DONA CECILIA

v.

CECILIA PERERA AND OTHERS

SUPREME COURT.
WANASUNDERA, J., L. H. DE ALWIS, J. AND SENEVIRATNE, J.
S.C. APPEAL No. 3/86.
C. A. APPEAL No. 239/78(F).
NOVEMBER 20, 1986.

Partition Action–Amicable division–Possession of divided lots–Prescription.

Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years.

Where a land was divided in the presence of all the co-owners who acquiesced in the division and possessed their divided lots exclusively taking the produce thereof everything points to an intention to partition the land permanently and not just for convenience of possession and although the plan of division was not signed by the co-owners and no cross conveyances were executed, with ten years of such possession the co-owners would acquire prescriptive title to their respective lots. The successor to a co-owner could tack on the period of possession of his predecessor in proving his prescriptive title.

Cases referred to:

(1) *Githohamy v. Karanagoda – (1954) 56 NLR 250.*

(2) *Dias v. Dias – (1959) 61 NLR 116.*

(3) *Simpson v. Omeru Lebbe – (1947) 48 NLR 112.*

(4) *Carolisappu v. Anagihamy – (1949) 51 NLR 355.*

APPEAL from judgment of the Court of Appeal.

D. R. P. Goonetilleke with *K. S. Tillekeratne* and *Nihal Perera* for plaintiff-appellant.

T. B. Dissanayake, P.C. with *Bimal Rajapakse* and *Piyatissa Abeykoon* for 2, 3, 5 and 6 defendant-respondents.

January 22, 1987.

L. H. DE ALWIS, J.

The plaintiff-appellant instituted this action to partition 2/3 part of a land called Pelakelle and 1/8 part of Uskelle of Kongahawatte depicted as Lots A, B & C in Plan No. 749 made by Licensed Surveyor, C. C. Wickremasinghe, on 22.6.68, marked X.

The plaintiff filed plaint on the basis that she was entitled to an undivided 80/120 share of the land and the 1st defendant to the balance 40/120 share. The 2nd and 3rd defendants were made parties to the action since they were in possession of a portion of the land. They filed a statement of claim claiming title to a divided portion of the land towards the west (which is depicted as Lot A in Plan X) and stated that they had gifted it to the 5th and 6th defendants on Deed No. 31492 of 28.8.57 (2D6). The 5th and 6th defendants filed statement of claim setting out their title to Lot A in Plan X on deeds and by prescriptive possession. The 8th defendant filed statement of claim, claiming Lot C in Plan X, on the title pleaded therein.

The position taken up by the 2nd and 3rd defendants was that the land was possessed in divided lots and the plaintiff's action for its partition therefore must be dismissed. The 5th and 6th defendants and the 8th defendant prayed that lots A & C which they respectively possessed should be excluded from the corpus.

The 5th, 6th and 8th contesting defendants, raised points of contest on these lines. The learned trial judge answered the issues in their favour and held that lots A & C should be excluded from the corpus in favour of the 5th & 6th defendants and the 8th defendant respectively.

The 1st defendant, who is the aunt of the plaintiff did not file a statement of claim and tacitly accepted the shares in the land allotted to her by the plaintiff according to the devolution of title pleaded in the plaint. A point of contest was raised by the plaintiff in regard to the prescriptive rights of parties, and the learned trial judge in answering it held that the 8th defendant, the 5th & 6th defendants and the 1st defendant had prescribed to their lots in the land, that is, to lots C, A & B respectively. In the result he held that the plaintiff had no rights in the corpus depicted in Plan X and dismissed her action. It is from this judgment that the plaintiff now appeals with the special leave of this court.

After the appeal was filed in the Court of Appeal on 13.9.78 the 1st defendant died on 21.10.78 and the appellant filed papers in the Court of Appeal for the substitution of her name as legal representative in the place of the 1st defendant and the application was allowed. The caption to the petition of appeal in the Court of Appeal and in this court, however, has not been amended accordingly. The amendment is now made.

The contesting defendants claim that the corpus was amicably divided among the co-owners in 1935 and Plan No. 161(2D5) was made on 15.2.1935 giving effect to the partition. According to them the land was divided into lots A, B & C. Lot A was allotted to the 2nd & 3rd defendants, Lot B to Jeramias and Lot C to Isabella and Ceciliya, who are the predecessors in title to the 8th defendant.

In regard to Lot C the plaintiff had agreed to exclude Lot C from the corpus when the case was first taken up for trial. But when it was commenced de novo, she made no such concession and points of contest were raised as to whether the plaintiff had earlier agreed to its exclusion and if so, whether she could now include it in the corpus she sought to partition. A further point of contest was also raised as to whether the 8th defendant, on her deeds possessed Lot C as a separate land. All these points of contest were answered in favour of the 8th defendant who was declared entitled to Lot C.

The 2nd and 3rd defendants claimed title to an undivided extent of 76/150 of Kongahawatte on Deed 256 of 2.2.33(2D4). That was two years before the amicable partition on Plan 2D5. In the trial court this deed was attacked as a forgery but the learned District Judge held it was not. At the hearing of the appeal learned counsel for appellant

stated that he was not challenging the genuineness of the Deed. The 2nd and 3rd defendants have gifted their rights in the land to the 5th and 6th defendants on Deed No. 31492 of 28.8.1957(2D6). In that deed the land is described as Lot A in Plan 161 of 19.2.35(2D5).

The contesting defendants therefore took up the position that the land was amicably divided in 1935 after the death of their predecessor in title, Anthony Perera. Thereafter their predecessors in title fenced off their respective lots and possessed them independently, and exclusively and took the produce of the land. The learned trial judge has accepted their evidence in regard to their possession.

The plaintiff had purchased interests in the land only in 1960 and knew very little about it. She admitted that she knew nothing about the rights of the other co-owners, except her own. Her witnesses also had not much knowledge of the land and the trial judge was of the view that their evidence could not be accepted. These findings of fact were not canvassed in this court.

The only matter argued before us was that there was no proof of an amicable division of the land in 1935 as depicted in Plan 2D5. It was submitted that all the co-owners at the time had not signed the plan signifying their consent to the division of the land into the lots A, B & C. The case of *Githohamy v. Karanagoda* (1) was strongly relied on by learned counsel for the appellant. There it was held that a plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession. When a land is amicably partitioned among co-owners it is usual to execute cross deeds among themselves or at least the co-owners should sign the plan of partition.

In that case apart from the plan, there was no evidence to show that the land was in fact partitioned on the occasion the plan was prepared. There was also no evidence that all the co-owners had acquiesced in the preparation of the plan, nor were aware of its preparation. Besides, the evidence of exclusive possession led in the case was insufficient to establish a prescriptive title in the co-owners

to their several lots. Learned counsel also cited the case of *Dias v. Dias* (2), which held that where a co-owner conveys his interest by reference to a particular portion or koratuwa of which he has been in possession the deed can be considered as effective in law to convey his undivided interest in the whole land. But in that case the division took place without the knowledge of all the co-owners.

Separate possession on grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title. In *Simpson v. Omeru Lebbe* (3) relied upon by counsel for the appellant, there was no documentary evidence of any division of the land as in the present case, and in those circumstances very clear and strong evidence of an ouster and of adverse possession was called for. In the present case on the other hand, according to the 3rd defendant all the co-owners of the land were present at the time the plan was made. They were herself and her husband Jusey, Isabella, Ushettige Cecilia Perera and Theodorisa. The 3rd defendant and her husband were allotted Lot A, Jeramias Lot B and others Lot C. The plaintiff's vendors on P1 were not called to testify to the contrary. The learned trial judge has accepted the 3rd defendant's evidence and found that there was an amicable division of the land in 1935. That finding has not been disturbed by the Court of Appeal. After the division, live fences were erected along the boundaries separating one lot from the other. At the time the preliminary plan X was prepared in 1968, the Surveyor found fences separating the lots and has depicted them in the plan. This evidence has been accepted by the learned trial judge. Although the Plan 2D5 was not signed by the co-owners the evidence clearly showed that they were present and were aware of the division of the land and acquiesced in it. Thereafter they had possessed their divided lots exclusively and had taken the produce. Everything pointed to an intention on their part to partition the land permanently and not just for convenience of possession.

Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years.

The 2nd and 3rd defendants who were allotted Lot A in Plan 2D5 on the amicable division in 1935 possessed it and gifted it to their daughter the 5D and her husband 6D in August 1957 on Deed 2D6. This action was filed by the plaintiff to partition the land in June 1966.

Learned counsel therefore submitted that the 5th and 6th defendants who became owners of Lot A in 1957 have not had ten years possession of Lot A in order to establish a prescriptive title to it. But their transferors, the 2nd and 3rd defendants had been in possession of the divided Lot A from the time of the amicable partition in 1935 till 1957 and it is open to the 5th and 6th defendants to rely on the possession of the persons from whom they derived title in order to establish a prescriptive title to the land. In *Carolisappu v. Anagihamy* (4) it was held that the period of possession of an intestate person can be tacked on to the possession of his heirs for the purpose of computing the period of ten years required to acquire prescriptive title under section 3 of the Prescription Ordinance.

In the present case the 5th and 6th defendants and their predecessors in title have been in exclusive possession of Lot A from 1935, that is, for over a period of over 30 years before action was filed and have acquired a prescriptive title to that lot. The learned trial Judge accordingly held that Lot A was a divided portion of the land and that the 5th and 6th defendants have prescribed to it. This finding has been rightly affirmed by the Court of Appeal.

The finding of the learned District Judge that the 8th defendant is entitled to Lot C was not challenged at the hearing. In fact at the preliminary survey the plaintiff, according to the Surveyor's Report 'X', admitted that Lot C belonged to the 8th defendant, and at the trial had no objection to it being allotted to the 8th defendant. This concession by the plaintiff is tantamount to an acknowledgment of the amicable division in 1935. Lot C was therefore rightly excluded from the corpus, as being a separate lot belonging to the 8th defendant.

As regards Lot B the learned trial judge in answering issue No. 4 relating to the prescriptive rights of parties, has held that the 1st defendant had prescribed to Lot B. But it does not appear from the judgment that he has scrutinized the evidence with a view to ascertaining whether the 1st defendant has prescribed to Lot B. Indeed there, is no evidence to support the Judge's finding except the Surveyor's Report 'X1' which shows that the 1st defendant was in possession of Lot B at the time of the survey in 1968, that is, after action had been filed. But as to when she entered into possession of Lot B, there is no evidence.

At the amicable division of the land in 1935, Lot B was allotted to Jeramias, who possessed it until he transferred his rights to the plaintiff on 15.2.1960 by Deed No. 1041 (P1). Isabella who also had interests in the land joined in the transfer P1. As Jeramias was in possession of Lot B until he transferred his rights to the plaintiff on P1, the 1st defendant could not have commenced possessing it before 1960. Since action was filed in 1966, she could not have acquired a prescriptive title to it. The learned judge has thus erred in holding that the 1st defendant has prescribed to Lot B. The 1st defendant did not file a statement of claim contesting the plaintiff's claim nor did she participate in the trial. She was prepared to accept the share alloted to her by the plaintiff. In the plaint, the plaintiff claimed an 80/120 or a 2/3 share of the entire land on P1 and conceded a 40/120 or a 1/3 share to the 1st defendant. Now that lots A & C have been excluded from the corpus, there remains only Lot B to be partitioned. The plaintiff and the 1st defendant, therefore will be entitled to their respective shares in Lot B only.

Point of contest No. 4 must now be amended to read as follows:

> "The 5th and 6th defendants have prescribed to Lot A the 8th defendant to Lot C, and the plaintiff and the 1st defendant are entitled to rights in Lot B. Issue No. 2 consequently should be confined to Lot B in Plan 749 and answered in the affirmative."

I set aside the judgment of the Court of Appeal and direct that interlocutory decree for the partition of Lot B only in Plan X be entered according to the shares allotted to the plaintiff and the 1st defendant in the plaint. The plaintiff will be entitled to costs of partition and the surveys pro rata from the 1st defendant.

The plaintiff however will pay each set of contesting defendants, namely, the 5th and 6th defendants, and the 8th defendant nominal costs of contest in the District Court fixed at Rs. 210, costs in the Court of Appeal fixed at Rs. 315 and costs in this Court fixed at Rs. 420.

The appeal is allowed subject to this variation.

WANASUNDERA, J.—I agree.

SENEVIRATNE, J.—I agree.

Appeal allowed.