amicable partition of 1951 was the starting-point of prescription amongst the co-owners, and that the evidence led on behalf of the plaintiff was sufficient to establish title to Lot D shown in P2 by prescription.

I am in entire agreement with Mr. Subasinghe's submission that an amicable partition amongst the co-owners can be a starting-point of prescription even though no deed of partition or cross deeds or other documents have been executed. However, it is to be noted that P2 has not been signed by any of

the co-owners to whom the plaintiff claims lots were allotted at the division in 1951. As observed by Ranasinghe, J., In *Ponnambalam v. Vaitialingam and another* (1) :—

> " 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 . . . Proof of such termination would be a question of fact depending on evidence, direct and or circumstantial. "

The question that arises for decision in this case is whether, upon the evidence, it could be said that the plaintiff and his predecessors in title have acquired a prescriptive title to Lot D in plan P2. Mr. Subasinghe urged that upon the evidence of Millie Nona and specially Neris Perera called on behalf of the plaintiff, there was sufficient evidence to establish title by prescription. I have perused the evidence of Neris Perera in regard to possession, and his evidence, *at most,* would show that his father Michael Perera, D. N. Perera, the deceased husband of the defendant, Martin Munasinghe, and Annie Nona who were allotted separate lots, possessed their lots separately. Millie Nona in her evidence, stated that she possessed the land after her purchase on P3 in February 1961. She further stated that Martin Munasinghe was in possession of Lot D and after his death, his widow and children possessed it.

Thus, it is seen that the evidence accepted by the District Judge, establishes the fact of possession of the divided Lot D in P2 for a period of 20 years. Possession was by taking the natural produce of the land. The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster. Ranasinghe, J., in *Ponnambalam v. Vaitialingam and another*

(supra), after a very careful consideration of the authorities dealing with the question of prescription among co-owners, expressed himself thus :—

> " .... 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. "

In my view, the evidence of possession relied on by plaintiff, does not show any circumstances from which the inference could be drawn that the separate possession of Lot D *had become adverse* at some point of time more than ten years before the institution of the action.

On the other hand, there are circumstances which tend to indicate the contrary. It is of some significance that P3 of February 1961 upon which Millie Nona purchased the land, makes no reference whatever to the plan of partition P2. If, in fact, Lot D in P2 was possessed as a distinct and separate lot, it is strange that there was no reference to P2 in the deed P3. Moreover, there is the evidence of Millie Nona that after her purchase in 1961, the defendant claimed that she was entitled to 1/12 share of the land. Millie Nona's testimony is that, since the defendant was worrying her, she got surveyor U. M. de Silva to prepare the plan P1, dated 12.4.67, and gave the defendant 7.2 perches out of her land (Lot B in P1). This, in my view, is a circumstance that goes against the plaintiff's case, for it is a recognition of the defendant's claim to rights in the land in dispute.

Finally, I wish to refer to the cases relied on by Mr. Subasinghe. Mr. Subasinghe cited the case of *Obeysekera v. Endoris and others* (2). Ranasinghe, J., In *Ponnambalam v. Vaitialingam* (supra), referring to this case, stated :—

> " 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. "

Mr. Subasinghe next cited *Simon Perera v. Jayatunga,* (3). Here, too, there was an additional circumstance :—

" In the instant case, the learned District Judge has found that after Baby Nona purchased a share, there had been an amicable division among the co-owners in pursuance of which Baby Nona possessed lot 3 in plan X filed of record as her exclusive property. *She not only annexed this lot to the land on the East, which was her property, but also constructed a wall which is in the nature of a permanent structure to a length of 144ft.* and possessed this portion exclusively . . . for a period of nearly 30 years. " (The emphasis is mine)

Another case cited before us was the decision of the Privy Council in *Nonis v. Peththa* (4). In this case, the " informal partition " which involved an exchange of lands amongst the co-owners was evidence by a document *which had been signed by all three co-owners.* The judgment does not refer to the precise evidence relating to possession but the Privy Council observed :—

It was clear from the evidence, that the document, so far from being intended to preserve the status quo, was drawn up *as part of an arrangement which was meant to resolve certain difficulties betwen the co-owners,* by attributing to the 1st respondent on the one hand, and to Sekera and the 2nd respondent on the other, separate properties which thenceforth would be separately enjoyed. "

Mr. Subasinghe also relied on the case of *Ram Menika v. Ram Menika* (5), and invited our attention to the following passage in the judgment :—

It need hardly be added that exclusive possession originally referable in the way just indicated to the consent of the Co-

proprietors *may sometimes by change of circumstances* become a holding adverse to and independent of all co-owners such as may, by lapse of time, give rise to a prescriptive right. "

This passage is not an authority for the proposition that exclusive possession by a co-owner for a period of 10 years is alone sufficient to give rise to a prescriptive title. There must be the further important element of a " change of circumstances ", from which an inference could reasonably be drawn that such possession is " adverse to and independent of " all other co-owners.

Before I conclude, I wish to refer to the case of *Mensi Nona v. Nimalhamy* (6), which appears to contain dicta that tend to support the contention of the plaintiff-respondent. But it is important to note that this was a case where there was clear and cogent evidence that the land " had been amicably partitioned between the then co-owners as far back as 1895 . . . It has also been clearly established by the evidence of the surveyor, Mr. Weeraratne, that in 1895, *at the instance of the then co-owners,* he surveyed and blocked out the land *and handed to each of the persons then in possession a plan of the block allotted in severalty to him.* " (The emphasis is mine.) Thus, it is clear that the division took place with the knowledge of all the co-owners and the possession of the separate lots thereafter was on a permanent basis, and not on grounds of convenience. In the appeal before us, however, there is no evidence as to the circumstances in which P2 came to be prepared. As stated earlier, it has not even been signed by any of the co-owners and Noris Perera stated in cross-examination, that he does not know upon which plan the amicable partition was effected.

On a consideration of these cases, it seems to me that there is no departure from the principle that exclusive possession of a separate lot alone is not sufficient, and that there must be proof of circumstances from which a reasonable inference could be drawn that such possession had become *adverse* at some date ten years before action was brought — a principle which was

emphasized in the judgments of K. D. de Silva, J. and H. N. G. Fernando, J. in the decision of the Divisional Bench in *Abdul Majeed v. Ummu Zaneera* (7). It is this essential requirement that the plaintiff has failed to prove in the instant case.

For these reasons, I am of the opinion that the plaintiff has failed to establish title by prescription to the land in suit. The appeal is accordingly allowed, the judgment and decree of the District Court are set aside and the plaintiff's action is dismissed with costs.

The defendant-appellant is entitled to the costs of appeal.

B. E. DE SILVA, J. — I agree.

Appeal allowed.