

1938

*Present : Koch and Soertsz JJ.*LUCYHAMY *v.* PERERA *et al.*

35—D. C. Colombo, 696.

*Conveyance—Title to undivided eastern half share—Land divided—
Misdescription—Effect of deed.*

Where a land was amicably divided into an eastern and western half and possessed as such and the eastern half share was wrongly described as undivided in a conveyance,—

Held, that the conveyance passed title to the portion possessed as the eastern half share as a distinct *corpus*.

Fernando v. Podi Singho (6 Ceylon Law Rec. 75) and *Senanayake v. Selestina Hamine* (23 N. L. R. 481) distinguished.

A PPEAL from a judgment of the District Judge of Colombo.

L. A. Rajapakse, for third defendant, appellant.

H. V. Perera, K.C. (with him N. E. Weerasooria), for plaintiff, respondent.

Cur. adv. vult.

¹ L. R. (1906) 1 Ch. D. 25.

April 25, 1938. KOCH J.—

I think that the learned District Judge has come to a right conclusion in holding that neither the appellant nor her brother, Neris, had ever possessed any part of the western half of Delgahawatta, over and above that portion of it which was planted in rubber. To begin with, the way the appellant set about describing her right to anything more rather disproves her possession of any land beyond the section planted with rubber. If she and her brother possessed a strip to the east of the rubber, that strip should have been identified and claimed; instead she claims 1 rood and 26½ perches which is made up of the difference between the extent of the rubber and the extent of half of Delgahawatta. It is true that in 1925 she and her brother in leasing the rubber portion described this as standing on a 5/12 share of the western half, but this does not mean that the lessors were in possession of the remaining 1/12 share.

The evidence which has been accepted by the District Judge is that both as the result of their father's wishes and as the portion planted with rubber was more valuable than the rest of the land, the appellant and her brother were quite satisfied to take the rubber for their undivided western half and to possess accordingly. The division took place in 1924, and it may be that the lessors were foolish enough to lease the rubber for not too good a value in order to obtain some ready money in advance, but, however this may be, the appellant and her brother would find it almost impossible to escape the effects of documents of a solemn and binding nature to which they were parties. Brother and sister apparently wanted to bring about a division of the rights they held in common in the western portion, and went to the expense of getting a survey made in 1928. It is not likely that in doing so they would have advisedly allowed a portion of more rights to remain undivided and scattered by having the survey confined to the rubber section; but, assuming they did so, the eastern boundary in the plan P 11 (b) would undoubtedly have been given as Delgahawatta belonging to Neris and Lucy and not as belonging to Sedris and Sederis (Abilinu). As though this were not sufficient between brother and sister, the two went to the further expense of entering into a partition deed in 1930. If there was any error in the plan, this could have been rectified in the deed, but, on the contrary, the recital in the deed is in the clearest language to the effect that the rubber surveyed and defined in the plans P 11 (a) and P 11 (b) occupied the undivided western half part or share of the land they were entitled to. I omitted to state that another boundary on the east of the land depicted in plan P 11 (b) is given as a road reservation 8 feet broad. This is shown on plan P 16, the plan made for the purpose of this case, as bringing in the portion south of it as part and parcel of the corpus sought to be partitioned between the plaintiff and the first and second defendants.

On reference to P 10, the deed of conveyance, in favour of Sedris and Abilinu, of the undivided eastern half, it will be seen that a right of cart way over what is described as the eastern half is reserved to the owners of the western half.

The District Judge, in weighing the oral evidence, has fully appreciated the weight of these documents and has unhesitatingly accepted the evidence of Neris, the appellant's own brother, who disclaimed title to any portion to the east of his block. This evidence is supported by that of another brother, Don James, who says that in 1924, all the land to the east of the ditch which was the eastern boundary of the rubber section was given to his two brothers, Sedris and Abilinu, as the result of a family division in 1924. It is true that Sedris, on the other hand, has been giving evidence in favour of the appellant, but he was forced to admit that he and his brother possessed on the west of the road shown in plan P 16. He tried to explain this by saying that the eastern portion was not so big as the western portion. His evidence does not appear to have been satisfactory and the learned District Judge has in strong terms disbelieved him and his sister, the appellant. I am of opinion that there is justification for the Judge's finding on the facts.

The only other point is one of law. It is contended on behalf of the appellant that under deed P 18 of 1935 Abilinu purported to convey his right, title, and interest to an undivided eastern half of the land, and that the plaintiff, therefore, did not gain rights to a divided eastern half and much less to the corpus he sought to partition which extended to somewhat over a half of the land. In support, appellant's Counsel cited a number of decisions of this Court, each of which I shall deal with separately.

The first case was that of *Fernando v. Podi Singho*¹. Here a person who had prescribed to a part of a land conveyed an undivided share of the whole land. It was held that the transferee was bound by the terms of the deed and that an undivided share only passed, and not that part of the land to which the transferor had prescribed. This case is distinguishable for what was conveyed was an undivided share of the whole land irrespective of any reference to where that share was located.

The next case is *Senanayake v. Selestina Hamine*². Here what was transferred was an undivided eastern portion of land in extent 2 acres. It was held that the deed did not convey a divided 2 acres. This case is also distinguishable as an undivided eastern 2 acres is too vague to admit of definite location.

The third case is *Dingiramma v. Appuhamy*³. The facts here are similar to the previous case for what was conveyed was an undivided two-third share towards the southern side. This case can be distinguished for the same reason.

The last case is *Perera v. Temma*⁴, where land owned in common was dividedly possessed, but what was conveyed was an undivided half share of the whole land. The facts here are similar to those of *Fernando v. Podisingho* (*supra*) and the decision can be distinguished for the reason given in dealing with that case.

On the other hand, Counsel for the respondent cited the case of *Missi Nona v. Neimal Hamy*⁵ in which Garvin J. held that where land was

¹ 6 Ceylon Law Rec. 73.

² 23 N. L. R. 481.

³ 4 C. A. C. 44.

⁴ 32 N. L. R. 228.

⁵ 10 Ceylon Law Rec. 159.

divided by held and possessed for over the prescriptive period the plaintiff by taking a conveyance for an undivided share cannot regard the land as possessed in common and bring an action for a partition.

The facts of the case before us are that the land was amicably divided into an eastern and a western half in 1924. Now, an eastern half is for all practical purposes a definite description. It has not the same vagueness as "a portion towards the southern side" or "an eastern 2 acres". It means the actual eastern half and, though the word "undivided" has been used in describing that half, in reality it was the actual eastern half as opposed to the western half. Admittedly what was possessed by the co-owners of that half was a divided eastern half, but, in possessing that half by arrangement, the co-owners, Sedris and Abilinu, who obtained that half under the deed in their favour in 1924, were allowed to possess an extra portion over the western boundary of that half, so that the eastern half came to be regarded as a certain corpus which included the whole of the actual eastern half.

I am, therefore, of opinion that although the deed purported to convey a share in an undivided eastern half, this was a misdescription and what was intended to be conveyed, and what legally passed, was a share in that which was regarded as the eastern half and is represented by the corpus shown in P 16. The transferor, Abilinu, was called and admitted that he intended to pass his rights to the whole of this corpus.

Had the corpus depicted in P 16 been confined to an actual divided eastern half, would not P 1 have given the rights of Abilinu to the transferee in that divided eastern half in spite of the eastern half having been described as undivided? Does it make a difference that that eastern half has been augmented by long possession and that what was regarded as an eastern half was something larger than that actual half?

The appeal therefore fails and must be dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.

