

1961

*Present : Sansoni, J., and T. S. Fernando, J.*

V. APPIAH *et al.*, Appellants, and S. SELLATHURAI *et al.*,  
Respondents

*S. C. 494/58—D. C. Jaffna, 86/P*

*Partition action—Issue of prescription—Burden of proof—Possession undetermined—  
Legal principle to be applied then.*

Where, in a partition action, the plaintiffs and the 1st defendant had, apart from prescription, paper title to  $\frac{2}{3}$  share of the corpus, but the contesting defendants claimed prescriptive title to the entire corpus—

*Held*, that the burden of proof regarding possession was on the contesting defendants. In such a case, if the possession in fact is undetermined, the rule that possession follows title should be held to be applicable.

<sup>1</sup> (1956) 57 N. L. R. 330.

**A** PPEAL from a judgment of the District Court, Jaffna.

*H. W. Jayewardene, Q. C.*, with *R. Manikkavasagar* and *L. C. Seneviratne*, for the Plaintiffs-Appellants.

*C. Ranganathan*, with *K. Palakidnar*, for the 2nd-5th and 8th Defendants-Respondents.

*Cur. adv. vult.*

October 27, 1961. SANSONI, J.—

The plaintiffs brought this action to partition a land called Uyanthanai described in the Schedule to the plaint and depicted as lot 1 in plan No. 1065A dated 13th April 1956 (marked X). They averred in their plaint that one Kander formerly owned that lot and that it had devolved on the 2nd plaintiff ( $\frac{1}{3}$ rd) 1st defendant ( $\frac{1}{3}$ rd) and 2-6 defendants ( $\frac{1}{15}$ th each). 2-5 and 8th defendants contested the plaintiffs' title and claimed that they were entitled to the entire land sought to be partitioned as part of a larger land bearing the same name, in extent 27 Lms., which had formerly belonged to Kander. After trial, the learned District Judge dismissed the plaintiffs' action with costs and they have appealed.

There have been previous cases with regard to the land sought to be partitioned, as well as the land adjoining it on the west which is 10 Lms. 11 Kls. in extent. I shall refer to them as the eastern lot and the western lot respectively.

In 1938 the present plaintiffs and one Vinayakamoorthy sued the present 2nd, 4th, 6th defendants and Kander's son Saravanamuttu in D. C. Jaffna case No. 12,783 for declaration of title to the western lot and obtained a decree as claimed and for the costs of the action. In 1939, in execution of the decree for costs, the Fiscal seized and sold the right, title and interest of the present 2nd, 4th-6th defendants and Kander Saravanamuttu in the eastern lot. Those interests were purchased by the 2nd plaintiff and Vinayakamoorthy and a Fiscal's Conveyance P1 of 24th April, 1940, was executed in their favour for the right, title and interest of those persons in an undivided  $\frac{2}{3}$ rd share of the eastern lot.

In 1939 a partition action D. C. Jaffna No. 14,742 was filed by Kander's son Kanapathipillai in respect of both the western and the eastern lots on the basis that they formed one land. The defendants to that action were Kander Saravanamuttu and the present 4th-6th defendants. The present plaintiffs and Vinayakamoorthy intervened in that action and filed a statement on 23rd January, 1940, asking for the exclusion of the western lot as their property, and claiming that they were entitled, to  $\frac{2}{3}$ rd of the eastern lot. Interlocutory decree was entered in January 1942, ordering the exclusion of the western lot from the action and decreeing the present plaintiffs and Vinayakamoorthy entitled to  $\frac{2}{3}$ rd,

and Kander Kanapathipillai entitled to  $\frac{1}{3}$  of the eastern lot. That decree was affirmed in appeal on 8th April, 1943. No further steps were taken in that partition action, but there can be no doubt that the interlocutory decree is *res judicata* between the parties so far as the title to the land now sought to be partitioned is concerned, apart from any question of prescriptive possession. Kander Kanapathipillai, the plaintiff in action No. 14,742, died in 1948 leaving no issue, and his interests devolved on 2-5 and 8th defendants. The present 1st defendant has become entitled by last will to the  $\frac{1}{3}$  share of Vinayakamoorthy.

It was conceded at the argument before us by Mr. Ranganathan that title, apart from prescription, is in the 2nd plaintiff ( $\frac{1}{3}$ ), 1st defendant ( $\frac{1}{3}$ ), and the successors in title of Kander Kanapathipillai; this is the inevitable result of the decree entered in case No. 14,742 which is binding on the parties to this action. But Mr. Ranganathan sought to support the judgment in view of the learned Judge's finding that the contesting defendants have acquired a prescriptive title to the eastern lot against the plaintiffs and the 1st defendant. That finding is vitiated to some extent by the other findings of the learned Judge that the plaintiffs have no paper title to the land sought to be partitioned, and that the decree in case No. 14,742 was not *res judicata*. Those findings are clearly wrong. If the learned Judge had approached the case on the basis that the title to  $\frac{2}{3}$  share, apart from prescription, was in the plaintiffs and the 1st defendant, he would have placed the burden of proof regarding possession on the contesting defendants and I think he would have found differently on the issue of prescription.

It is common ground that the land has no plantations or buildings of any kind on it. It is unfenced on all sides, and the only thing growing on it is grass. This grass is said to be scraped from the land during certain times of the year, probably during the months of October to January. The 1st plaintiff, who is the husband of the 2nd plaintiff, claimed that he and his wife had been in possession of their share from 1944, and that they had scraped grass during the months of October to January; he was a Government employee until he retired in 1955, and during his period of service he was stationed outside Jaffna except for a period of 8 years, but he claimed to have been a frequent visitor to Jaffna. The 4th defendant, who was the only other witness at the trial, said that he used to go and scrape grass from the land at certain seasons, and the learned Judge has preferred to accept his evidence about possession; but this finding again is weakened by the learned Judge's observation that on the 1st plaintiff's evidence he had no possession of the land he sought to partition. That observation is incorrect as my brief reference to the evidence given by the 1st plaintiff shows.

Having regard to the nature of the land, it is most likely that nobody possessed the land exclusively. If there was any possession, probably the plaintiffs as well as the contesting defendants scraped grass occasionally. The legal principle to be applied in such a case is that where possession in fact is undetermined, possession in law follows the right

to possess. In other words, the rule that possession follows title should be held to be applicable. The claim of the contesting defendants to have prescribed against the plaintiffs and the 1st defendant must be rejected.

I would therefore set aside the decree under appeal and direct that the land depicted as lot 1 in plan No. 1065A dated 13th April, 1956, (marked X) be partitioned allotting to the 2nd plaintiff  $\frac{1}{3}$ , 1st defendant  $\frac{1}{3}$ , and 2-5 and 8th defendants jointly  $\frac{1}{3}$ . The plaintiffs are entitled to recover their costs of the contest in the lower court and their costs of appeal from the contesting defendants.

T. S. FERNANDO, J.—I agree.

*Appeal allowed.*

