1944 *Present:* **Howard C.J. and de Kretser J.**

PERERA, Appellant, and ATTALE, Respondent.

221—D. C. Colombo, 2,392.

Partition—Action dismissed—Land possessed dividedly—Sale pending action—Adverse possession—Interruption and subsequent restoration—Partition Ordinance, s. 17.

Where an action was instituted for the partition of a land and was dismissed on the ground that the land was possessed dividedly and not in common,—

Held, that the sale of an "undivided" share by one of the owners pending the action was not obnoxious to section 17 of the Partition Ordinance.

Defendant was ousted by plaintiff in November, 1940, of a land when he could claim a little over nine years' possession. He brought a possessory action against the plaintiff and decree was entered in February, 1942, declaring him entitled to the possession of the land.

Held, that defendant's possession was interrupted by the ouster and the decree in the possessory action did not give him *de jure* possession of the land from the date of ouster.

APPEAL from a judgment of the District Judge of Colombo. The facts are stated by the District Judge as follows:—It is common ground that Liyanage *alias* Pathirage Cornelia Perera was the original owner of the land which is the subject-matter of this action. In 1928 Case No. 24,427 of this Court was instituted for the partition of the entire *corpus* shown in the plan. By deed No. 841 dated July 20, 1931, Cornelia Perera transferred her interests to one Alice Perera. Those interests are described in the deed as an undivided ½ of 3/5 of the whole land. Alice Perera by deed No. 440 dated April 5, 1933, conveyed those interests to one Lawrence Perera, who in turn by deed No. 952 dated August 9, 1940, conveyed them to the defendant in this case. Cornelia Perera was the seventh defendant in the partition case. The present defendant intervened and was made seventy-ninth defendant. The action was dismissed on the ground that the land was held dividedly and not in common.

By deed No. 740 of February 27, 1938, shortly after the dismissal of the partition action, Cornelia Perera purported to convey her interests to

one Dharmadasa who, by deed No. 115 dated November 5, 1941, conveyed them to the plaintiff. In these deeds the description given is " an undivided ½ of 3/5, now a defined portion ".

L. A. Rajapakse (with him *K. Herat*), for plaintiff, appellant.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for defendant, respondent.

Cur. adv. vult.

March 22, 1944. DE KRETSER J.—

There are three questions for decision in this case—

(1) Was the sale to Alice Perera void by reason of section 17 of the Partition Ordinance?
(2) If valid, did it convey more than three-tenths of lot K, the subject matter of this action?
(3) Has defendant acquired a title by prescriptive possession?

Of these the second presents no difficulties. Mr. Perera admitted he could not support the learned trial Judge's view that the *maxim falsa demonstratio non nocet* applied and further that decisions of this Court were against him. If valid, the deed purporting to convey three-tenths of the larger *corpus* would operate to the extent of conveying only three-tenths of lot K.

In my opinion the first question must be answered in the negative. Section 17 renders void only the alienation of shares of a land which is properly the subject of a partition action, *i.e.*, land belonging in common and nut land alleged to belong in common. The words " as aforesaid " refer so back to section 2, and section 2 only contemplates an action to partition land really belonging in common to two or more persons. The sale prohibited is one of an undivided share in such a land. To hold otherwise might work manifest injustice. A person owning the entirety of a land might well be ignorant that third parties had instituted an action to partition his land on a false allegation that they owned it. He would no doubt be affected by a partition decree if they did obtain one and might intervene to protect his rights but that would not alter the fact that the whole land was his and it would be manifestly unjust to prevent him from dealing with what was his merely because third parties had brought a partition action.

In *Jango Appu v. Somawathi*[1] this Court dealt with this question, and Pereira J. said that section 17 did not apply where the alienation was not of a share but of the entire *corpus*. He added the words " any of the owners " clearly imply that the case contemplated is a case of property owned by several owners, and hence the word " interest " can only mean some interest short of absolute ownership of the entirety of the property. de Sampayo J. agreed on the same lines.

The present is a case of many separate lands being included in a partition action and the action was dismissed on the ground that the land was not held in common. Each owner of each lot was not therefore affected by the abortive partition action and was free to dispose of his land as he chose. As Wood-Renton J. remarked in *Abeysekera v. Silva*[2]

[1] *2 C. A. C. 166.*

[2] *1 C. A. C. 37.*

"undivided" in section 17 means undivided in the eyes of the law. Here the larger land had long ceased to be undivided in the eyes of the law.

The third question seemed to present more difficulty but on consideration it seems to me that the difficulties were more seeming than real. Defendant was ousted by plaintiff in November, 1940, when he could claim a little over nine years' possession. He brought a possessory action against the present plaintiff and decree was entered in his favour in February, 1942, decreeing him entitled to possession of the land. Mr. Perera contended that whilst from November, 1940, plaintiff was in *de facto* occupation the effect of the decree was to give the defendant *de jure* possession from that day and so he had had possession for over the prescriptive possession. Apart from the fact that there is no evidence as to the date when the possessory action was brought, the decree did not declare defendant entitled to possession from the date of the ouster or from the date of the action but from the date of the decree. There was thus no foundation for one part of the argument. Mr. Perera asked in whom possession was during the action and answered it himself at one time by saying it was in the Court, through its agent the plaintiff. If that view be correct, and think it is, then it was in neither the plaintiff nor the defendant and the defendant remained where he was with regard to prescriptive possession.

Assuming that the effect of the decree was to declare that the defendant had been unlawfully ousted, he argued that the Court had therefore held that defendant was the person entitled to possession and both plaintiff and defendant could not be in legal possession at one time. The answer is that Court declared him entitled to be restored to possession and that plaintiff was in occupation *ut dominus*, *i.e.*, his possession was legal possession, such a possession as section 3 of the Prescriptive Ordinance contemplates. What he had done was to take possession in a manner which the law did not favour and so defendant was restored to possession, but in the interval there can be no doubt that the plaintiff was in possession and that defendant's possession had been interrupted. Had the Court awarded damages the position would not be different for the Court would only be making the plaintiff pay for his wrongful act, but making him pay on the footing that he had been in possession.

The case of an action *rei vindicatio* stands on a different footing and the case of *Wimalasekera v. Dingiri Mahatmeya*[1] is perhaps against the defendant. All that case decided was that a decree declaring A, the plaintiff, entitled to a land decides the rights of parties as at that date and necessarily wipes out all accumulations in B, the defendant's favour. Had the present defendant brought an action *rei vindicatio* and succeeded, of course plaintiff's possession for two years would have been wiped out but that does not mean that the defendant had possession during the pendency of the action. If Mr. Perera's contention be correct, suppose A, the plaintiff, after nine years' possession, brought an action *rei vindicatio* which lasted two years and supposing B had taken forcible possession, A would be entitled to be restored in a possessory action and might, when his title failed, urge that as he was entitled to be restored to possession

[1] *39 N. L. R. 25.*

he was therefore in *de jure* possession and so he had acquired a prescriptive title. Such a plea has never been urged and would not succeed, if urged. Mr. Perera would say that was because the parties' rights are decided as at the date of action filed. Quite so. A might have got damages for B's possession *pendente lite* but A's rights by possession would be decided as at the date of action. Can it be urged that A's rights are enlarged if he brings a possessory action, which decides, not that he is entitled to possession because he is the owner but only that he was wrongfully ousted and must be restored? The argument that the man who seeks constitutional redress must be protected is met with the answer that if he chose a particular form of redress he must take that redress and no more. In this case there was nothing to prevent defendant from bringing an action *rei vindicatio* and then the rights of parties would be decided as at the date of action. He chose to get back into possession and have the advantage of being the defendant, if plaintiff sought to vindicate title, or of remaining in possession, if he did not. It must be remembered that the plaintiff was entitled to look after his own rights and if he found the defendant prescribing against him he was entitled to interrupt that possession, and what he did in this case was to slip into possession with the aid of a recalcitrant tenant of the defendant. There was nothing wrong in his doing so.

Van Leeuwen in his commentaries (*bk. II., chap. 8, s. 3*) where he deals with prescription says that if a person who is ousted regains possession without delay his possession is not considered to have been interrupted.

A few days were allowed him to make ready and to gather his friends or weapons or otherwise exert his zeal to assist him in protecting his possession. It would seem to follow that a greater delay meant that his possession was interrupted and then his remedies were a possessory action or an action *rei vindicatio*. We have been referred to no authority, and I know of none, which says that success in a possessory action meant that he was considered to have continuous possession, and in fact the reasoning would appear to be to the contrary. The Dutch law seems to have recognized that a person could not only retain possession but regain it *vi et armis*. We are not concerned with the criminal aspect of the matter but with the effect of the interruption on possession. If the person ousted regained possession in a few days his possession would be continuous and not otherwise. The interrupter may be punished criminally and he may be condemned in damages for the wrong, but the interruption would remain. Note also that it is only when a man regains possession that his possession is continuous. In the case before us, the defendant did not regain possession. His possession was not merely interrupted but finally broken or stopped. It is interesting to note that *Van Leeuwen* (*bk V., chap. 12, s. 3*) says a possessory action relates only to provisional possession and failure does not mean loss of the right to possession but the losing party may bring a full action. This passage supports the view that a possessory action does not decide rights of possession but only restores the person wrongfully ousted, and so *de jure* possession cannot in this case be said to have been decreed to the defendant but only *de facto* possession.

There is nothing which I can see which compels us to take the simple facts of the case in any but their natural meaning and that means that the defendant did not acquire title by prescriptive possession.

Accordingly, the plaintiff must be declared entitled to seven-tenths of the land. Rs. 15 a month for the whole land was agreed upon as damages. Plaintiff has remained in possession throughout. Defendant, on his claim in reconvention. will be declared entitled to three-tenths and will get three-tenths of Rs. 15 or Rs. 4.50 a month from November, 1940, till he is given possession, with legal interest on the amount due up to this date. Plaintiff will get half costs in the Court below and in this Court.

HOWARD C.J.—I agree.

Judgment varied.