1976 *Present :* **Thamotheram, J., Rajaratnam, J., and Sharvananda, J.**

W. B. APPUHAMY, Appellant *and* W. M. A. GALLELLA and others, Respondents

S. C. 88/70 (Inty.)—D. C. Negombo 722/P

Deed—Description by extent inconsistent with description by boundaries —Relevance of extrinsic evidence—Maxim falsa demonstratio non nocet—Evidence Ordinance section 97.

Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietory interest.

APPEAL from a judgment of the District Court Negombo.

C. Ranganathan with *S. D. Jayatillake* for the Plaintiff-Appellant.

H. W. Jayawardena with *Rajah Dep* and Miss *S. Fernando for* the defendants-respondents.

Cur. adv. vult.

January 27, 1976. SHARVANANDA, J.—

The plaintiff seeks to partition the land called 'Higgahawatta' described in the schedule to the plaint containing in extent 40 perches. This land is depicted in Plan 1143 dated 24th March, 1966, marked X, filed of record, according to which the present extent of the land is 34.4 perches. The action was instituted on 24th November, 1965.

It was admitted by all parties that Punchi Banda Gallella was the original owner of this land. The only contest was whether Punchi Banda Gallella, on deed No. 1220 of 1959 (3D1), sold and transferred the entire corpus to the 3rd defendant, or only an extent of about 10 perches out of the corpus. The 3rd defendant's title has now been transferred by deed No. 20354 of 1965 (P7) to the 2nd defendant with the right to obtain a re-transfer being reserved to the 3rd defendant. The conflict in the claims of the plaintiff and the 1st defendant on the one hand and the 2nd and 3rd defendants on the other arises out of the different constructions placed by the parties on the said deed No. 1220 (3D1) as to the extent of the land conveyed by it. The plaintiff relies on the description by extent, while the 3rd defendant relies on the description by boundaries for his construction of what was conveyed by 3D1.

The plaintiff claims that what was transferred on 3D1 is only 10 perches (or 1/4th) out of the entire land and that the remaining 3/4th share had devolved on the three children of P. M. Punchi Banda Gallella in equal shares, each being entitled to a 1/4th share of the land. Two children of the said Punchi Banda Gallella transferred their shares by deed No. 32255 dated 14.10.64 (P2) to the plaintiff who accordingly claims an half share of the entire land, the remaining 1/4th share being allotted to the 1st defendant, who is the third child of Punchi Banda Gallella.

The 2nd and 3rd defendants claim that the entirety of the land in extent 40 perches was conveyed to the 3rd defendant on 3D1.

The District Judge has held that the deed 3D1 conveyed the entirety of the land sought to be partitioned to the 3rd defendant and consequently has dismissed the plaintiff's action. The plaintiff has appealed to this Court from the said judgment and has urged that the said deed conveyed only 10 perches representing the portion called 'Kadekella' out of the entire corpus of 40 perches to the 3rd defendant.

Thus, the decisive matter in dispute between the parties is as to what was conveyed by deed 3 D1. By the said deed, Punchi Banda Gallella, for a sum of Rs. 2,000, sold and transferred to the 3rd defendant the land and premises described in the schedule thereto. The schedule, referred to, reads as follows :—

> "All that land called Higgahawatta *alias* Kadekella containing in extent 10 perches situated at Dunagaha..... and bounded on the North by the high land of the late Marthelis Appuhamy now owned by Baron Appuhamy, East by the high land of Mrs. P. B. Gallella *alias* Baba Hamine, South by the high land of the late Carolis Appuhamy and on the West by the Dunagaha-Minuwangoda public road together with the buildings, plantations and everything thereon."

The uncertainly of what was conveyed a rises from the inconsistent descriptions of the extent. The area description covers 10 perches, while the boundary description about 40 perches.

The vendor Punchi Banda Gallella became entitled to the corpus on deed No. 20189 of 1937 (P9) which was based on deed No. 16401 of 1915 (P8). The two title deeds P8 and P9 refer to the corpus as land called 'Higgahawatta' without any alias. The encumbrance sheets P9 and P10 where all the deeds relating to this corpus are registered give the name of the land as 'Higgahawatta portion' and extent as 1 rood. It is significant that 3D1 refers to the portion conveyed by it as Higgaha-

watta alias Kadekella containing in extent 10 perches when, admittedly, Higgahawatta, to which the vendor was entitled, contained an extent of about 40 perches within its boundaries. In conveyancing, ordinarily, the extent is not given at the outset : it usually follows the description of the corpus by the boundaries or on reference to any available plan, unless the extent intended to be conveyed forms a portion of the corpus described by boundaries. The reference to 10 perches at the outset as the extent of the land tends to support the plaintiff's contention. Further, the reason for the introduction of the alias 'Kadekella' is relevant to identify the land. According to the uncontradicted evidence of the plaintiff, only the 10 perch extent of the land Higgahawatta where the boutique building No. 2 appearing in Plan X stands is called 'Kadekella' locally because of the existence of the said boutique. According to him, the 3rd defendant bought on 3D1 only that portion which was locally called 'Kadekella'. This explanation of Kadekella has not been disputed by the 3rd defendant. It serves as a guide to the identification of the boutique portion as the parcel intended to be conveyed by 3D1. Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. "In order, however, to identify the parcels in a conveyance, resort can always be had to extrinsic evidence."—per Lord Parker in *Eastwood v. Ashton* (1915 A. C. 900 at 909).

The plaintiff submits further that the subsequent conduct of the 3rd defendant in relation to the land conveyed by 3D1 serves to show the sense in which the language of 3D1 was used. He states that the evidence touching the act and conduct of the 3rd defendant, the transferee on 3D1, is admissible to identify the property referred to in the schedule to 3D1. Generally, the subsequent actings of the parties to a contract cannot be used as throwing light on its meaning. "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify *words which are plain and unambiguous.*"—per Lord Halsbury in *North Eastern Rail Co. v. Hastings* (Lords) (1900 A. C. 260 at 263). The general rule is that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made, unless it is to found an estoppel or subsequent agreement. The House of Lords has, in two recent cases, viz. *James Miller and Partners Ltd. v. Whitworth Street Estates Ltd.* (1970—1 A. E. R. 796) and *Schuler A. G. v. Wickman Ltd.* (1973—2 A. E. R. 39) emphasized that, in construing a contract, the Court is not

entitled to take into account the conduct of the parties subsequent to the execution of the contract as throwing light on the meaning to be given to it. This rule is however limited in its operation to cases where the contract is capable of only one proper meaning when interpreted in accordance with the ordinary rules of construction. Parol evidence is not in that event admissible either to contradict, vary, add to or subtract from the terms of a written agreement the plain or unequivocal language of a document. The construction cannot be controlled by previous negotiations, nor by subsequent declarations or conduct of the parties. But, when the words used in the agreement or instrument are ambiguous or capable of two meanings in identifying parties or property, then it is, and always has been, permissible to look at the way in which it was used for such identification. It is open to the Court, in that event, to look at the way in which the party himself who relies on it interpreted it. For the purpose of applying the instrument to the facts and determining what passes by it and who takes an interest under it when the instrument contains inconsistent terms or descriptions relating to the identity of parties or property, every material fact that will enable the Court to identify the person or thing mentioned in the instrument and to place the Court whose province is to declare the meaning of the words of the instrument as near as may be in the situation of the parties to it will be relevant to resolve the ambiguity or equivocation relating to the party or subject matter referred to in the instrument. Thus, in deciding the scope of an ambiguous title to land, it is proper to have regard to subsequent actings of each of the parties, especially when such acting amounts to admission against the party's proprietory interest. The House of Lords, has however, in the two cases referred to above, held that such evidence is not admissible for the construction of the terms of a contract, even though there be ambiguity about them. It reiterated that the parties' intention must be ascertained, on legal principles of construction, from the words they have used.

In *Watchman v. East Africa Protectorate* (1919 A. C. 533), the question arose as to whether the extent of the property conveyed or assured by the certificate issued to the defendant by the Government was to be fixed by the description of its area, or by the description of the boundaries. The area included within the boundaries, mentioned in the certificates was 160 acres in extent, while the land was described by area to be containing 66¾ acres in extent only. The defendant had always treated the latter as the true area conveyed. A patent ambiguity appeared on the face of the document and the Court was invited to take account of subsequent conduct

to determine which of two present but inconsistent descriptions of the subject matter was to be preferred. It was held by the Privy Council that the evidence of user may be given in order to ascertain the sense in which the parties construed the language employed and that this rule applies to both modern and ancient documents and whether the ambiguity be patent or latent. *Watchman v. Attorney-General of East Africa* (1919 A. C. 533) was distinguished in *Schuler v. Wickman Ltd.* (1973—2 A. E. R. 39) by the House of Lords. It is consistent with the provisions of section 97 of our Evidence Ordinance. Monir, in his Law of Evidence (4th Ed.) Vol. I at page 594, when commenting on section 97 of the Evidence Ordinance, quctes with approval the case of *Banaphal Singh v. Mohammed* (155 I. C. 634) (this report is not available to me) for the proposition that where the boundaries given in a deed show that the whole grove was sold, but the description of the grove given by the number and area indicates that only a part of the grove was sold, other evidence is admissible to establish the identity of the land sold. Since the report is not available, one does not know whether the other evidence related to surrounding circumstances or to subsequent user. In the case of *Ratranhamy v. Singho* (30 N. L. R. 197), the disputed land which formed the subject of a transfer was described as lying within stated boundaries and as comprising certain lots in a preliminary plan. The question was there raised whether a lot which was outside the boundaries but within the plan was included in the transfer. It was held that the case fell within the principle of section 97 of the Evidence Ordinance and the evidence given as to occupation pursuant to such transfer was regarded as conclusive as to what was the proper construction to be placed on the document of transfer. Fisher C. J. stated there that "the action of the transferee in not taking possession of the lots in question indicates that the deed must be construed according to the boundaries and not according to the plan".

The 3rd defendant, on deed No. 41188 of 1959 (P3), transferred the premises which he got on 3D1 to Seemon Appuhahamy subject to a condition of re-transfer within a period of 5 years. By deed No. 17755 of 1962 (P4), the 3rd defendant obtained a re-transfer of the very premises with a new schedule containing an unequivocal description thereof. The schedule is revealing. It reads as follows:—

> "All that divided portion of land called Higgahawatta alias Kadekella registered in E. 432/34 being a portion from and out of Higgahawattekotasa in extent about 1 rood registered in E. 257/299 situated at Dunagaha.....and which said divided portion is bounded on the North by the highland of Baron Appuhamy, East by land of Mrs. P. B.

Gallella alias Baba Hamine, South by highland of late Carolis Appuhamy, West by the High Road to and from Dunagaha to Minuwangoda containing in extent about 10 perches with the soil, plantations and buildings thereon."

Then, by deed No. 17756 of 1962 (P5), the 3rd defendant, on the very same day, transferred the premises, as newly described in P4, to Podihamine, subject to the right to re-transfer within 3 years. Podihamine, on deed No. 20353 of 1965 (P6), transferred back the premises to the 3rd defendant. Then, by deed No. 20354 of 1965 (P7), the 3rd defendant transferred his interests to the 2nd defendant, subject to the right to obtain a re-transfer within 3 years. The new description of the premises which the 3rd defendant acquired on 3D1, as set out in P4, P5, P6, and P7, resolves all ambiguities. It necessarily involves and embodies an admission by the 3rd defendant against his proprietory interest to the effect that what was intended to be conveyed to him on 3D1 was a portion of 10 perches only and not the entire corpus falling within the four boundaries set out in 3D1. Though the 3rd defendant was a party to all these deeds, he did not get into the witness box to offer any other explanation for the clarification of what he acquired on 3D1.

The instrument 3D1 is registered in E. 432/34 (P11) which is a new folio opened on 18th May, 1959, without any cross-reference. The name of the land was given as Higgahawatta alias Kadekella and the extent as 10 perches, though the boundary description was that of the entire corpus of one rood. The subsequent instruments P3, P4, P5, P6 and P7 are all entered in that folio P11. On 5th October, 1962, a cross-reference was entered on P11 with the endorsement "instruments relating to the property of which this property is a portion are registered in E. 257/299" (P10) where the instruments relating to the larger corpus of 1 rood are registered. A cross-reference was also made on 5th October, 1962, in P10 that "instruments relating to a portion of this property are registered in E.432/34" (P11). The schedule of the deed No. 17755 dated 19th September, 1962, (P4), the re-conveyance in favour of the 3rd defendant, clarifies the position when it describes the land conveyed as "all that divided portion of land called Higgahawatta alias Kadekella registered in E.432/34 (P11) being a portion from and out of Higgahawatta also in extent about 1 rood registered in E.257/299 (P10)". This clarification and correction serve to eliminate the doubt engendered by the inconsistent descriptions in 3D1 of the parcel conveyed thereby.

"Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description." — *Mellor v. Walmesley* (1905—2 Ch. 164). "Where, in a grant, the description of the parcels is made up of more than one part, and one part is true and the other false, then, if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a falsa demonstratio and will not vitiate the grant. It is immaterial in what part of the description the falsa demonstratio occurs."—*Cowen v. Truefitt* (1899—2 Ch. 309). "The maxim of 'falsa demonstratio non nocet' applies only when the Court has made up its mind as to which of two or more conflicting descriptions ought, under the circumstances, to be considered the true description. When this is done, the false description may, of course, be disregarded."—*Eastwood v. Ashton* (1915—A.C. 900). The specific reference to Kadekella and the evidence of subsequent user of the parcel that was intended to pass on 3D1 by the transferee serve to identify with certainty the property which was intended to pass by 3D1. The specification of the area as 10 perches must be considered as a material term of the description of the property. The general description of the boundaries does not enlarge the effect of the prior description by area, viz., "containing in extent 10 perches". The description by boundary in 3D1 must, in the circumstances, be rejected.

Mr. Jayawardena, Counsel for the 3rd defendant-respondent, relied on the case of *Jack v. M'Intyre* (1845—8 E.R. 1356) which was a decision of the House of Lords in support of his contention that the reference to the extent of 10 perches in 3D1 is a case of falsa demonstratio. He submitted that the statement as to extent must be regarded as a misdescription, when the corpus, according to the boundaries, can be fixed. He referred to the passage in the judgment of Romer J. in *Cowen v. Truefitt Ltd.* (1898—2 Ch. 551 at 551) where he stated that "in construing a deed purporting to assure a property if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars will have no effect". This statement of Romer J. was quoted with approval by Lord Sumner in (1915) A.C. 900 at 914. As Lord Parker observed in *Eastwood v. Ashton* (1915 A.C. at 912), there is no general rule as to which of two inconsistent descriptions is to prevail and the doctrine of falsa demonstratio is useless unless and until the Court has made up its mind as to which of the two or more conflicting

descriptions ought, under the proved circumstances of the case, to be considered to be the true description. There is no a priori assumption that either or any of the descriptions is false. Words which form an essential part of the description should however never be rejected.

The facts in *Jack v. M'Intyre* (8 E.R. 1356) were as follows: By lease made in 1719, the lessor demised for three lives renewable for ever all that part of the townland of B. containing 509 acres arable, meadow and pasture bounded on the south by D1, on the north and east with L. N. and on the west with T's and W's land. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises. It was held by the Lords that 400 acres of bog and land reclaimed from bog which were situated within the ambit of the specified boundaries passed under the lease and renewals thereof, in addition to the 509 acres arable, meadow and pasture. As the Lord Chancellor said: "There was no inconsistency whatever between the different parts of the description. It was a demise of all the part of the lessor's lands bounded in a particular way. The boundaries were minutely and correctly described. All the lands, therefore, contained within those boundaries would pass unless there was some inconsistency between that description and the other part of the instrument". It was explained in the several judgments that the omission to refer to the 400 acres of bog was because at that period it was considered property of little or no value. Further, it was a matter of common notoriety in Ireland and a matter of conveyancing practice there "to allow the bog to pass with the profitable land described in the instrument as arable, meadow and pasture. It passed by the law of forfeiture in all the grants of the forfeited estates, and that law was in full force at the time of the lease being executed". Lord Campbell very relevantly draws attention to the fact of possession of the bog by the lessee and those under whom he claimed, since the year 1719, for over a hundred years. The evidence of subsequent possession or non-possession of the disputed portion by the parties was considered a relevant circumstance to determine what were the premises that were intended to be leased on the lease. This case is no authority for the proposition that area description should, as a matter of law, yield to boundary description.

Another circumstance which clinches the construction in favour of the plaintiff is that the originals of the title deeds to 3D1, i.e. deeds No. 16401 of 1915 (P8) and No. 20189 of 1937 (P9) were not produced by the 3rd defendant, the transferee on 3DI, but came from the custody of the plaintiff, who apparently got them from the heirs of the vendor Punchi

Banda Gallella. If the 3rd defendant has purchased the entire corpus lying within the boundaries as described in the schedule to 3D1, he would have got the original title deeds P8 and P9 into his hands from the vendor. But, since only a portion of the corpus was being purchased by the 3rd defendant, the vendor had retained the original title deeds for proof of his title to the balance portion which was not disposed of by 3D1. In the result, I hold that what was conveyed on 3D1 was only that portion of land called Kadekella in extent 10 perches and that the balance portion of the land sought to be partitioned devolves on the plaintifl and the 1st defendant as pleaded by the plaintiff.

As Gratiaen J. stated in *Ponna v. Muthuwa* (52 N.L.R. 59 at 61), "where the words of description contained in the grant are sufficiently clear with reference to extent, locality and other relevant matters to permit of an exact demarcation of all the boundaries of what has been conveyed, then the grant is of a defined allotment. If, however, the language is insufficient to permit of such a demarcation, the grant must be interpreted as conveying only an undivided share in the larger land." The deed 3D1 suffers from lack of precision or sufficient particularity in respect of metes and bounds and hence it has to be held that the 3rd defendant became entitled on 3D1 to an undivided extent of about 10 perches covering only Kadekella out of the entire corpus. In the circumstances, it is competent for the plaintiff to have and maintain this action to partition the entire corpus depicted in plan X, including the Kadekella portion. But, of course, in the partition decree, the 2nd and/or 3rd defendant will be allotted, as far as practicable, the Kadekella portion containing in extent about 10 perches.

In the result, the appeal is allowed and the judgment of the Court below is set aside. Let an interlocutory decree be entered for partition of the corpus depicted in plan X declaring the 2nd defendant entitled to the Kadekella portion, in extent of about 10 perches, out of the corpus, subject to the 3rd defendant's right to a re-transfer of the said portion in terms of his deed No. 2038 and declaring the plaintiff and the 1st defendant entitled to the balance portion in the proportion of 2 to 1 shares.

The plaintiff-appellant is entitled to costs of this appeal and of the trial in the lower Court payable by the 2nd and 3rd defendants-respondents.

THAMOTHERAM, J.—I agree.

RAJARATNAM, J.—I agree.

Appeal allowed.