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1963 *Present* **: Basnayake, C.J., and Herat, J.**

DINGIRI APPU and another, Appellants, and **MOHOTTIHAMY** and 2 others, Respondents

S. C. 210/60-D. C. Avissawella, 6693/L

(i) Deed thirty years old-Presumption of its due execution-Discretion of Court to refrain from drawing such presumption-Requirement of production of the original deed or its duplicate-Evidence Ordinance, s. 90-Prevention of Fraud/I Ordinance, ss. 2, 16-Notaries Ordinance, 3. 31 (26a).

(ii) Co-owners-Adverse possession by one of them-Proof-Ouster-Prescription Ordinance, s. 3.

(i) The presumption of due execution of a dead thirty years old may be drawn under section 90 of the Evidence Ordinance, only upon production of the very document in regard to which the Court is invited to draw such presumption. The pr education of a copy, even if it is a Certified copy, is not sufficient.

Obiter : It is open to the Court to refrain from presuming any of the matters stated in section 90 of the Evidence Ordinance.

(ii) Where a land is owned in common, there must be clear evidence of ouster of all the other co-owners by the co-owner who claims that he enjoyed the land exclusively without recognising the rights of others. He must also establish that ho commenced 'o do so from a certain date and that ten years have elapsed torn that date.

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APPEAL from a judgment of the District Court, Avissawella.

H. W. Jayewardene , Q.C., with S. S. Basnayake, for the 2nd defendant-appellant and for the substituted defendants-appellants.

N. E. Weerasooria. Q.C.. with R. L. Jaya-sooriya, for the plaintiffs-respondents.

June 18, 1963. **BASNAYAKE, C.J.-**

The plaintiffs Abeywardena Mudianselage Mohottihamy, Abeywardena Mudianselage Heenappu and Abeywardena Mudianselage Ukku-hamy, all of Dodawatta, instituted this action on 17th April 1952 against Abeywardena Mudianselage Dingiri Appu and Abeywardena Mudianselage Mituruhamy. They asked that they be declared entitled to the land called Halgahagawawatta bounded on the east by the land of Hami Appu and Galwetiya, on the south by the Village Committee Road, on the west by Mugunagahagawahena and Galkona and on the north by Gal Enda and forest containing in extent about one amunam more or less and more fully depicted in Plan No. 1041 of 4th April 1948 made by R. A. Wijetunga, Licensed Surveyor. Thedefendants in

their answer stated that the plaintiffs had included in the land which they called Halgahagawawatta a portion of the land called Mugunagawawatta which forms no part of Halgahagawawatta. They also stated that the land called Halgahagawawatta comprised several allotments of land, namely, (1) Bambaragalawatta, (2) Egodahawatta, (3) Talgahawatta alias Talgaha Aramba, (4) Maha Aramba alias Unapanduragawawatta, (5) Oegederaga-wawatta, and (6) Halgahagawa Kumbura. They maintained that the plaintiffs were entitled only to 1/3rd share of the lands collectively known as Halgahagawawatta and asked that the plaintiffs' action be dismissed, that the 1st defendant be declared entitled to a l/3rd share of these lands and all the improvements on the land called Bambaragalawatta.

It is common ground that a man called Pelpolage Babappu, who is the father of the 1st defendant Dingiri Appu and the grand-father of the plaintiffs, was the owner of the land collectively called Halgahagawawatta which consists of several allotments. The plaintiffs base their title on deed No. 16146 of 1st February 1903 said to be executed by Pelpolage Babappu in favour of his son Davith Appu. They also claim the benefit of section 3 of the Prescription Ordinance on the ground that they and their predecessors in title have been in undisturbed and uninterrupted possession of the entire land for over 10 years which entitle them to a decree in their favour.

The proceedings in this case commenced before District Judge Wijaya-tilake, and when he was transferred from Avissawella after two of the plaintiffs' witnesses had given evidence, the proceedings continued before his successor District Judge A. D. J. Gunawardena. At the close of the plaintiffs' case it was agreed that the evidence of Jayasena, Clerk of the

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Land Registry, Kegallo, and Licensed Surveyor Wijetunga given before Judge Wijeyatilake be adopted as part of the plaintiffs' case. Learned counsel for the defendants-appellants does not complain against that agreement. His contention is that deed P2 (No. 16146) dated 1st February 1903 and attested by notary Balasurige Cornelis Perera has not been proved. The notary who attested the deed and the attesting witnesses are now dead. The plaintiffs therefore relied on section 90 of the Evidence Ordinance. The original of the deed was at no time produced before Judge Wijayatilake or his successor who decided the case. The duplicate of the deed was produced before Judge Wijayatilake by a clerk from the land Registry and it was taken back. His successor had before him only a certified copy on which he based his conclusion which he states thus : "I am satisfied for the aforesaid reasons that the execution of the deed P2 has been duly proved." The reasons he states are-" The attesting notary and the 2 witnesses to that deed are dead. It is over 30 years old and it has come from proper custody and the deed has been promptly registered." The learned Judge is wrong in holding that the execution of the deed has been duly proved, because clearly its execution had not been proved in the manner prescribed by the Evidence Ordinance. Perhaps he had section 90 of the Evidence Ordinance in mind when he made the statement above quoted , but he does not appear to have considered the terms of that section as carefully as he should have.

That section reads-

" Where any document purporting or proved to be thirty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

The language of the section indicates that the presumption under section 90 may be drawn only upon production of the very document in regard to which the Court is invited to draw the presumption prescribed therein. Even then the Court is not bound to presume any of the matters specified in the section because the enabling words are " may presume " and not " shall presume

". A copy, even if it is a certified copy, will not do for the reason that the statute permits the Court to draw the prescribed inferences only on the production of the document itself. We are fortified in our view of the section by the decision of the Privy Council in the case of Basant Singh v. Brij Raj Saran [1 (1935) A. I. R.(Privy Council)]. It has been held in the case of Kiri Menika v. Duraya [132. ' (1913) 17 N. L. R. 11.] that in the case of documents required by law to be

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executed in duplicate at the same time and subject to the same formalities as those prescribed in the Notaries Ordinance and produced from the custody of the Registrar-General, the duplicate stands on the same footing aa the original and may be treated for the purposes of section 90 as if it were the original, because it is to all intents and purposes an original document. The requirement that deeds be executed in duplicate is to be found in section 16 of the Prevention of Frauds Ordinance which reads-

" Every deed or other instrument, except any will, testament, or codicil required by this Ordinance to be executed or acknowledged before or to be attested by a notary, shall be executed, acknowledged, or attested in duplicate."

Now it is section 2 of that Ordinance that requires that the classes of instruments specified therein should be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and that the execution of such instrument should be duly attested by such notary and witnesses. Section 31 of the Notaries Ordinance prescribes the rules which must be observed in the execution of deeds. Sub-section 26 (a) of that section requires a notary to deliver or transmit to the Registrar of Lands of the district in which he resides, before the fifteenth day of each month, the duplicate of every deed or instrument except wills and codicils executed or acknowledged before or attested by him during the preceding month. Kiri Menika v. Duraya (supra) should not be regarded as holding that the Court is bound in every case to presume any or all of the matters referred to in section 90 on the production of the duplicate. It is open to the Court, as in the case of the original itself, to refrain from presuming any of the matters stated therein. There may be cases in which the correctness or the genuineness of the duplicate is called in question. Cases have come up before us in which there have been discrepancies between the original and the duplicate of the same deed. In such cases the Court is free to refuse to treat the duplicate as a replica of the original and as standing in the same place as the original. In the instant case even the duplicate was not produced before the Judge who was invited to draw the presumptions prescribed in section 90. He had only a certified copy before him and he acted wrongly in drawing the presumptions he drew on an examination of the certified copy.

The plaintiffs claimed that they were entitled to a land in extent one amunam more or less and more fully depicted in plan No. 1041 of 4th April 1948 made by R. A. Wijetunga, Licensed Surveyor. That plan was prepared for the purpose of D. C. Avissawella Case No. 4571 instituted by A. M. Appuhamy, a brother of the 1st defendant, who is not a party to the

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present proceedings in December 1945 in respect of a land called Maha-arambe. It was made at the instance of the 2nd and 3rd defendants to that action and it depicts an extent of 17 acres 2 roods and 31 perches while the extent mentioned in the deed is one arnunam which, according to the evidence of Surveyor Vancuylenburg, is equal to 4 or 5 acres in the case of high land.

The extent depicted in the plan cannot be reconciled with the extent given in the deed. The land depicted in tracing PI which is a tracing of the plan prepared by Surveyor Wijetunga on 4th April

1948 for the purpose of D. C. Avissawella Case No. 4571 consists of Mugunagawawatte, Maha-arambe and Bambaragalawatte. Maha-arambe and Mugunagawa-watte fall outside the area in dispute. There remains therefore only the northern portion of PI which is called Bambaragalawatte which the parties agree is common property.

The plaintiffs asked that they be declared entitled to the entire land to the exclusion of all the co-owners. The evidence of witnesses who speak to the enjoyment of the entire land depicted in PI which the plaintiffs claim to the exclusion of the others is vague and affords no ground for basing a decision in their favour. Learned counsel for the defendants maintained that the land in dispute is not the exclusive property of any one person. Where a land is owned in common, there must be clear evidence of ouster of all the other co-owners by the co-owner who claims that he enjoyed the land exclusively without recognising the rights of others. He must also establish that he commenced to do so from a certain date and that ten years have elapsed from that date. The decisions of this Court in the cases of Bajapakse v. Hendrick Singho [1 (1959) 61 N. L. R.32.], Abdul Majeed v. Ummu Zaneera[2 (7959) 61 N.. L. B. 361.] and CarolineGunawardene Samamkoon and another v. William Warnasooriya (S. C. 12/D. C.Tangalle No. P 60-S. C. Minutes of 19.12.1958) explain the meaning of ouster and the nature of the evidence required to prove it. The plaintiffs have failed to establish their rights either by producing the original or the duplicate of P2 before the Judge who decided the case. Nor have they established adverse possession for ten years. The appeal should therefore be allowed and the plaintiffs' action dismissed with costs.

HERAT, J.-I agree.

Appeal allowed.

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