1932 *Present:* **Macdonell C.J. and Lyall Grant J.**

JANDIRIS *et al. v.* DEVE RENTA *et al.*

47—D. C. Galle, 26,265.

Evidence—Document admitted in appeal—Exhibit taken from record—Courts Ordinance, s. 40.

Where it is sought to produce in appeal a document which has been discovered as an exhibit in the record of a previous action, referred to in the course of the proceedings,—

Held, that the document may be admitted under section 40 of the Courts Ordinance.

APPEAL from a judgment of the District Judge of Galle.

Rajapakse, for plaintiffs, appellants.

N. E. Weerasooria (with him *Wikramanayake*), for defendants, respondents.

February 9, 1932. MACDONELL C.J.—

This is a partition action of a rather complicated character, and the Court should be much indebted to the care with which Mr. Rajapakse for the appellant elucidated the story, but now that it has been fully argued on both sides the number of points in dispute has been narrowed down to three in number.

The case of the first and second plaintiffs is that one Hendayaman Mendiris was the owner of one-half of the land to be partitioned and they seek to establish this by the following evidence. They say that the

original owner of the whole land was one Franciscu de Silva, possibly by virtue of a not produced deed of 1839. He died leaving a widow, Edirimuni Sanohamy, and an only child, a son, Sadris de Silva; by inheritance they would be entitled to one-half each and there is sufficient evidence that these rights did come to them by inheritance. This Edirimuni and Sadris, respectively widow and son of the deceased original owner Franciscu, granted to Mendiris, under whom the plaintiffs claim, a planting agreement on deed No. 6,001 of October 8, 1841, P 3. There was considerable argument before us as to the meaning of this document and a special translation had to be made during the course of the appeal for the use of the Court, but the document is certainly capable of meaning that Mendiris acquired under it some rights to the soil, as well as planting rights. The plaintiffs in their case put their rights to the soil under P 3 at one-twelfth, but the deed itself is silent as to the extent of the rights to the soil, if any, which Mendiris acquired under it; the question will be referred to again later. Seven years later on August 28, 1848, the same Edirimuni, widow of Franciscu the original owner, and one Hakkini Balohamy, widow of Sadris the before-mentioned only child of that Franciscu, joined in a usufructuary mortgage No. 4,700, 30 D 3, of all their interest, which would be three-fourths of the whole land, in favour of one Thenga, and on October 19, 1848, that is in the same year, *i.e.*, about seven weeks later, the same Edirimuni, widow of Franciscu, conveyed in full *dominium* to the same Thenga by deed No. 2,898, marked X, the whole of the interest in the soil which she had inherited from her husband Franciscu; this interest would be one-half. Thus Thenga, usufructuary mortgagee of three-fourths, became also full owner of a one-half. On February 1, 1855, the same Thenga by deed No. 265, P 1, conveyed to Mendiris one-fourth of the soil.

This deed No. 2,898 of October 19, 1848, X, was not produced at the trial and its absence led the learned trial Judge to raise the relevant question, how could Thenga, only a usufructuary mortgagee in 1848, convey a *dominium* in 1855 on P 1, and as the plaintiffs did produce as part of their evidence the pleadings in case D. C. Galle No. 23,317, P 17, filed April 20, 1865, and brought by Mendiris in connection with this land, the replication in which does refer to an exhibit as establishing Mendiris' right to one-fourth of the land, it was an omission on their part not to search for and produce that exhibit, which if they had searched for, they would have found to be this deed No. 2,898, X. On the other hand the usufructuary mortgage of 1848, 30 D 3, was not on the defendant's list of documents and only became known to the plaintiffs by being produced by thirtieth defendant when giving evidence. After judgment in the present case and appeal lodged, plaintiffs searched the record of D. C. Galle, No. 23,317, P 17, yet again, discovered the exhibit therein document No. 2,898, X, and applied for leave to produce it. The Registrar-General states that the original in his records is tattered and illegible. We decided to admit the document X under the power given by Ordinance No. 1 of 1889, section 40. Certainly this power must be exercised with every caution, partly because the Supreme Court is not in civil matters a Court of trial but of appeal and

review, and chiefly perhaps because of the danger that evidence not produced below but sought to be produced to it for the first time, will be manufactured for the occasion. This is a very real danger which was fully before us in considering the application to admit X, but we considered that in the present case the danger was reduced to a minimum. For one thing, the evidence was documentary and not oral, and for another, the document sought to be put in did not come from the custody of the plaintiffs or from anyone connected with them but from the custody of a Court of record and from among the records of that Court. This document X establishes that Thenga had the right to convey to Mendiris in 1855 one-fourth of the land on P 1.

The next material event was that in 1858 by deed No. 812, 30 D 1, Sadris's widow Hakkini Balohamy aforementioned and his three children joined in selling one-half to one Dines who later on in 1865 by deed No. 2,048, P. 13, 30 D 2, sold this one-half to one Jangiri and to one Nandoris, *semble* for an undivided one-fourth each; Nandoris, it may be mentioned, was a son of Mendiris. These two purchasers on P 13 afterwards partitioned the land by action D. C. Galle, No. 25,437. This partition action necessitated the usual surveyor's plan and report, P 14, of date March 6, 1874, and in his report the surveyor specifies the persons then in possession as being Mendiris, his son Nandoris, and one Ama who was Mendiris' son-in-law, for three-fourths of the land, and Jangiris for the remaining one-fourth. This shows that Mendiris was in possession at the date of that partition action, 1874, but it does not specify what fractional rights to the soil he claimed to be possessed of.

On January 17, 1877, Mendiris obtained by Fiscal's transfer of that date, P 2, 30 D 4, a conveyance to him of two-twelfths of this land which two-twelfths had on August 9, 1871, been sold in execution against its owner Andris de Silva and purchased by Mendiris. This Andris de Silva was one of the defendants in the case of April, 1865, D. C. Galle, No. 23,317, the pleadings in which are exhibit P 17 as has been said. It was an action by Mendiris claiming to be quieted in his possession of one-half of certain planting rights. The defendants in their answer admitted his title to one-fourth of the soil but only admitted his title to one-fourth of the planting rights instead of to the one-half which he claimed. Why was Andris de Silva made a defendant in that case? Obviously because he claimed rights in the land in question. The result of the case is not known but it must have been unfavourable to Andris de Silva since the Fiscal's conveyance 30 D 4 bears No. 23,317, the very number of the action brought by Mendiris in April, 1865. It was argued for the respondent that 30 D 4 proved nothing in the absence of further evidence that Andris did own the two-twelfths sold. This being a partition action a party, in this case the plaintiff, must prove his title but the proof required of him must be reasonable having regard to dates and circumstances. The party produces a conveyance to his predecessors in title of two-twelfths on a Fiscal's transfer over 50 years old, there being nothing oral or written to suggest that the two-twelfths did not pass to him on it. It was argued that this was not evidence which in a partition action a Court should hold to be sufficient proof that the two-twelfths duly passed, but no authority was cited for this argument.

These then are the documents, P 1 and P 2 or 30 D 4, on which plaintiffs seek to show that Mendiris owned five-twelfths of the soil out of the six-twelfths or one-half which they claim for him in their plaint. To my thinking the proof they furnish is ample, and nothing, documentary or oral, has been produced to contradict them. The only difficulty is the remaining one-twelfth, the claim to which is based on P 3, the planting agreement. Now the translation made for this Court is capable of meaning that Mendiris got by it some rights to the soil. But it is significant that Mendiris in his replication in the case of 1865, D. C. Galle, No. 23,317 P 17, accepts the defendants' admission that he owns one fourth of the soil—he had acquired this fraction on P 1 in 1855—but does not claim that he is entitled to anything more than one-fourth of the soil. (The two-twelfths he could not mention, since they only came to him in 1877, twelve years later.) Yet if he had obtained any fraction of the soil by the planting agreement P 3, one would have expected him to say so in that replication. His explicit assertion of right to one-fourth is very like an admission that he does not assert right to anything more. Nor does the surveyor's report of March 6, 1874, in the partition action D. C. Galle, No. 25,437, help to establish such a right in Mendiris. That report states that three-fourths of the soil belonged to Mendiris and Nandoris, his son, and Ama, his son-in-law, by purchase, but does not say in what proportions. Nandoris had acquired a one-fourth on P 13 and Mendiris another one-fourth on P 1, and it is quite possible that Ama's share accounted for the other one-fourth. The evidence comes to this; no document is produced specifically stating that Mendiris got one-twelfth on the planting agreement P 3 or at any other time, and there is one document, the replication in P 17, which by its silence suggests that he did not then, in 1865, own that one-twelfth. But there is no evidence to show that he obtained a one-twelfth at any time subsequent to 1865. If so, the plaintiffs' claim that Mendiris was entitled to this one-twelfth, additional to the five-twelfths which they have proved that he was entitled to, must fail.

With the plaintiffs the thirteenth defendant also appeals. He establishes certain rights to share in the land on deeds P 8, P 9, P 10, all duly registered, and his claim was not contested on appeal. The judgment appealed from says " the claim of forty-first defendant is defeated by the registration of P 8, and P 9, and was not pressed at the trial ", yet in his preliminary decree the learned District Judge omits the thirteenth defendant altogether. The appeal of the thirteenth defendant must therefore be allowed also.

With regard to the costs of this appeal: in the Court below the sufficiency of P 1 to convey a one-fourth to Mendiris was contested, and the judgment appealed from holds that P 1 was not valid to convey the one-fourth it purported to convey. The plaintiffs then had to come to this Court to get the decision now made in their favour that P 1 was valid to convey a one-fourth. During the course of the appeal but not at once, the respondents' Counsel did admit that P 1 was valid to convey the one-fourth but he contested strongly the validity of P 2, 30 D 4, to convey the two-twelfths. In whatever way one looks at the case, it seems to me that the plaintiffs had to make appeal to this

Court to get the rights to which they are now declared to be entitled. If so, there seems no reason to deprive them of the costs in appeal where substantially they have succeeded.

Before dismissing this matter it is necessary to say a word or two with regard to the judgment in this case. One is grateful to the learned District Judge for the valuable summaries which he has made of the evidence of the first plaintiff and of the thirtieth defendant, the two chief witnesses called, but the judgment itself in a very complicated case only runs to 14 lines. That judgment does not make it really plain what fraction of the land learned District Judge thinks Mendiris was entitled to and, as I have pointed out, it omits altogether to deal with the case of thirteenth defendant. With all respect this does not seem to me to give to the parties involved, to say nothing of the Court of Appeal before which the case may ultimately come, the consideration to which they are entitled in so difficult a matter as the present case.

The order in this case must be as follows:—Appeal allowed with costs. The case is to go back to the learned District Judge with the declaration that Mendiris was entitled to a five-twelfths share of the land and not to any less fraction, also with the declaration that the thirteenth defendant is entitled to share as claimed by him; likewise an order that the learned District Judge do allot shares on such basis.

LYALL GRANT J.—I agree.

Appeal allowed.