

1956 Present : Sansoni, J., and T. S. Fernando, J.

GIRIGORIS APPUHAMY, Appellant, and MARIA NONA *et al.*,
Respondents

S. C. 296—D. C. Gampaha, 1,256P

Partition action—Land possessed in different lots by co-owners—Maintainability of action in respect of a portion only.

Where a land is possessed in different portions by different co-owners for convenience of possessor, a partition action cannot be maintained in respect of one portion only ; the entire land should be brought into the action.

APPPEAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *J. M. Jayamanne* and *P. Ranasinghe*,
or the plaintiff-appellant.

E.S. Amarasinghe, for the 4th and 7th defendants-respondents.

Cur. adv. vult.

July 11, 1956. SANSONI, J.—

In this partition action the plaintiff sought to partition lots A to G in plan No. 770 marked X. His case was that one Juanis was the former owner of the land Millagahalande of 13A. 3R. 36P. and that Juanis gave that land to Singho Appuhamy to be planted, and separated off a 1/3 share as the planter's share : that Singho Appuhamy thus entered into possession of that 1/3 share as a separate and defined portion. The plaintiff further stated in his plaint that Juanis by deed P7 of 1896 conveyed a

defined $\frac{2}{3}$ share of the land to Roidahamy and that she thus entered into possession of the lots mentioned, in extent 9A. 1R. 10 $\frac{2}{3}$ P. The devolution of title from Roidahamy is set out in the plaint and a partition asked for on that basis.

The 4th and 7th defendants filed an answer pointing out that the entire land of 13A. 3R. 36P. formerly belonged to Juanis and Johanis upon Crown Grant 4DI of 1866 to which title plan 4D2 was attached. They also pleaded that this entire extent should be partitioned, as the whole land was being possessed in different portions by the co-owners only for convenience of possession. A fresh plan of the whole land was made (No. 883 marked Y), and although other persons were disclosed as necessary parties to the action, the plaintiff was not willing to enlarge the corpus or to add the parties disclosed, and he undertook to prove that the land he sought to partition was a separate land.

After trial the learned District Judge held that the entire land of 13A. 3R. 36P. should have been brought into the action and as the plaintiff had failed to establish that lots A to G formed a separate land the action failed.

At the argument before us Mr. Jayawardene drew attention to certain natural features shown in the plan Y, namely, old fences with trees forty years old, and old ditches, which formed the eastern boundary of the lots which the plaintiff sought to partition. He also drew attention to the descriptions in the deeds executed by Roidahamy who in 1896 had received a gift of an undivided $\frac{2}{3}$ share of the entire land of 13A. 3R. 36P. Yet another point he made was that in 1871 Sinchiappu and Singhappu, by deed P3, entered into a planting agreement for a divided portion of the entire land lying to the east of the lots sought to be partitioned.

Mr. Amerasinghe, on the other hand, contended that the execution of the planting agreement did not help to prove that the land was divided as it was merely a case of a co-owner who was entitled to a $\frac{1}{6}$ share dealing with a specific extent which did not exceed his interests in the entire land. In regard to Roidahamy's deeds, he pointed out that all of them were executed on the basis that she was entitled to undivided interests in the entire land of 13A. 3R. 36P., and that the most that can be urged in regard to them is that she sometimes referred to an undivided $\frac{2}{3}$ and to particular directions in which the donee or transferee from her may possess. In regard to the old ditches and the old fences, Mr. Amerasinghe pointed out that the plaintiff's case was that there had been a division of the whole land over seventy years ago and the age of the trees on the fences is not much more than forty years. Certainly, the theory of a division seventy years ago is not borne out by any of the documents produced, since none of them refer to a divided $\frac{1}{3}$ or a divided $\frac{2}{3}$ portion of the entire land. Nor again has any deed been produced which refers to the lots sought to be partitioned as comprising a separate and distinct land.

There is no doubt that the land is possessed in different lots by different co-owners, but such a mode of possession is in no way inconsistent with common possession. It would have been different if the co-owners had

executed deeds for divided shares ; some weight would then have been lent to the theory that there had been a division of the entire land many years ago. It is not uncommon for co-owners who possess their interests in a particular direction to execute deeds in which they refer to the fact that they are possessing their interests in that way, but the very fact that Roidahamy has dealt with her interests as undivided interests in the entire land shows that she did not consider herself to be at any time the sole owner of the lots sought to be partitioned. The plaintiff's entire case was based on the assumption that Roidahamy was at one time the sole owner of the lots sought to be partitioned. The deeds she executed are the best answer to that, and they disprove the plaintiff's case. Even the deed in the plaintiff's favour is for an undivided share of the entire land of 13A. 3R. 36P.

We were referred to the decisions of this Court in I Balasingham's Notes of Cases on pages 77 and 92. I think the principle laid down in those judgments is that once there had been a division of a common land by arrangement among the co-owners, the fact that thereafter some of those co-owners deal with undivided interests in the entire land does not restore the land to its former position of an undivided land. In the case we are dealing with, however, there is no evidence that the land was ever divided by agreement among the co-owners, and since all the deeds executed by the successors in title of the former owners, except those executed in relation to the planting agreement, deal with undivided interests in the entire land, it is more than probable that the land was never in fact divided.

I would dismiss this appeal with costs.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.
