

1962

Present : Sansoni, J., and Silva, J.

DANTON OBEYESEKERE, Appellant, *and*
W. ENDORIS and others, Respondents

S. C. 141/60—D. C. Gampaha, 3993/P

Co-owners—Separate possession of a portion of the co-owned land by one of the co-owners—Inference of prescriptive possession and title.

A two-third share of a co-owned land containing in extent about two roods was possessed separately for over twenty years by the 1st defendant and his predecessors in title. It was not separated off for mere convenience of possession and as a temporary arrangement. It was much more likely that it was intended as a permanent mode of possession by an outsider when she bought the share from two of the co-owners.

Held, that the lot so separated off ceased, with the lapse of time and exclusive possession, to be held in common with the rest of the land. Those who possessed it were entitled to claim that they acquired prescriptive title to it. The mere mention of undivided shares in subsequent deeds could not affect the true position.

APPPEAL from a judgment of the District Court, Gampaha.

Frederick W. Obeyesekere, for the 8th Defendant-Appellant.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera* and *Ranjit Dheeraratne*, for the Plaintiff-Respondent.

Cur. adv. vult.

August 30, 1962. SANSONI, J.—

The Plaintiff brought this action to have a land called Kadurugahawatte partitioned. That land is described in the Schedule to the plaint as bounded on the North by the live fence of a portion of this land of Lawaris Naide, East by the High Road, South by the live fence of the land of A. Thomis and West by the live fence of the land of Lawaris Naide and another containing in extent about two roods. The northern boundary is of some importance, as will appear later in this judgment.

According to the plaint, Danchi Naide was the original owner, and he died leaving as his heirs his wife Kiri Nachchire and 3 children Poddi, Migel and Tamby. Poddi and her mother transferred to the other two heirs their 2/3 share of the land by deed 8D1 of 1899, so that Migel and Tamby thus became the owners of a 1/2 share each. They by deed 8D2 of 1905 sold an undivided 2/3 share to Maria Elizabeth Fernando,

who by deed 8D3 of 1909 transferred that share to Cornelia Henrietta Obeyesekere, who by deed 8D4 of 1935 transferred that share to the 1st Defendant.

The 1st Defendant died pending this action. The 8th Defendant is his legal representative, and his heirs are the 7th to the 11th Defendants.

The Plaintiff averred in the plaint that Migel died, leaving him and Elisahamy as his heirs, each thereby becoming entitled to 1/12 share, and that Elisahamy by deed 2D1 of 14th December 1953 transferred her share to the 2nd Defendant, that Tamby died leaving as his heirs 4 children namely, Lisohamy, Rapiel, Rosahamy and Podina, and the two former by deed P1 of December, 1953 transferred their 1/12 share to the Plaintiff, and the two latter by deed 2D2 of 15th December 1953 transferred their 1/12 share to the 2nd Defendant. Thus the Plaintiff claimed to be entitled to 2/12ths, and he allotted 8/12 to the 1st Defendant and 2/12 to the 2nd Defendant.

When the Surveyor went to make the preliminary plan, the Plaintiff pointed out a block of 21 perches as shown in Plan Y as the corpus. The 1st Defendant's representative disputed this and stated that it represented only a divided portion of the entire land which the 1st Defendant possessed, and that the rest of the land lay towards the North. A fresh commission was issued and a new plan X was made, in which the original 21 perches was shown as Lot C, and the Lots A and B lying to the North of it were, as pointed out by the 1st Defendant's representative, depicted as the rest of the land.

Answers were thereafter filed. The 1st Defendant pleaded that he had acquired prescriptive title to Lot C of 21 perches, and that the entire land consisted of Lots A, B and C. The 2nd Defendant in his answer agreed with the Plaintiff with regard to the corpus to be partitioned. He also pleaded that Lots A and B, which were subsequently surveyed, were another land belonging exclusively to him and the 6th Defendant. The 6th Defendant's answer agreed with that of the 2nd Defendant.

At the trial points of contest were framed on these lines. The Plaintiff and 2nd and 6th Defendants claimed, as against the 8th Defendant, that Lot C of 21 perches represented the entire land described in the schedule to the plaint. The 8th Defendant, as the 1st Defendant had done, claimed Lot C upon prescriptive possession.

With regard to Lots A and B the position of the 2nd and 6th Defendants was that Amarabandu and his wife, Podihamy, had acquired interests in those Lots upon deeds 2D5 of 1917 and 2D6 of 1939 which conveyed respectively 1/5 and 1/10 shares of a land called Kadurugahawatte of about 2 roods bounded on the North by the live fence of the land owned by Peduru Perera and others, on the East by the Main Road, on the South by the live fence of a portion of this land owned by Juanchi (probably another name for Danchi) Naide, and on the West by the live fence of the land called Meegahawatte. The 6th Defendant, who is the son of Amarabandu and Podihamy, acquired 2/15 share of that land on deed 2D7 of

1937, and also received a gift from his parents of their interests upon 2D4 of 1951. By deed 2D3 of 1952 he sold $\frac{3}{8}$ share to his brother-in-law the 2nd Defendant, and he would have been left with a very small share.

The learned District Judge held that Lot C was the entire land that Danchi Naide owned. He also held that the 1st Defendant had not acquired a prescriptive title to it. He accordingly entered an interlocutory decree against which the 8th Defendant has appealed.

It is necessary first to refer to the conduct of the 2nd Defendant as disclosed in earlier actions. Having obtained deed 2D3 in June 1952, he destroyed a barbed wire and live fence which separated Lot C from the land to the north of it in November 1952. He was charged in the Magistrate's Court, Gampaha, by the 1st Defendant and pleaded guilty of the offence of mischief. He refused, in breach of an undertaking given by him, to allow the fence to be erected, and he was sued in the Court of Requests, Gampaha, and was ordered to pay damages to the 1st Defendant. While that action was pending he purchased the shares mentioned in 2D1 and 2D2 while the Plaintiff bought a share on deed P1 at the same time.

Bearing on the question of prescription are two plans which have been produced. A plan 8D8 of 1949 made at the instance of the 1st Defendant depicts the fence which has been destroyed. It shows Lot C lying between that fence on the north and a wire fence on the south as the property of the 1st Defendant. A still earlier plan 2D9 of 1938 produced by the 2nd Defendant is illuminating. It depicts the land lying to the north of Lot C. The abutting land on the south, corresponding to Lot C, is described as "Land of Mrs. J. P. Obeyesekere" (the transferee on deed 8D3). It is most unlikely that Lot C would have been so described if it had not been regarded at that time as her property and possessed as such. While there are only one coconut and one beli tree on Lot C there is also a boutique on it, and the oral evidence is overwhelming that the 1st Defendant and his predecessors in title possessed that divided lot exclusively and collected the rent from the boutique. The evidence of the 2nd Defendant, who was the only witness called for the Plaintiff, is plainly unreliable where it is not false. In any event he does not claim to have known these lands before 1947.

As to whether Lot C alone represents the entirety of Kadurugahawatte of about 2 roods which the Plaintiff seeks to partition, the first matter which goes against that view is the extent. 21 perches (or 27 perches if one includes the extent of the V. C. road adjoining it) is nowhere near two roods. The main argument of Mr. Jayewardene, however, was that Lots A and B now belong to persons who have succeeded to Lawaris Naide's interests and he relied strongly on the northern boundary in deeds 8D1 to 8D4. No doubt these deeds show that Lawaris Naide's land adjoined Danchi Naide's land, but they do not help us to fix the location of either land. The fence which the 2nd Defendant destroyed was not, in my view, the boundary fence of Danchi Naide's land, but only the fence separating 1st Defendant's divided $\frac{2}{3}$ share from the balance

$\frac{1}{3}$ share. Danchi and Lawaris were related to each other and they are said to have brought up Amarabandu. They may well have possessed their adjacent lands in one continuous extent, as the evidence of their kinsman Alberis called by the 8th Defendant seems to show. When the outsider Maria Elizabeth Fernando bought in 1905, however, her share would have been separated off by erecting the fence which the 2nd Defendant later destroyed.

Separate possession of that $\frac{2}{3}$ share for over 20 years has been clearly proved, and those who possessed it are entitled to claim that they have acquired prescriptive title to it. I do not think this is a case where a lot was separated off for mere convenience of possession and as a temporary arrangement. It is much more likely to have been intended as a permanent mode of possession, and the lot so separated off would, with the lapse of time and exclusive possession, cease to be held in common with the rest of the land. Each case must be considered in the light of the proved circumstances, and the mere mention of undivided shares in subsequent deeds will not affect the true position. I think that if the learned District Judge had considered the case in this way, he would have held that the land depicted in plan Y does not belong in common to the parties but only to the heirs of the 1st Defendant.

I would accordingly set aside the judgment and decree of the lower Court and dismiss the plaintiff's action. Since the 8th Defendant had to fight the Plaintiff as well as the 2nd and 6th Defendants at the trial, he is entitled to recover his costs of contest in the lower Court from them. The plaintiff-respondent will pay the 8th Defendant's costs of the appeal.

SILVA, J.—I agree.

Appeal allowed.
