1957 *Present:* Basnayake, C.J., and L. W. de Silva, A.J.

JULIANA HAMINE *et al.*, Appellants, *and* DON THOMAS *et al.*, Respondents

S. C. 770—D. C. Gampaha, 3,279/P

Partition action—Title of each party—Duty of Court to scrutinise it—Prescriptive possession—Evidence—Partition Act, No. 16 of 1951, ss. 20, 25, 48, 61.

In an action instituted under the Partition Act No. 16 of 1951—

Held, that section 25 of the Act makes it obligatory on the Court to scrutinise, quite independently of what the parties may or may not do, the title of each party before any share is allotted to him. Where a party fails to produce his material documents of title, or omits to prove his title, the procedure prescribed in sections 20 and 61 of the Act should be followed.

Held further, that when a witness giving evidence of prescriptive possession states "I possessed" or "We possessed", the Court should insist on those words being explained and exemplified.

APPEAL from a judgment of the District Court, Gampaha.

Sir Lalita Rajapakse, Q.C., with *D. C. W. Wickremasekera*, for the 3rd, 5th and 6th defendants-appellants.

Austin Jayasuriya, for the plaintiff-respondent.

Cur. adv. vult.

[1] *(1857) 1 Beven & Siebel 52.* [2] *(1857) Austin's Reports 207.*

September 30, 1957. L. W. de SILVA, A.J.—

The plaintiff instituted this action for the partition of a divided portion of a land called Kahatagahawatte marked lot B in extent 3 roods, 6 and 13/100 perches on the footing that he owned 6/8 shares and the 1st defendant the remaining 2/8 shares. The plan No. 534 marked X made for this action by the commissioner appointed by the District Court refers to lot B depicted in a plan of 1904. The extent of the alleged divided portion according to the plan X is 2 roods and 35 perches.

The 2nd and 3rd defendants, who were claimants at the survey, filed an answer alleging that Nicholas Appu, the original proprietor referred to in the plaint, was the owner of an undivided 1/12 share of Kahatagahawatte in extent about 8 acres, and set out a devolution of title claiming the half share which was inherited by Catherinahamy as the widow of Nicholas Appu They thus joined issue with the plaintiff. The 5th and 6th defendants, who are appellants along with the 3rd defendant, are the heirs of the deceased 2nd defendant.

After trial, the learned District Judge pronounced his judgment and entered an interlocutory decree for a partition of the corpus depicted in the plan X, allotting to the plaintiff and to the first defendant the respective shares set out in the plaint. The claim of the contesting defendants appellants was dismissed. Their appeal questions the correctness of the findings in respect of Catherinahamy's half share which they claimed at the trial and which has been allotted to the plaintiff.

Points of contest were framed at the trial with regard to the devolution of Catherinahamy's 1/2 share in relation to the respective titles pleaded and the prescriptive rights of the parties. The identity of the corpus was not specifically raised as a point of contest.

The share which devolved on Catherinahamy was conveyed by her on 3D2 in 1907 to Lavaris who gifted the share to the 2nd and 3rd defendants on 3D3 in 1925. Thereafter Catherinahamy on P1 in 1934 purported to convey the same interests to Selesthinu from whom the plaintiff purchased them on P2 in 1940. These competing deeds deal with an undivided 1/12 share of the larger land of 8 acres. The Court had to consider and determine whether the deeds applied to the corpus in suit and whether the title of the 2nd and 3rd defendants was superior to that of the plaintiff. The learned District Judge held that 3D2 and 3D3 did not apply to the land depicted in the plan X and upheld the plaintiff's title to it on P2. In coming to this conclusion, he was misled by the boundaries in the defendant's deeds. An examination of the documents shows that the boundaries in the two sets of deeds are identical. Learned Counsel for the respondent conceded that the trial Judge had erred in coming to his conclusion. Where there are two titles derived from one and the same source, the earlier title must prevail. No question of priority by registration was raised. It is thus obvious that the title which passed to the 2nd and 3rd defendants on 3D2 and 3D3 must prevail over P1 and P2.

Having erroneously found that the plaintiff was entitled to Catherina-hamy's 1/2 share on P2, the learned District Judge proceeded to make a finding that the 3rd defendant and the heirs of the deceased 2nd defendant had failed to prove a title by prescription. This finding cannot be supported. The paper title being in the 2nd and 3rd defendants, the burden of proving a title by prescription was on the plaintiff. That burden he has failed to discharge. Apart from the use of the word *possess*, the witnesses called by the plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C. J. in the Full Bench Case of *Alwis v. Perera* [1]:

> "I wish very much that District Judges—I speak not particularly, but generally—when a witness says 'I possessed' or 'We possessed' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

But a finding on the mere devolution of title as set out in the judgment of the Court of trial is of no consequence unless there is also a finding which determines the corpus to which that title relates. While the plaintiff purported to obtain a title on P2 to 1/12 share of a land of 8 acres, he purported to obtain a title on P4 to 1/4 share of lot B in extent 3 roods, 6·13 perches. He did not adduce any evidence to explain how the corpus he has sought to partition was reduced at various stages. The plaint does not refer to a plan, nor does it aver how the divided portion marked lot B came into existence. The plan of 1904 referred to in the plan X made for the purposes of this action was not produced at the trial. The boundaries appearing in the plaint are different from those shown in the plan X. There is no evidence whatever to identify the land described in the plaint with the land depicted in the plan X. The material elicited in the cross-examination of the plaintiff confirms his ignorance and uncertainty :—

Q. This land is a portion of a bigger land ?
A. I do not know. It is a separate portion.

Q. Who pointed out the boundaries to the surveyor ?
A. The 1st defendant and I.

Q. All round this land are portions of Kahatagahawatte ?
A. Yes.

Q. So that this is also a portion of Kahatagahawatte ?
A. Must be.

The learned District Judge has not considered this aspect of the case. The speculative nature of the plaintiff's purchases is borne out by his own deeds. Search was dispensed with on his purchase of a 1/12 share of a

[1] *(1919) 21 N. L. R. at 326.*

larger land on P2. His next purchase of a 1/4 share of lot B on P4 was made eleven days later through another Notary. Learned Counsel for the appellants has brought some of these matters to our notice since they have a bearing on the investigation of the title of the parties.

I now turn to the title of the 1st defendant. He filed no answer, but a Proctor filed his proxy. According to the plaint, two of Nicholas Appu's children are said to have sold their 2/8 shares to the 1st defendant. The only evidence touching his title was given by the plaintiff who did no more than repeat his averment in the plaint. The title deeds of the 1st defendant were not produced at the trial though he was present in Court and expressed a desire to have his interests allotted on the northern side. The Court had no opportunity of examining his title. Nevertheless the judgment states : " *the 1st defendant has obtained title to 2/8 share* from two of the children of Nicholas Appu. "

But learned Counsel for the plaintiff respondent has pointed out that the title of the 1st defendant is not the subject of this appeal and has argued that the appellants are not entitled to rely upon matters which the trial Judge was not called upon to decide. We are unable to accept this contention without qualification. This is a partition action governed by the Partition Act No. 16 of 1951. Section 25 of the Act is as follows :—

> " On the date fixed for the trial of a partition action or on any other date to which the trial may be adjourned, *the court shall examine the title of each party* and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made. "

Since this provision of law makes it obligatory on the Court to examine the title of each party, the title of the 1st defendant had to be subjected to scrutiny before any share was allotted to him. The finding that the 1st defendant has obtained title to a 2/8 share is unfounded. The learned trial Judge does not appear to have made use of section 20 or 61 of the Partition Act. Section 20 prescribes the step which the Court should take when a party to a partition action fails to produce at the trial his material documents of title, while section 61 prescribes the procedure to be followed where a party omits to prove his title. We wish to commend the use of these sections. Without an examination of the 1st defendant's title, the Court of trial could not, without causing prejudice to the other parties, proceed to the next stage of considering and deciding which of the orders mentioned in section 26 of the Act should be made.

We are of the opinion that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest *inter se* and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do. The

interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its, terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person as to the interests awarded therein and shall be final and conclusive for all purposes against all persons, whomsoever, notwithstanding any omission or defect of procedure or in the proof of title adduced before the court, and notwithstanding the provisions of section 44 of the Evidence Ordinanace, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act.

We are of the opinion that the plaintiff has failed to prove a title to the property he has sought to partition. On a consideration of all the matters to which we have referred, we allow the appeal and dismiss the plaintiff's action with costs both here and in the court below.

BASNAYAKE, C.J.—I agree.

Appeal allowed.