1923.

Present: Porter J. and Jayewardene A.J.

APPUHAMY *v.* MARIHAMY *et al.*

211—D. C. Kurunegala, 7,963.

Partition—Crown grant in favour of one heir in trust for all the heirs of original possessor—Action by another heir for partition—"Owner"—Prescription.

Where a co-heir paid the Crown half-improved value (contributed by all co-heirs) and obtained a Crown grant in his favour, and held the land in trust for all the co-heirs,—

Held, that another co-heir could bring an action for partition although he was not the legal owner.

"Here the trust is not denied, and it would be futile to refer the plaintiff to a separate action to obtain a conveyance to support a title which is admitted to be in him."

Silva v. Silva[1] distinguished.

THIS was an action in which the plaintiff sought to partition a land called Kahatagahawatta, which was originally owned by one Appurala. He died leaving his widow and one son, who by their deed No. 843 of 1878 (P 1) sold the land to one Jusey Appu. Jusey Appu died about 35 years ago, leaving as heirs three brothers and a sister, viz., Thomis, Elaris, Maiappu (fourth defendant), and Marihamy (first defendant). Thomis and Elaris both died, and their heirs sold their half share of the land by deed 14,678 of 1917 (P 3) to the plaintiff.

The third, fourth, and seventh defendants filed answer pleading a Crown grant dated February 7, 1910, in favour of third and fourth defendants, and prayed that plaintiff's action be dismissed. The sixth defendant filed answer claiming fourth defendant's half share upon a deed of gift from him.

Plaintiff stated at the date of trial that the fourth defendant's brothers and sisters contributed an equal share each towards the consideration, and that the fourth defendant had fraudulently had the grant executed in his own favour and that of his son-in-law, the third defendant, that the plaintiff and his predecessors in title had possessed their shares since the date of the Crown grant, and that the third and fourth defendants had concealed the grant from the others and had not even registered it till after the purchase by the plaintiff.

The third, fourth, and seventh defendants admitted that the Crown did not sell the land to them, but that it was settled on them for the half-improved value. The sixth defendant claimed the half

[1] *(1916) 19 N. L. R. 47.*

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share the fourth defendant was entitled to on the Crown grant on a gift from him subject to his life interest.

After trial the learned District Judge dismissed the plaintiff's action, with costs. The plaintiff appealed.

H. V. Perera, for plaintiff, appellant.

J. S. Jayewardene, for defendants, respondents.

October 24, 1923. JAYEWARDENE A.J.—

This is an appeal against the dismissal of a partition suit. It is common ground that the land sought to be partitioned, Kahatagahawatta, depicted in plan No. 198 of June 23, 1920, as lots A, B, and C, was in the year 1878 sold by one Ukkurala Appuhamy to Jusey Appu. The latter died many years ago, leaving him surviving four children as his heirs. They were, Thomis, married to Isohamy; Elaris; Marihamy, the first defendant; and Maiappu, the fourth defendant. Thomis died leaving his widow and three children: Jusey, Marcelline, and Nona. Elaris married R. Marihamy and died leaving his widow and a child, Eugina. Maiappu, the fourth defendant, gifted a half share to his son Jayarias on deed No. 6,262 of January 11, 1913, subject to a life interest in his favour. Jayarias died leaving his widow, Rosalina, the sixth defendant. The heirs of Thomis and Elaris sold their half share to the plaintiff by deed No. 14,678 dated December 10, 1917. It would appear that in the year 1909 the Crown claimed lots B and C of this land as the property of the Crown, being chena land, and by a Crown grant of the year 1910 it was settled on payment of half-improved value. All the co-owners—the heirs of Jusey Appu—contributed to pay the amount demanded by the Crown, but the fourth defendant, who was sent to obtain the grant, obtained it in his name and in the name of his son-in-law, the third defendant. Notwithstanding the Crown grant the mode of possession never changed, and the fourth defendant, who remained in the village, admittedly possessed it on behalf of his co-owners. The fourth defendant admits that the other co-owners contributed their shares to pay the Crown demand. On these admissions it is perfectly clear that the fourth defendant purchased the land in trust for the other co-owners, and that the other co-owners have acquired a title by prescription to their shares. The learned District Judge has, however, dismissed the plaintiff's action, holding that as the legal title which is based on the Crown grant is in the fourth and third defendants, the plaintiff is not entitled to bring a partition action. In doing so he has followed the judgment of this Court in *Silva v. Silva* (*supra*). In that case the plaintiff brought an action claiming to be entitled to a half share of a land which had been bought on a Crown grant which was taken in the defendant's name. He alleged that

in purchasing the land from the Crown the defendant acted on behalf of himself and the plaintiff, but this Court held that the plaintiff was not an "owner" within the meaning of the Partition Ordinance, as he had no legal estate, and that his right, if any, was to bring an action to compel defendant to grant a conveyance of a half share to him. The defendant had denied the trust. But I think that case can be easily distinguished. Here the trust is admitted, and the parties have had time to acquire a title by prescription, as at the date of the institution of the action ten years had elapsed since the issue of the Crown grant. In *Silva v. Silva* (*supra*) the Crown grant was issued in 1906, and the action for partition was brought in 1915. In repelling an application of the appellant that the case should be sent back for a decision on the question of prescription, De Sampayo J. said :—

> "The plaintiff's own case is that the Crown was owner of the land at the time of the sale, and that the defendant and Jamis Hamy became owners by virtue of the Crown grant. That being so, the plaintiff cannot possibly succeed on prescription, even if he has been in possession of lot A with the defendant since the Crown grant, because the period that has elapsed is less than ten years. It is, therefore, idle to send the case back, as we are pressed to do, for the purpose of taking evidence as to possession."

Again, referring to an English case, *Taylor v. Grange*,[1] where Fry J. said :—

> "No doubt an equitable owner may obtain a decree for partition if he is entitled to call for a legal estate, which would have entitled him to a partition at Common law."

The learned Judge remarked :—

> "These defects in the pleadings may be overlooked, but he must prove the facts as they are denied. Can he be allowed to do so in a partition action? I think not. No authority has been cited to show that even in England a partition action can be brought if the trust is denied. It appears to me that there an action is possible only in the case of an undisputed trust, the purposes of which have been exhausted."

In *Galgamuwa v. Weerasekere*[2] this Court has held that the principle laid down in *Silva v. Silva* (*supra*) would not apply to defendants or intervenients, and that the latter would be entitled to establish a trust in a partition suit to which they are parties. Here the trust is not denied, and it would be futile to refer the plaintiff to a separate action to obtain a conveyance to support a title which is admitted to be in him. Further, according to the

[1] *(1876) 13 Ch. D. 223.*

[2] *(1919) 21 N. L. R. 108.*

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admission of the fourth defendant, the plaintiff has acquired a title by prescription. The plaintiff has, in my opinion, established his right to a share of the land, consisting of lots A, B, and C. The case must go back for an adjudication upon the question of the shares the parties are entitled to, and upon the question of compensation that has been raised between the parties. The judgment appealed from is, therefore, set aside, and the case will go back for the purposes indicated. The appellant is entitled to his costs in appeal, all other costs to be costs in the cause.

PORTER J.—I agree.

Sent back.