1950 *Present:* **Nagalingam J. and Pulle J.**

DONA ELISAHAMY *et al.*, Appellants, *and* DON JULIS APPUHAMY, Respondent

S. C. 98—D. C. (Inty.) Panadure, 511

Partition action—Divided portion of a larger corpus—Deeds conveying fractions of the larger corpus—Transferees bound by the terms of their deeds.

T. L. who was entitled to an undivided 1/12th share of a larger land of 24 acres possessed, as a separate and divided block, a portion X of the common land, and she and her successors acquired title to that divided block X by prescriptive possession. Thereafter, plaintiff purchased the interests of some of the co-owners of block X. The shares, however, which were conveyed to him were described in the deeds as fractions of shares not of block X but of the larger land of 24 acres. This feature was common also to the deeds of some of the defendants.

In an action brought by the plaintiff for the partition of the divided block X—

Held, that the plaintiff and the defendants could get no larger fraction of block X than that set out in the deeds in respect of the larger corpus of 24 acres.

" If persons who are entitled by prescription of a land persist, after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired a title by prescription, must be bound by the terms of their deeds ".

APPEAL from an order of the District Court, Panadure.

Vernon Wijetunge, for the 1st, 3rd and 4th defendants appellants.

H. A. Koattegoda, for the plaintiff respondent.

Cur adv. vult.

December 7, 1950. PULLE J.—

The appellants are the 1st, 3rd and 4th out of seven defendants in an action instituted for the partition of a land called Kongahalanda *alias* Kongaha Kannatta in extent 1A. 3R. 08P. It is not disputed that this

land formed part of a larger land of the same name in extent 24 acres. The portion sought to be partitioned is therefore very nearly 1/12th of the larger land.

The appellants contended that the action could not be maintained as the land was not a distinct corpus but part of an undivided land. The learned trial Judge found against the appellants and held that the plaintiff's predecessor in title one Tantriwattage Lokuhamy who was entitled to an undivided 1/12th share of the larger land possessed the land sought to be partitioned as a divided block and that she and her successors had acquired title thereto by prescriptive possession. The learned Judge has set out convincing reasons for holding that the land had become a distinct corpus by separation and that therefore the action was maintainable. In my opinion the appellants have failed to show that the finding is wrong and the appeal, therefore, fails on that point.

The second point raised by the appellants is that the shares allotted to the parties are not in accordance with the shares dealt with in the deeds produced in the case. It would appear that Tantriwattage Lokuhamy referred to above had four children, viz., (*a*) Hendrick, (*b*) Punchihamy, (*c*) Appolonia, and (*d*) Bastiana. By two deeds P2 of 1942 and P1 of 1945, the plaintiff purchased the interests of six out of the seven children of Hendrick and the interests of Appolonia. The 1st defendant-appellant by deed 1D7 of 1933 purchased the interests of the remaining child of Hendrick and the interest of Bastiana. The 1st defendant and her children also succeeded to certain shares by intestate succession upon the death of the husband of the 1st defendant. A feature common to all the deeds is that the shares conveyed are described as fractions of shares not of the land sought to be partitioned but of the larger land of 24 acres. For example, by deed P1 of 1945 the plaintiff purchased the interests of one of the seven children of Hendrick who himself was one of the four children of Tantriwattage Lokuhamy. The share conveyed is not 1/7th of 1/4th of the 2 acre block which Lokuhamy acquired by prescriptive possession but 1/7th of 1/4th of 1/12th of the larger land of 24 acres. The question for decision is what rights in the land passed on P1 and on the other deeds in which the shares are calculated in the same manner. The plantiff's contention is that P1 conveyed to him title to 1/7th of 1/4th of the corpus in the suit. Much as one would wish to give to the plaintiff shares according to his mode of calculation the authorities are against him. In the case of *Fernando v. Podi Singho* [1], Bertram C.J. laid down the following proposition:—

> " If persons who are entitled by prescriptions of a land persist, after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired title by prescription, must be bound by the terms of their deeds ".

Applying the principle laid down in this case the plaintiff and the defendants whose title is based on each of the deeds referred to will get no larger fraction of the corpus sought to be partitioned than that set out in the deeds in respect of the larger corpus.

[1] *(1925) 6 Ceylon Law Recorder 73.*

I am not unmindful of the fact that certain inconvenient results would flow from the interpretation which I have placed on the deeds as for example, the unallotted shares might give rise to further disputes and fresh litigation. The parties and their predecessors are entirely to blame for this situation and I do not think it would be proper to help them out of it by construing their instruments of title in a sense contrary to that laid down by this Court.

I would vary the decree appealed from to the extent that the parties will be entitled to shares calculated in the manner set out in the judgment and that it will be open to the learned District Judge to enter a decree for sale, if partition is impracticable.

I see no reason to disturb the order made by the learned District Judge as to the costs of contest.

There will be no costs of appeal.

NAGALINGAM J.—I agree.

Decree varied.