1951 *Present :* **Rose C.J. and Gratiaen J.**

KARUNARATNE, Appellant, *and* SIRIMALIE, Respondent

S. C. 93—D. C. Kegalle, 4,534

Partition action—Investigation of title—All claimants present—Standard of proof required.

Where, in a partition action, all possible claimants to the property are manifestly before the Court, no higher standard of proof should be called for in determining the question of title than in any other civil suit.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, K.C., with *H. W. Jayewardene*, for the plaintiff appellant.

N. E. Weerasooria, K.C., with *C. R. Gunaratne* and *W. D. Gunasekera*, for the defendant respondent.

Cur. adv. vult.

November 8, 1951. GRATIAEN J.—

The plaintiff and the defendant, claiming interests through a common source of title, are admittedly co-owners of a land called Batapandurahena in the Kegalle District in the proportions of $\frac{3}{4}$ to $\frac{1}{4}$ respectively. The plaintiff has instituted this action for the partition of the property on this basis. The only dispute between the parties relates to the extent of the *corpus* sought to be partitioned. The plaintiff's contention is that the land consists of lots 1, 2, 3, 4 and 5 depicted in plan No. 3,116 prepared by Surveyor Aluwihare for the purposes of this action. The defendant, on the other hand, takes up the position that only lots 4 and 5 comprise the common property, and she claims the exclusion of lots 1, 2, and 3 from the proposed partition on the ground that they had for many years been owned and possessed by her exclusively by right of paternal inheritance.

Lot 5 is rocky land unsuitable for cultivation and lots 1 and 2 are also uncultivated. Lot 3 contains tea, rubber and coconut and other plantations which have admittedly been enjoyed by the defendant for many years. On the other hand, lot 4 was planted, mainly in tea, and possessed by the plaintiff shortly after he first acquired interests in the common property in 1936. It is not of course suggested that the exclusive possession of these separate allotments by the respective parties is necessarily inconsistent with the idea of co-ownership.

After a lengthy trial the learned District Judge upheld the defendant's contention that lots 1, 2 and 3 should be excluded from the proposed partition. He held in particular that on a balance of probability lot 3 (which is the same as lot 2 depicted in plan No. 1,070 prepared in 1945 by Surveyor Siriwardene) formed part of a separate property called Tennehena which belonged exclusively to the defendant on the basis set out in her pleadings. The plaintiff has appealed from the learned Judge's judgment in so far as the partition of Batapandurahena has been ordered to be confined to lots 4 and 5.

The point of contest between the parties is simple, but I agree with the learned Judge when he states that the case is not an easy one to decide.

In the first instance, as so frequently happens, the earlier title deeds relating to the common land describe the *corpus* with reference to metes and bounds, which, with the passage of time, have become increasingly difficult to identify with precision. Moreover, it is apparent that most of the witnesses who gave evidence at the trial were unable to testify with personal knowledge to facts or events which occurred at a time when they were either very young or still unborn.

The burden of proving that lots 1, 2 and 3 also fell within the boundaries of the common property Batapandurahena was undoubtedly cast on the plaintiff, and I readily endorse Mr. Weerasuriya's submission that, having regard to the conclusive effect of a partition decree which is binding not only on the parties *inter se* but also on all the world, it is the duty of the Court to satisfy itself that the title of the parties is strictly proved. Vide *Golagoda v. Mohideen (1937) 40 N. L. R. 92* and the earlier authorities cited in *Jayawardene on Partition at pages 72 to 82.* In accordance with this principle, the Court should not enter a partition decree unless, if I may adopt Fernando J's phrase in *Golagoda's* case, it is " perfectly satisfied " that the rights of possible claimants *who are not parties to the proceedings* have not been shut out accidently or by design. Subject however to this important qualification, the fact remains that a partition action is a civil proceeding, and I do not understand the authorities to suggest that, where all possible claimants to the property are *manifestly* before the Court, any higher standard of proof should be called for in determining the question of title than in any other civil suit.

In the present case, there was ample evidence upon which a Court could be perfectly satisfied that no persons other than the plaintiff and the defendant had any outstanding claims to the allotments in dispute. The only outstanding question for determination was therefore whether the plaintiff had satisfactorily established on a balance of probability that he and the defendant were co-owners of lots 1, 2 and 3 which, as he contends, fell within the boundaries of Batapandurahena and whether he had disproved the defendant's claim to be entitled to these allotments exclusively in her own right.

With regard to the second of these connected issues, is seems to me that the learned Judge has failed sufficiently to direct his mind to one important circumstance. The defendant, while acknowledging co-ownership of Batapandurahena, claimed in her pleadings the exclusion of lot 3 on the ground that it formed part of a separate land called Tennehena (as depicted in plan No. 1,070) which her father " Kira *alias* Rankira " had " separated off " in 1892 when his co-owners, who were the plaintiff's predecessors in title, had sold their interests in Tennehena to a European planter named Strong in terms of the deed D1. This " separated portion " she claims to have been transmitted to her in due course by right of paternal inheritance. It is abundantly clear that this special defence set up by the defendant broke down in the course of the trial. The plaintiff proved that the defendant's father Rankira had died three years before the deed D1 was executed. There is, moreover, intrinsic evidence which indicates (1) that the " Kira " who separated off a portion of Tennehena in 1892 was not in truth the plaintiff's father

but another person by that name who appears in the plaintiff's chain of title, and (2) that Tennehena was in any event not situated within the boundaries of the *corpus* sought to be partitioned.

I appreciate that the necessary rejection of the basis on which the defendant's claim is founded cannot by itself conclude the main issue between the parties, but it is certainly a point which is material to the determination of that issue. The question remains whether the plaintiff has himself discharged the burden of proving that lots 1, 2 and 3 fall within the boundaries of the common land.

Admittedly the more recent conveyances in the plaintiff's chain of title, namely, P4, P5 and P6 which were executed in 1936, 1937 and 1939 respectively, describe the land with reference to metes and bounds which catch up the allotments in dispute. But the first of these conveyances was prepared at the instance of the witness Siriya with whom the defendant has been on somewhat unfriendly terms, and one should therefore hesitate to give effect to the deeds without looking for confirmation from earlier documents. The clue to the problem, in my opinion, is to be found by the examination of two earlier conveyances P1 and P7, the first of which was executed in 1866 and the latter in 1902. Neither document taken by itself can be regarded as conclusive, but if they be considered in combination with one another and with reference to the Surveyor's plans, the strength of the plaintiff's case appears to me to be irresistible.

P1 is the earliest available document of title dealing with Batapandurahena, and is relied on by both parties. The northern and eastern boundaries admittedly refer to the entire *corpus*, while the southern boundary is inconclusive. The western boundary is described as "*the limit of Labuwellahena*". It is of great importance to ascertain the location of Labuwellahena.

The land immediately to the west of lot 4 is admittedly the land Tennehena which is the same as lot 1, depicted in the plan No. 1,710. The parties are agreed that, if the area covered by Batapandurahena is to be restricted to lots 4 and 5 only, the only legitimate conclusion to be drawn is that what was described in 1866 as "Labuwellahena" is in truth part of the property now designated "Tennahena". The learned Judge thinks that this is probable, but there is no evidence to support so speculative a theory. On the other hand, the case for the plaintiff is that the land immediately to the west of lot 4 was always known as "Tennehena", and that "Labuwellahena" was a correct description of a village holding (*lying to the west of lot 3*) which was many years ago purchased, together with a number of other small allotments, by an European planter. These allotments, according to the plaintiff, were in due course consolidated by their new purchaser, and now form part of a large tea-and-rubber property known as Nainagala or Debathgama Estate. If, therefore, it can be demonstrated that the land originally called "Labuwellahena" was in fact a property lying immediately to the west of lot 3, it must follow that, at the time when P 1 was executed, lot 3 must have been properly included in the common property known as Batapandurahena. Indeed, it is only on this basis that "Labuwellahena" could correctly be described as the western boundary of Batapandurahena.

An examination of Mr. Aluwihare's plan No. 3,116 demonstrates the force of Mr. H. V. Perera's argument on this point.

I now proceed to consider the deed P 7 whereby Mr. Strachan, who had previously purchased a number of village holdings in the locality, sold them as a consolidated block named Debathgama Estate in 1902. This estate is admittedly situated to the west and south of the *corpus* depicted in plan 3,116, and is described in the schedule with great detail by reference to the boundaries of the various allotments of land which taken together comprise Debathgama Estate.

The eastern boundary of the allotments 8 (*d*) in P 7 is described as follows:—

> " East by Tennehena claimed by Sirimalie and others and H. Siriya and others. Batapandurahena claimed by Rankira and another and a water course ".

It is not difficult even at the present time to locate this eastern boundary by reference to the plans No. 3,116 and 1,070 filed of record. The northern part of the boundary is " Tennahena claimed by Sirimalie (i.e., presumably the defendant) and others ". This clearly refers to lot 1 in plan 1,070 which is admittedly claimed as " Tennehena " by the defendant and which in fact is situated between lot 4 of Batapandurahena and what is now part of Debathgama Estate.

The southern part of the eastern boundary described in P 7 is " Batapandurahena claimed by Bankira (i.e., the defendant's father) and another (i.e., the plaintiff's predecessor in title) ". This can only refer to lot 3 of the present *corpus*, so that this affords cogent evidence that lot 3 was at that time recognised both by the defendant's father and by the adjoining land-owner as being situated within the boundaries of Batapandurahena. Finally, the circumstance that P 7 describes one of the village holdings purchased by Mr. Strachan as bearing the name " Labuwellahena " contradicts the defendant's suggestion that " Labuwellahena " and " Tennehena " were one and the same property.

The facts which I have set out seem to be consistent only with the truth of the plaintiff's case—namely, that lot 3 is part and parcel of the *corpus* sought to be partitioned. At the same time, it effectively negatives the speculative theory (which the learned Judge adopted without reference to the document P 7) that " Labuwellahena " was probably an alternative name for " Tennehena ".

In my opinion the judgment entered by the learned District Judge should be varied by ordering that lots 1, 2 and 3 depicted in Mr. Aluwihare's plan No. 3,116 filed of record should also be included in the decree for partition. The case must now go back to the District Court of Kegalle for further proceedings under the Partition Ordinance on this basis.

The appellant is entitled to the costs of appeal and to the costs of the contest in the Court below. All other costs will be costs in the cause.

ROSE C.J.—I agree.

Judgment varied.