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Present : Branch C.J. and Jayawardene A.J.

GOONESEKERE *et al v.* PEIRIS *et al.*

124, 124A—D. C. Kalutara, 10,159.

Rectification of deed—Misdescription of corpus in plaintiff's deeds—Action for partition—Prescription.

Where, on the institution of an action for the partition of land, a misdescription of the *corpus* and its boundaries in the deeds, upon which the plaintiff relied, was discovered,

Held, that the mistake was capable of rectification, and that for that purpose the action should be converted into one *rei vindicatio*, to which all the parties to the deeds or their representatives should be added.

Prescription begins to run against the party seeking rectification only from the date of the discovery of the mistake.

APPEAL from a judgment of the District Judge of Kalutara. The facts are fully set out in the judgment of Jayewardene A.J.

J. S. Jayewardene, for the 4th and 5th defendants, appellants.

H. V. Perera, for 6th and 7th defendants, appellants.

Drieberg K.C. (with *de Zoysa*), for plaintiff, respondent.

January 10, 1926. BRANCH C.J.—

I have had the advantage of reading the judgment of Jayewardene J., and in the very exceptional circumstances of the present case I agree that the course proposed by him should be adopted. I also agree as regards his order as to costs. There is no doubt that on the facts before us, including in these facts matters which are common ground or are not seriously disputed, the original transfer and the subsequent dealings relating to the land called Ambagahawatte or Wandurugewatte were intended to comprise lots 4 and 5. By a mistake, however, common to both parties the land was given a description, which cannot be said to include lot 5. In other words, transfers containing a very serious and important error were executed by mutual mistake of the parties and the defendants are improperly seeking to take advantage of that mistake. The error was discovered in the course of partition proceedings, and it is not in dispute that relief by way of rectification would not be barred if the period within which such relief may be claimed runs from the time when the plaintiffs became aware of the error. Treating the relevant deeds as rectified to include lot 5, the deeds in their new form will

operate from the date they were executed and the position of the plaintiffs would thus become unassailable. We have all the facts before us, and a grave injustice would be done if the Court declined to make an order, such as the one, we think, can and should be made. The contesting defendants rely on purely technical grounds, and while I have had a good deal of hesitation in arriving at the conclusion that we can so drastically reform the case as we propose to do, I am glad to think that the wide powers we possess enable this to be done.

JAYAWARDENE A.J.—

This is an action for partition. The plaintiff seeks to partition two contiguous lots, 4 and 5, of a land called Ambagahawatte *alias* Wandurugewatte. The defendants and certain added parties content that the plaintiff is not entitled to any share in lot 5, and that the partition should be restricted to lot 4, in which alone plaintiff is entitled to share on his deeds. The learned District Judge has held that the plaintiff is entitled to shares in both lots, and has directed their partition. Against this judgment and order the 4th, 5th, 6th, and 7th defendants appeal. In view, however, of an admission made by the 4th and 5th defendants at the trial, their appeal has rightly not been pressed. It is common ground that the land Ambagahawatte *alias* Wandurugewatte was by a partition deed of the year 1886 divided into 7 blocks among its owners, that lot 4 was allotted to one Suwaris Appu, lot 5 adjoining it on the south to one Don Davith Gunasekere Dissanayake, and that by a deed of the year 1879 Suwaris Appu sold his lot 4 to Don Davith the owner of lot 5, who thereupon became the owner of lots 4 and 5. Don Davith died many years ago leaving a widow and six children who became entitled—the widow to a half share and each of the children to a one-twelfth of the two lots. Three of the children, Cornelis, Carlina the 6th defendant-appellant, and Porlentina, by deeds executed in the years 1902 and 1904 sold their rights to Mr. Domingo de Silva. The other children are the 1st, the 3rd defendant (now dead), and the 4th defendant-appellant. The share of the widow was sold by her administrator and purchased in 1902 by Mr. Domingo de Silva, who in 1908 sold all the shares he was entitled to to one Anthonis Arsecularatne, whose daughter and husband in 1913 sold those rights to the first plaintiff. He transferred them in 1918 to the second plaintiff, his wife. The plaintiffs and their predecessors in title had entered into the possession of and possessed a three-fourth share of lots 4 and 5. In June, 1921, they instituted the present action for the partition of lots 4 and 5, praying that they be allotted a three-fourth share, the 1st and 2nd defendants one-twelfth and the 4th and 5th defendants one-sixth. The defendants filed answer and asked that lot 5 be

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excluded from the partition, on the ground that no rights in that lot had been conveyed to the plaintiffs. The other heirs of Don Davith and his wife, the vendors to Domingo de Silva, intervened and claimed their shares in lot 5, which they said they had not transferred, and also asked that lot 5 be excluded from that action. It would appear that in all the transfers executed after the death of Don Davith on which the plaintiffs base their title, the interest conveyed is described as the vendor's interest in lot No. 4, and the southern boundary is given as lot No. 5. So that it is clear that on the deeds, as they stand, the plaintiffs are not entitled to any share of lot No. 5, and they are not entitled to rely on prescription because at the date of the institution of the action they had not had ten years' possession, and they are unable to claim the benefit of the possession of their predecessors in title as the transfers in their favour do not convey a share of lot No. 5. The plaintiffs contend that there had been a mistake in the description of the land transferred; that the mistake was common to all the parties to the deeds; that the parties intended to deal with shares in both the lots Nos. 4 and 5; and that they are entitled to have the deeds rectified. It seems to me that the vendors did intend to convey, and the vendees intended to purchase rights in both the lots 4 and 5. The plaintiffs and their predecessors have been in possession of shares in both lots since the date of the sales in 1902 and 1903, that is, for a period of over 22 years, without claim or contest by the present disputants. All the heirs, except the 6th and 7th defendants, have admitted the justice of the plaintiffs' claim and abandoned their own in favour of the plaintiffs. Taking all the facts and circumstances into consideration, I think the plaintiffs have satisfactorily proved that a mistake has occurred in the description of the *corpus* and its boundaries. That being so, the question arises whether the deeds can be rectified in this action which is a partition action and whether the claim for rectification is barred. Mr. Perera, for the appellant, says that there are insurmountable obstacles to the plaintiffs' application for rectification being granted, even if the Court is inclined to do so. I do not think that there can be any serious objection to a deed on which the plaintiff relies being rectified in the course of a partition action, provided all the necessary parties are before the Court if a mistake is discovered after the institution of the action. It is contended that until the deed is rectified the plaintiff would have no title, and his rights would arise on the deed only after its rectification. So that the plaintiff would have had no title at the date of the institution of the action, and the action cannot be maintained. He is said to be in the same position as a *cestuique trust* who has been held is not entitled to bring a partition action until he has obtained a conveyance from the trustee (*Silva v. Silva* [1] but see *Galgamuwa v.*

[1] *(1916) 19 N. L. R. 47.*

Weerasekera [1] *and Francisco v. Marihamy* [2]). It may be that a *cestui que trust* is not entitled to bring a partition action as he has no title. His title comes into existence only on the execution of the conveyance in his favour. The conveyance has no retrospective effect. But the position of a person seeking rectification is entirely different. A deed when rectified takes effect retrospectively from the date of the execution of the rectified deed (*Malmesbury v. Malmesbury.*[3] *Craddock Bros. Hunt* [4]). *As Lord Sterdale* M. R. said in the latter case :—" After rectification the written agreement . . . . is to be read as if it has been originally drawn on its rectified from (*Johnson v. Bragge* [5]) and it is that written document, and that alone, of which specific performance is decreed." So that when a deed is rectified it would have the same force as if the mistake had not been made, and the party would be entitled to his rights, not from the date of the rectification, but from the date of the execution of the deed. Therefore, a plaintiff, when his deed is rectified, would have had title at the date of the institution of the action and would be entitled to maintain an action for partition.

As regards the question of prescription, the matter is governed by section 11 of the Prescription Ordinance, and the right to obtain rectification would be barred on the expiry of three years from the time the cause of action accrued. Mr. Perera contends that the cause of action arose on the execution of the deed containing the mistake. That may be so, but where the mistake is not discovered until some time after the execution of the deed, I think the cause of action arises on the discovery of the mistake. In this case the vendees obtained all they had bargained for, and their possession was never disturbed, and the mistake was not discovered until after the institution of this action. On the facts of this case no cause of action arose until the plaintiff's title was questioned, and the error brought to his notice. In *Beale v. Kyte*,[6] Neville J. said that it was inconceivable that time could run from the time the mistake was committed, and it must run from the time when the plaintiff's attention is first called to the error. Under the Limitation Act of India, relief on the ground of mistake is barred on the expiry of three years from the time when the mistake becomes known to the plaintiff. (See Article 96 of schedule I. of Act IX. of 1908.) The plaintiff's claim to relief is therefore not barred by limitation.

The plaintiff's difficulties do not, however, end here. The shares in dispute have devolved on them from two sources and on separate conveyances. One source is the appellant, and the other the administrator of Don Davith's widow's estate. Those parties by two deeds transferred their interests to Mr. Domingo de Silva, who transferred to Anthonis Arseculeratne, whose heir transferred to the

[1] (*1919*) *21 N. L. R. 108.*
[2] (*1923*) *2 T. L. R. 89.*
[3] (*1862*) *31 Beav. 407.*
[4] (*1923*) *2 Ch. 136.* (*151, 159*).
[5] (*1901*) *1 Ch. 28* (*37*).
[6] (*1907*) *1 Ch. 564.*

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first plaintiff. The transferees on these deeds must be parties to an action for rectification, for all the deeds would have to be rectified before the plaintiffs can succeed in their claim to lot 5. These persons or their legal representatives, I do not think, can be made parties to a partition action. I would therefore convert this action into an action *rei vindicatio* with a prayer for rectification, and direct that Mr. Domingo de Silva or his legal representative be added as parties to the action, and also that the administrator of Dona Catherina's estate be also added, if he is not *functus officio*.

If, however, the estate has been finally closed, an administrator *de bonis non* would have to be appointed and joined as a party to the action. The defendants who have admitted the title of the plaintiffs to their shares in lot 5 and the appellants will be bound by the finding of the Court that they intended to convey lots 4 and 5, and that the plaintiffs are entitled to a rectification of the deeds executed by them, and it will not be open to them to raise those questions again. I feel strongly that the justice of the case requires that some such order as this should be made in view of the special circumstances of this case. There are absolutely no merits in the appellants' claim, and unless such an order is made the plaintiffs run the risk of their relief to rectification being defeated by prescription. All the pleadings, &c., will be stamped as in an action *rei vindicatio*, for this purpose the value of a three-fourth share of lot 5 will be taken as the value of the relief sought. The plaintiffs will, in the first instance, pay all the stamps fees, including those payable by the defendants and added defendants also, if the latter fail to pay them. All the steps involved in the conversion of the action into an action *rei vindicatio* must be taken within three months of the receipt of the record in the lower Court, but the Court will grant the plaintiffs such time as it considers reasonable to join the parties whose joinder is directed by this judgment. If the steps required to be taken within three months are not so taken, lot 5 will be excluded and the action will proceed as an action for the partition of lot 4 only.

The 6th and 7th defendants are entitled to their costs, but the other appellants will bear their own costs of this appeal. All other costs, including the costs of the trial already had, will be in the discretion of the District Judge.

Judgment varied.