1951 *Present:* **Gratiaen J. and Gunasekera J.**

JAYARATNE, Appellant, *and* RANAPURA, Respondent

S. C. 22—D. C. Galle, 3,752

Partition action—Divided portion of common property—Transfer of fraction of such portion—Reference in conveyance to undivided share of the larger common property—Rule of construction.

One of six co-owners of a common property had, following upon an amicable partition, acquired prescriptive title to a divided portion of the land. He thereafter intended to convey an undivided 1/6 share in that divided portion to a third party, but the deed of conveyance wrongly described the share so conveyed as an undivided 1/36 share in the larger land. An action was later instituted for the partition of the divided portion in which all the parties derived their title from the same predecessor—i.e., the original co-owner who had acquired prescriptive title to the *corpus*.

Held, that the Court was entitled, so as to give effect to the real intention of the deed of conveyance, to construe it as having conveyed an undivided 1/6 share and not merely an undivided 1/36 share in the divided portion sought to be partitioned.

Fernando v. Fernando (1921) *23 N. L. R. 483 followed.*

Elisahamy v. Appuhamy (1950) *52 N. L. R. 332* not followed.

APPEAL from a judgment of the District Court, Galle.

N. E. Weerasooria, K.C., with *W. D. Gunasekere*, for the defendant appellant.

S. P. Wijewickreme, with *T. B. Dissanayake*, for the plaintiff respondent.

Cur. adv. vult.

June 19, 1951. GRATIAEN J.—

The plaintiff instituted this action for the partition of an allotment of land depicted in plan No. 549 made by Mr. K. V. P. A. de Silva, Surveyor. The *corpus* is admittedly a defined portion of a larger land and contains an area approximately one-sixth its total acreage. A man named Ando Appu had over 75 years ago owned an undivided one-sixth share of the larger land, and he sold this share in 1876 to K. Cornelis who is admittedly a predecessor in title of the plaintiff as well as of the defendant.

It will be convenient if I first set out the chain of title upon which interests in the *corpus* now sought to be partitioned passed to the defendant. In 1892 Cornelis gifted an undivided 3/36 of the larger land to his daughter Sopinona. At a later date, by an instrument to which I shall later refer, he sold an undivided 1/36 to an outsider, so that he still retained an undivided 2/36 share in the property. This share passed to his daughters Sopinona and Baby Nona, whose joint interests in the larger land now amounted to 5/36.

The evidence establishes that at some date prior to 1908 all the co-owners in the larger land, by an amicable arrangement, divided it up into 6 separate allotments of more or less equal extent, and each co-owner or group of co-owners thereafter possessed a separate allotment exclusively. The separate allotment which is the subject matter of the present action has continued, as from the date of this amicable partition, to represent the original 1/6 share which passed in 1876 to Cornelis. There can be no doubt that, long prior to the institution of these proceedings, the other co-owners of the larger land, and those who claimed under them, had abandoned such interests as they previously owned in the present *corpus;* similarly, those who claimed under Cornelis gave up their interests in the rest of the land and became exclusively entitled, by prescriptive possession, to this *corpus* in lieu of their undivided interests in the larger extent.

By deed D 2 of 1908 Sopinona and Baby Nona sold their interests to a man named Sadiris. This deed correctly purports to convey to Sadiris their undivided 5/6 share of the divided portion (i.e., of the present *corpus*) which had been substituted for the undivided 5/36 of the larger land. The language of the deed D 2 affords intrinsic evidence of the fact that the amicable partition previously agreed upon by the original co-owners had by that date been implemented. This 5/6 share was conveyed by Sadiris to Marthenis in 1941 and, as the result of a series of deeds, the details of which are not material for the purposes of this appeal, was ultimately sold to the defendant by the deed D 7

of 1947. On the basis of this title the defendant, by virtue of the conveyance in his favour and of long prescriptive user enjoyed by his predecessors, became the owner of an undivided 5/6 share in the divided allotment which is the subject matter of these proceedings. This share has been conceded to the defendant by the plaintiff in the proposed partition. The defendant's claim to have acquired title in some way or other to the remaining 1/6 share of the *corpus* has been rejected by the learned District Judge, and there was ample evidence to support his finding on this issue.

I shall now consider the chain of title upon which the plaintiff claims the outstanding 1/6 share in the corpus. I have already referred to a transaction by which Cornelis, the father of Sopinona and Baby Nona, had sold certain interests to an outsider. This is the transaction whereby, in terms of the deed P 1 of 1908, he purported to convey " an undivided 1/36 in (the larger land) " to two persons named Babanis and Charles. The amicable partition to which I have referred had already taken place, but this circumstance does not seem to have been brought to the notice of the notary who drafted the conveyance. The interests of Babanis and Charles ultimately passed, by a series of deeds in which various successive purchasers were concerned, to the plaintiff by the deed P 10 of 1947. The evidence establishes very clearly that each such purchaser in turn possessed, by virtue of his title, the outstanding 1/6 share of the *corpus* and made no claim to possess any interests in the other allotments comprising the larger land. Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors-in-title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided 1/36 of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P 10 executed in favour of the plaintiff.

Mr. Weerasuriya has invited us to hold that the effect of P 10 and of the earlier conveyances was to pass title only to an undivided 1/36 of the present *corpus* which is admittedly included in the larger lands described in the deeds. While conceding that these notarial instruments were intended to convey the 1/6 share in the *corpus* which the plaintiff and his predecessors in title had successively possessed by virtue of these deeds, he submitted that it is not open to a Court to give effect to this intention unless and until the manifest error is corrected by a notarially executed deed of rectification. The manner in which the deeds were acted upon and the intrinsic evidence in the later deeds, under which reference is made specifically to the assessment number of the present *corpus*, clearly establish what was the real intention of the vendors.

Mr. Weerasuriya relies on the earlier rulings of this Court in *Bernard v. Fernando* [1]; *Fernando v. Podi Singho* [2]; and *Elisahamy v. Appuhamy* [3]. As against this view, there are other decisions of this Court which have

[1] *(1913) 16 N. L. R. 438.*
[2] *(1925) 6 Law Recorder 73.*
[3] *(1950) 52 N. L. R. 332 ; 43 C. L. W. 111.*

on some occasions been differentiated but never, as far as I am aware, expressly dissented from. In *Don Andris v. Sadinahamy*[1], certain deeds relied on in an action for the partition of a larger land purported only to dispose of smaller defined allotments which were enjoyed by co-owners for convenience of possession (but not in such a manner as to acquire prescriptive title to the separate allotments). Sampayo J., with whom Schneider J. agreed, held that it was not justifiable to take " too narrow a view of the effect of these deeds ", and that " if the *real intention* is to dispose of the interests of the parties in the entire land, this Court has found no difficulty in giving a broad construction to such deeds ". Mr. Weerasuriya has argued that such an equitable method of construing written instruments should not be applied to the converse case where a person intending to convey a share in a divided allotment of the entire extent has purported, through an error, to convey a proportionately smaller share in the entire extent. I find, however, that this is precisely what was done by Bertram C.J. and Sampayo J. in *Fernando v. Fernando* [2]. The facts of that case require to be closely examined. The plaintiff had sued the defendant for the partition of lot B which originally formed part of a larger land, and it was admitted that the common predecessor in title of both the plaintiff and the defendant had acquired prescriptive title to lot B in its entirety by exclusively possessing it in lieu of his original undivided half share in the larger land. His other co-owner had, apparently similarly possessed the adjacent allotment exclusively. The later deed conveying title to the plaintiff had, however, through the same kind of error as has occurred in the present case, purported to convey an undivided $\frac{3}{8}$ share in the entire land and not, as was intended, an undivided $\frac{3}{4}$ share in lot B. It was therefore contended, just as Mr. Weerasuriya now contends, that in the proposed partition of lot B the plaintiff could only be allotted a $\frac{3}{8}$ share in accordance with the strict language of his deed. *Bernard v. Fernando* (*supra*) was relied on in support of this submission. Bertram C.J., however, held that *Bernard v. Fernando* would apply when " other undivided interests came into consideration ", whereas, in the case with which he was dealing, " the question was not as to what is the precise share stated in the deeds of the plaintiff, but in *what proportion, as between the plaintiff and the defendant*, the land is to be divided ". He pointed out that the common predecessor of both parties had acquired prescriptive title to lot B and that as no other person had any interests to lot B, justice required that, as between the plaintiff and the defendant, this specific allotment should be divided in the same proportion as their respective deeds had *intended* to give them shares. It is important to note that Sampayo J. who wrote the judgment in *Bernard v. Fernando*, agreed with Bertram J.'s ruling in the later case. Turning now to *Fernando v. Podisingho* (*supra*), I find that Bertram C.J. referred specifically to his judgment in *Fernando v. Fernando* (*supra*), and indicated that the equitable principles enunciated there and in *Don Andiris v. Sandirishamy* could conveniently be applied in a partition action but was not appropriate in an action *rei vindicatio*.

[1] *(1919) 6 C. W. R. 64.*

[2] *(1921) 23 N. L. R. 483.*

It seems to me that the decision in *Fernando v. Fernando* [1] which has never been expressly over-ruled, is on all fours with the present case. The plaintiff and the defendant now possess between them the entirety of the interests of their common predecessor in title Cornelis, and those interests have for very many years been represented by the *corpus* which is the subject matter of this action. Moreover, the plaintiff's immediate predecessor, who together with his wife conveyed Cornelis' outstanding interests to the plaintiff, had acknowledged in evidence that they placed him in possession of 1/6 share of the *corpus* by virtue of the deed in his favour. No one else claims interests in this particular share. I do not therefore see what prejudice could be caused by giving what Sampayo J. calls " a broad construction " to the deeds under which the plaintiff claims title so as to give effect to their true intention. I would therefore hold that the plaintiff should, by virtue of the deed P 10, and of his possession of the share which he has claimed, be allotted 1/6 and not merely 1/36 in the *corpus*. With respect, the recent decision in *Elisahamy v. Appuhamy* [2], which takes a contrary view, does not refer to and certainly does not purport to over-rule the decision in *Fernando v. Fernando*. I must confess that, if the question was at large, I might find some difficulty in justifying a departure from the strict rules laid down for construing written instruments. But this Court seems for many years to have preferred to adopt a more generous approach in situations where it is manifest that no prejudice could result to the interests of others. Possibly the correct solution may lie in the jurisdiction of a Court to rectify, or treat as rectified, documents in which, by a mutual mistake, the true intention of the parties is not expressed. *Fernando v. Fernando* [3]. Be that as it may, I consider that I cannot legitimately refuse to follow the earlier precedents, where, in precisely similar circumstances, Judges of great experience have declined, on equitable considerations, to pay too scrupulous a regard to the language of a written instrument.

I would affirm the judgment of the learned District Judge, and dismiss the defendant's appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.