

*Present* : Bertram C.J. and De Sampayo J.

1921.

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FERNANDO *v.* FERNANDO.

64—D. C. Kalutara, 7,954.

*Partition—Purchase by two persons of undivided shares belonging to one co-owner—Prescriptive possession of a separate block by the two purchasers—Action for partition of the block—To what shares are the two co-owners entitled ?*

A purchaser who acquires an undivided share of a land is only entitled to the same undivided share of any specific portion of the land when the partition of that portion is under consideration. Where, however, two parties have acquired the whole interest of a shareholder in certain proportions, and their deeds describe the interest of such a shareholder as an undivided interest, and it transpires that a specific portion of the land has, in fact, been held by the person through whom they both claim as his portion for the prescriptive period, and the question then arises as to the proportion in which that specific portion has to be divided as between these parties, this specific portion must be divided in the same proportions as those described in their deed.

THE facts appear from the judgment.

*J. S. Jayawardene*, for the appellant.

*Samarawickreme*, for the respondent.

1921. October 28, 1921. BERTRAM C.J.—

*Fernando v.  
Fernando*

The question on this appeal arises in a partition action, the parties to which are the plaintiff and the defendant. The plaintiff produces deeds giving him a three-eighths undivided share of a particular piece of land. The land that is to be partitioned, however, is not the whole of that land, but a portion of it described as lot B, amounting approximately to a half of the whole. Lot B, so the plaintiff contends, was, in fact, possessed by the person, through whom both the plaintiff and the defendant claim, as his share of the land. Questions of fact have been gone into, and Mr. J. S. Jayawardene has attempted to show on behalf of the defendant that, whereas the plaintiff had three-eighths of the entire land, the defendant had acquired five-eighths of the entire land. I do not think we can accept this. The evidence seems to me to show that the plaintiff had acquired three-eighths, and the defendant one-eighth, the person through whom they both trace their title being entitled to only half of the whole.

Mr. J. S. Jayawardene insists that, as the plaintiff's deeds only give him three-eighths of the whole, he cannot have more than three-eighths of any particular portion of the whole. But the question here is not what is the precise share stated in the deeds of the plaintiff, but in what proportion, as between the plaintiff and the defendant, is the land to be divided.

Mr. Jayawardene cited the cases of *Fernando v. Christina*<sup>1</sup> and *Bernard v. Fernando*.<sup>2</sup> If I understand these cases aright, the principle which they lay down is that a purchaser who acquires an undivided share of a land is only entitled to the same undivided share of any specific portion of the land when the partition of that portion is under consideration. But that is so where other undivided interests come into consideration. Where, however, two parties have acquired the whole interest of a shareholder in certain proportions, and their deeds describe the interest of such a shareholder as an undivided interest, and it transpires that a specific portion of the land has, in fact, been held by the person through whom they both claim as his portion for the prescriptive period, and the question then arises as to the proportion in which that specific portion has to be divided, it seems to me that justice requires that, as between those parties, this specific portion must be divided in the same proportions as those described in their deeds.

In my opinion the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1912) 15 N. L. R. 321.

<sup>2</sup> (1918) 16 N. L. R. 438.