MAGILIN PERERA
v.
ABRAHAM PERERA

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT) AND GUNAWARDENE, J.
C. A. APPEAL No. 444/77(F).
D.C. COLOMBO No.12385/P.
MARCH 6, 1986.

Partition action – Original owner – Judicial approach to the question of original ownership.

When a partition action is instituted the plaintiff must perforce indicate an original owner or owners of the land. A plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and, even if it be so claimed, such claim need not necessarily and in every instance be correct because when such an original owner is shown it would theoretically and actually be possible to go back to still an earlier owner. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.

APPEAL from the District Court of Colombo.

P. A. D.Samarasekera, P.C. with *Jayantha de A. Guneratne* for plaintiff-appellant.

N. R. M. Daluwatta, P.C. with *Miss D. K. Gabadage* for 21st defendant-respondent.

Cur. adv. vult.

May 8, 1986.

GOONEWARDENE, J.

The plaintiff-appellant filed this action in the District Court seeking to partition the land called Delgahawatteowita depicted on preliminary plan No. 960 marked X and produced at the trial. There was no dispute in respect of the corpus sought to be so partitioned.

The case of the plaintiff was that the original owner of the property had been her grandfather Brampy Perera who was married in community of property to her grandmother Pavistina and on the death of both of them the property devolved equally on their eight children who included *inter alia* the plaintiff's father Arnolis, Abraham the

contesting 21st defendant-respondent (who died subsequent to the lodging of this appeal and in room of whom a legal representative has been appointed) and Cecilia, on whose death seven children (one having died unmarried and issueless) succeeded to her rights, one of them being Alpin the 12th defendant who testified at the trial on behalf of the contesting 21st defendant.

The plaintiff gave evidence at the trial and described the succession under the said Brampy Perera. She claimed that she derived the interest of her father Arnolis upon deed No. 32155 of 1958 (P1) and that the title of the said Brampy Perera to the land having devolved on the parties mentioned by her they are entitled to rights therein as shown by her.

The 21st defendant had filed answer denying the original ownership of Erampy Perera and his marriage in community of property. Consequently while admitting the mere devolution under Brampy Perera and the bare execution of deed P1, he had denied that any rights passed to the parties mentioned by the plaintiff. His claim had been that the land had at one time been a swamp and that over 30 years previous to the action he started filling up the same and cultivating it, that all plantations had been raised and possessed by him, and that he had acquired a prescriptive title to the same. Consequently, while claiming title to the entire land he had asked for a dismissal of the plaintiff's action. It might at this point be useful to take note of the fact that the 21st defendant had not claimed to be the original owner of the land. His claim had been that he had had the requisite possession for the period mentioned by him as a consequence of which he had acquired a prescriptive title to the entire land.

After trial the learned District Judge answering the relevant points of contest in favour of the 21st defendant by his judgment dated 29th April 1977 dismissed the plaintiff's action on the view he had taken that the 21st defendant had acquired title by possession to the entire land, and consequently this appeal came to be filed.

Learned President's Counsel appearing for the plaintiff-appellant contended before us that it makes no difference whether Brampy Perera referred to was one who was not married in community of property to Pavistina or whether in point of fact the original owner had been Brampy Perera or his wife the said Pavistina. His contention was that in

either event the property devolved on their eight children. It became possible for him to make this latter assertion in view of the evidence of the 21st defendant that the land belonged to his mother and that he entered the land on his mother's rights. Learned President's Counsel appearing for the 21st defendant-respondent conversely contended that it was not in the mouth of the plaintiff-appellant at this stage to take up this position and that there is in any event no clear evidence that the 21st defendant in giving this evidence was referring to this land or some other land. On the question as to whether such reference was to this land or any other, I am satisfied having carefully examined his evidence that the 21st defendant's reference was to this land, a view taken by the trial judge himself when he refers to this item of evidence and goes on to advert to the 21st defendant's possession of this land for over 30 years as stated in the latter's statement of claim. The other question is as to whether the plaintiff can now be heard to say that it matters not whether the land originally belongs to Brampy Perera the husband or Pavistina the wife. The contention of the learned Counsel for the 21st defendant was that the action had been brought on the footing of Brampy Perera's original ownership, that the pleadings were on that footing, that the points of contest raised were on that footing and that at this stage the plaintiff should not be allowed to adopt the other position that Pavistina was the original owner even if the 21st defendant's evidence suggested that. Learned Counsel contended that the 21st defendant had at the trial to meet the position taken up by the plaintiff that Brampy Perera was the original owner, which position he did in fact meet. He contended that even at a later stage of the trial a point of contest should have been raised as to whether Pavistina was the original owner in order to enable the 21st defendant to refute that position by evidence and to enable the trial Judge to come to a finding on that, and if the question arose to make a further finding as to what rights she was entitled to. His contention was that at this stage the appellant should not be permitted to adopt this position, a position he (Counsel) himself did not come ready to meet.

When a partition action is instituted the plaintiff must perforce indicate an original owner or owners of the land. A plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and even if it be so claimed such claim need not necessarily and in every instance be correct because when such an original owner is shown it could theoretically and actually

be possible to go back to still an earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the plaintiff if it be so established need, not necessarily result in the case of the plaintiff failing. In like manner if it be seen that the original owner is in point of fact someone lower down in the chain of title than the one shown by the plaintiff that again by itself need not ordinarily defeat the plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.

It is in this perspective and against such a background I think that this matter must be viewed. The case of the 21st defendant must be understood to be that his title to this land is independent of any predecessor in such title. He says he possessed the land in its entirety for over 30 years and claims a title based upon possession. The case of the plaintiff in this respect in essence is that the 21st defendant's title is to an undivided 1/8th share and that such title is referable to a predecessor. That predecessor the plaintiff had claimed to be Brampy Perera the father of the 21st defendant. However, the plaintiff's case on her plaint had been that on Brampy Perera's death a half share devolved on his widow Pavistina and the balance half equally on each of their eight children. She had further stated that on the death of Pavistina her rights too devolved on the self same eight children and thus they are shown as inheriting equally her half share; so that on her plaint Pavistina at some stage is shown though not as an original owner of the entire land, at least in a sense, as an original owner of the entire half share. This position the 21st defendant had challenged and denied in his statement of claim. The plaintiff had pleaded a devolution under Brampy Perera which broadly speaking is the same devolution under Pavistina with respect to the half share left to her on her husband's death. The 21st defendant knew then what the devolution under Pavistina was which devolution the plaintiff was relying on with respect to Pavistina's undivided half share. If the 21st defendant in

giving evidence has stated that the land originally belonged to Pavistina (meaning not an undivided half from Brampy Perera but the whole) can it reasonably be said that the plaintiff should be precluded from relying on that evidence and adopting that very position and can it be said that the Court should not allow him to do so. I think not. I am of the view that to do so would not be consistent with the justice of this case. The answer to the objection raised on behalf of the 21st defendant is in my view a simple one and to be largely found in the reason given above that the 21st defendant in any event had to meet the case of Pavistina being entitled to an undivided half share, in connection with which the 21st defendant himself had testified that Pavistina was entitled not merely to a half, but to the whole. Counsel for the 21st defendant contended before us that the trial Judge was not called upon to decide upon the original ownership of Pavistina, and if she was held to be such original owner, to then decide upon the quantum of her rights. He contended that in the absence of points of contest on these questions the 21st defendant was not required to lead evidence as to ouster with respect to a case of the original owner being Pavistina, evidence he would have otherwise placed before the Court. What I have said earlier is a sufficient answer to all these submissions: the question as to the original ownership of Pavistina though not formulated in this manner as a point of contest at the trial can I think in all the circumstances be deemed to have been contained in the point of contest numbered as one and the answer to that and as to the quantum of her rights can be deemed to be found in the evidence of the 21st defendant referred to earlier given at the beginning of his cross examination, in the form of an admission running counter to what appears to be his position that he was for all purposes and at all times material the original and only owner of the land.

The question then whether it was Brampy Perera or his wife Pavistina who was the original owner of this land becomes largely academic and of not much moment in this view of the matter and it is my finding at this appeal that either the one or the other of them was such owner and such person's rights devolved on the eight children referred to. This finding that the original owner might have been Pavistina can be said to arise from the evidence of the 21st defendant himself while the finding that the original owner might have been Brampy Perera gets support from inter alia the oral testimony of the plaintiff and others including the admission by the 21st defendant in evidence that his father had planted arecanut trees found along the

perimeter of the land. Account in this connection must also be taken of the document P1 (executed in 1958 at a time when the need for creating evidence of title could not have been said, in all the circumstances, to have existed) especially with respect to the title recited therein and the share dealt thereby both of which support an original ownership on the part of Brampy Perera.

On this finding then the children of Brampy Perera and Pavistina became co-heirs in respect of the land and the remaining question is as to the effect of the 21st defendant's claim of title to the entire land based upon possession. At the outset itself it can be said that this claim must fail. Even if the 21st defendant had exclusive possession it is clear that such possession cannot be adverse and must be referable to his lawful title (or what in some contexts is called paper title) and his possession must be deemed to be on behalf of all the co-owners in the absence of clear proof of ouster. Evidence of the latter is singularly lacking and on the contrary the evidence tends taken as a whole to suggest possession by others in the plaintiff's pedigree as well, at various times. In this respect there is also some cogency in the argument of the learned President's Counsel for the plaintiff-appellant that the 21st defendant's evidence and claim before the Surveyor at the preliminary survey that he had possession for about 30 years makes out a case where, having regard to his age, he commenced to possess around the age of fifty the conclusion being that as suggested by the evidence others in the plaintiff's pedigree before that possessed rights in the land.

The learned District Judge's findings on the relevant points of contest cannot stand in the view that I have taken that he has misdirected himself on these questions.

The plaintiff has given evidence in proof of the pedigree relied on by her and in accordance with that evidence it is possible to determine what shares the parties are entitled to in the subject matter.

In the absence of any counter claims to the improvements the learned District Judge has arrived at a finding that the same should belong to the 21st defendant and I see no reason to disturb that finding.

I accordingly set aside the judgment of the District Judge and remit the case back to the District Court with a direction to enter interlocutory decree for partition in accordance with the evidence given by the plaintiff-appellant at the trial. The improvements will

belong to the 21st defendant-respondent for which he will receive at the appropriate stage the appropriate compensation. The plaintiff-appellant will be entitled to recover pro rata the recoverable costs (which will include the costs of the preliminary survey) from the parties entitled to rights in the land. The 21st defendant (now dead and represented by his legal representative) will pay the plaintiff-appellant Rs. 315 as costs of this appeal but in all the circumstances I make no order as to costs of contest in the Court below.

G. P. S. DE SILVA, J. – I agree.

Appeal Allowed.