COURT OF APPEAL

R.M.L. Fernando
Vs
Ganitha

C.A. (S.C.) 13/74 - D.C. Kurunegala 2997/P

Informal division of co-owned land – Dividedly possessed by each co-owner – Prescriptive Title – Partition Action

The Plaintiff Appellant purchased some land from two brothers Ibrahim and Ossen who in turn purchased at various times several contiguous lots from several co-owners. Ibrahim and Ossen fenced the 1st lot off and held it dividedly with the consent of the other co-owners and whenever they bought adjoining blocks they broke down the fences incorporating them and fencing off the amalgamated enlarged block with the approval and consent of the other co-owners. They held this amalgamated block dividedly for a period longer than 10 years.

Plaintiff appellant, successor in title to Ibrahim and Ossen instituted action to partition the co-owned land. The Respondents contended that the land had been dividedly possessed for a period longer than 10 years and that the land was no longer co-owned. The District Judge dismissed appellant's action.

The plaintiff appealed to the Court of Appeal against the District Judge's order.

Held that the land had been dividedly possessed for a period of 10 years or more on the basis that the co-ownership had ceased and so no action for partition was available.

APPEAL from judgment of the District Court of Kurunegala.

Before: L.H. de Alwis, J & Abeywardena, J.,
Counsel: T.B. Dissanayake for Appellant.
H.W. Jayewardena, Q.C. with D.R.P. Gunatillake for Respondents.
Argued on: 2.3.82
Cur.adv.vult.
Decided on: 2.4.82

L.H. DE ALWIS, J.

The Plaintiff-appellant instituted this action in the District Court of Kurunegala to partition a land described in schedules 'A' and 'B' to the plaint and depicted in Plan No. 3606 marked 'X' surveyed on a Commission issued by the Court. The plan is, however, not in the record now. The contesting defendants-respondents took up the position that the land sought to be partitioned had been dividedly possessed by them and the other defendants for a period of over 30 years and was no longer commonly owned. They accordingly moved that the appellant's action be dismissed. The learned District Judge after trial held in favour of the contesting defendants-respondents and dismissed the appellant's action. It is from this judgment that the appellant now appeals.

Learned Counsel for the appellant in the course of his argument accepted the position that the corpus had been possessed in divided lots but submitted that it was for the sake of convenience and not as a permanent mode of possession, which terminated the co-ownership.

The appellant purchased rights in the corpus on very recent deeds, P6, P7 and P16 in 1966 and instituted the action in November of that year to partition the land. One of the appellant's vendors, Ibrahim gave evidence for him and stated that he did not speak with the other co-owners before dividing the land. But he admitted that the land was divided into small lots and although no plan was made, his predecessors-in-title had divided and possessed the land according to their respective shares. He said that ever since 1948 the land has been possessed in separate lots and he and his brother Ossen had possessed lots 6 & 7 from the eastern portion of the land lying to

the north of road, for their undivided shares in the land. The 4B defendant-respondent, who is a son of the original 4th contesting-defendant, Ukkuwa, could not say when the land had been divided but he was aware that it was dividedly possessed. He stated that the co-owners were in possession of their different portions of the land as separate lots for over 30 years. Sundera, a man of about 70 years of age who gave evidence for the respondents at the trial said that he had known the land for about 20-25 years prior and that from that time the co-owners possessed the land in lots after fencing off their respective lots." He said that the land was never possessed in common. The Surveyor's report 'X1' describes the land as divided into lots that are in the possession of the several defendants and some of the fences of the lots as being about 25 to 30 years old.

It is submitted by Counsel for the appellant that when a land is amicably partitioned among co-owners it is usual to execute cross deeds or at least for all the co-owners to sign the plan of partition. In this case admittedly there are neither cross deeds nor a plan of partition - Vide *Gitohamy Vs. Karanagoda*, 56 N.L.R. 250.

It was further submitted that for an amicable partition to be recognized in law there must be a division which in law terminates the co-ownership of the property. Vide *Dias Vs. Dias*, 61, N.L.R. 116. In the absence of a termination of co-ownership, it is submitted on the authority of *Corea Vs. Iseris Appuhamy*, 15 N.L.R. 65, that the possession of a co-heir enures to the benefit of his co-heirs and that a co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. In order to prove ouster very clear and strong evidence is required. *Sadiris Appuhamy Vs. James Appuhamy*, 60 N.L.R. page 207. But no physical disturbance of possession is necessary. In *Mailvaganam Vs. Kandiah*, 11 C.W.R. 171, it was held that no physical disturbance of possession is necessary and that it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to possess it as his own exclusively. The sole possession is often attributable to an express or tacit division of family property among the heirs and the adverse character of exclusive possession may be inferred from circumstances. *De Mel Vs. De Alwis*, 13 C.L.R. 207.

The principle laid down by the Privy Council in *Corea Vs. Appuhamy* was "modified" as Thambiah J, put it in *Perera Vs. Jayatunga*, 71 N.L.R. 338, by the theory of a counter-presumption propounded in *Tillakeratne Vs. Bastian*, 21 N.L.R. page 12, by a Full Bench of the Supreme Court. In that case Bertram C.J., stated : "It is, in short, a question of fact, whenever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable, in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than 10 years before action brought."

In *Kirimenike Vs. Menikhamy*, 22 N.L.R. 510, where members of a family make an informal but definite partition of their lands, and each party enters into possession of his share, then the possession of the several shareholders become adverse, from the date of their doing so and title by prescription can be acquired. If however the arrangement continued for a long period of time on equitable grounds it is presumed that at some point possession became adverse but such a presumption is only drawn upon a consideration of all the circumstances of the case.

Dealing with the question of separate possession by a co-owner Lord Wilberforce in *Nonis Vs. Peththa*, 73 N.L.R. page 1 said as follows - "In relating this provision (Section 3 of Prescription Ordinance Chap. 68) to the case of co-owners it must be borne in mind that separate possession by an individual co-owner of part of the property in common ownership may, and often does, occur and continue for a considerable period, purely for reasons of convenience, and that in order to displace the title of the other co-owners clear and strong evidence of possession exclusive of the other co-owners, and inconsistent with the continuation of the co-ownership is required ..... But, side by side with this basic rule, the Courts of Ceylon have recognized that acts of an informal character, falling short of partition effective in law, may be sufficient to found a prescriptive claim."

Lord Wilberforce referred to the case of *Kirimenika Vs. Menikhamy* and said "the alternatives were constrasted of, on the one hand, an informal but definite partition, when each party enters into possession of his share and, on the other, a permissive arrangement. In the first case, title by prescription might be acquired, and even in the

second case this might follow if the arrangement continued so long that on equitable grounds it might be presumed that possession became adverse."

In the present case it is common ground that the original owner of the entire land was Suramba Panikkiya, who died leaving three children, Pina, Punchi, and Dingiriya. According to the respondents each of these three children possessed their 1/3 of the land dividedly. The first deed relating to this land is P1 executed in 1932 by two of Pina's grand children in favour of one Henry de Silva, from whose heirs Ibrahim and his brother Ossen have purchased shares. They also purchased rights in the land from Thomas and Josey Nona who figure in Pina's pedigree, on P5 in 1945 and on deed P2 in 1946 respectively. Thereafter Ibrahim by deed P18 of 1947 conveyed his rights to Ossen.

A circumstance from which Ossen's adverse possession can be presumed is that when his possession was disturbed by one Welbinahamy in 1946 he filed action in the District Court of Kurunegala, case No. 5299 for her ejectment on the ground that she had forcibly taken possession of about 6 acres of his land. Ossen claimed the entirety of Pina's rights according to his pedigree 4D7 filed in that case. He gave the extent of the land that he possessed as 25 acres out of the whole land which was about 82 acres in extent. In para 13 of his amended plaint Ossen states that he and Ibrahim separated off the extent of 25 acres with the consent of the other co-owners and the approval of the overlord and possessed it. In para 17 he pleaded that he and his predecessors-in-title had been in undisturbed and uninterrupted possession of the divided extent of 25 acres of the land by a title adverse to and independent of that of the defendants for a period of over 10 years. Welbinahamy in her answer claimed through her deceased husband the rights of one of Pina's children Hapu, on the footing that Pina left two children and not one child Silpa, as shown by Ossen, in his pedigree. She and her children were the defendants in the case. In that case the defendants themselves admitted in paragraph 5 of their answer dated 15.2.51 that Pina separately and dividedly possessed his interests in the land. The case was settled and consent decree was entered by Court declaring Ossen entitled to lot 'A' depicted in plan No. 3055A, which lot is in extent 15 acres and 10 perches, while Welbinahamy and her children were declared entitled to Lot 'B' in extent 2 acres, 3 roods and 36 perches.

It is significant that no reference at all is made in the decree to the larger land of 82 acres obviously because Pina's portion had by then been separated off and possessed as a distinct entity.

Counsel for the appellant submitted that the learned District Judge was wrong in drawing the inference that Ossen had restricted his claim in that case to only 25 acres as and for his rights to the entirety of Pina's share, and that it is inconceivable that Ossen would have abandoned the full extent of his share unless his possession was merely for convenience. But in schedule 'B' to the Plaint Ossen desribes the land as the divided portion of 25 acres and gives the southern boundary as the road and western boundary as the remaining portion of the land. The learned Judge has identified this portion as the area where lots 6 & 7 in Plan X are situated and according to the plaint and answer filed in that case this portion was a distinct and divided extent of land that Ossen possessed for his share. As a matter of fact, the consent decree indicates that the actual extent of the land was even less than that - just a little over 18 acres out of which 2 acres, 3 roods and 36 perches were given to Welbinahamy and her children. The plaintiff as the successor-in-title to Ossen cannot now claim the balance extent of land since the other defendants have prescribed to it before the plaintiff filed this action in 1966. This is the view taken by the learned Judge and I see no reason to disagree with him.

The position is the same in regard to the interests of Pina's heirs which the appellant purchased on P7 & P8. These rights were included in the claim that Ossen made to the entirety of Pina's rights in case No. 5299 and they have subsequently passed to Ibrahim on P12. They come within the extent of 18 acres referred to in the decree 4D10 entered in that case.

Ukkuwa, who is an heir of Dingiriya and a predecessor-in-title of Ibrahim himself filed an action in the District Court of Kurunegala case No. 5239/L for declaration of title and ejectment against the same Welbinahamy and her children and the judgment of the Supreme Court entered in appeal in that case was produced marked 4D4. In that case too Welbinahamy claimed rights in the land from one Hapu who she claimed was another child of Pina. She alleged that Hapu though married in diga returned and re-acquired binna rights to her father's land. Whether that was so, was undoubtedly the main issue

in the case but the point to be noted is that the Supreme Court in its judgment does make reference to the amicable division of the land according to which Pina was entitled to 3 blocks of land for his 1/3 share. The Supreme Court set aside the judgment of the District Court in that case and held that Ukkuwa was entitled to judgment as prayed for. Ukkuwa was one of the original contesting defendants in the present action. He died and is now represented by 4(a) - 4(c) defendants-respondents. Ukkuwa was also a vendor to Ibrahim. The case filed by Ukkuwa against Welbinahamy and the judgment of the Supreme Court entered in his favour, is another circumstance to be taken into consideration in proof of his adverse possession of a separate lot of land.

Counsel for the appellant submitted that most of the deeds executed in respect of the corpus refer to undivided fractional shares and are consistent with his case that separate possession was for convenience. But the mere reference to undivided shares in deeds executed after the date of the alleged division is not conclusive of the question. *Perera Vs. Jayatunga,* 71 N.L.R. 338, 343 *Danton Obeysekera Vs. Endoris,* 66 N.L.R. 457.

Ossen and Ibrahim have also purchased the shares of some of the heirs of Punchi and Dingiriya on deeds P11, P10, P8 and P9. It is admitted by Ibrahim that whenever he purchased additional shares he broke down the fences of those lots and incorporated them with his own land which was on the eastern side and to the north of the road. Ibrahim has sold a divided portion of 20 perches on 2D1 in 1953 to Sundara and Baiyawathie and a divided extent of 1 rood on the same day on 17D1 to Tikiri. Thereafter both Ibrahim and Ossen have sold a divided portion of 20 acres to the 7th respondent. On the same day that the deed was executed, Ossen sold his right, title and interest in the land to Ibrahim on P12. That includes the divided portion of 15 acres and 10 perches that Ossen was declared entitled to on decree 4D10. Ibrahim has also purchased an undivided 2 1/2 acres from Ukkuwa on P15 of 9.7.1956. This portion too, as was his practice, he has amalgamated with his land to the north of the road by extending the western boundary. The learned Judge has taken the view that the interests that Ibrahim purchased from the heirs of Punchi and Dingiriya do not lie outside lots 6 & 7 and that is borne out by Ibrahim's evidence. Ibrahim has possessed lots 6 & 7 for well over 10 years and has acquired a prescriptive title to

them. His last purchase was from Ukkuwa on P15 in July 1956 and that is over 10 years prior to the filing of the present action in November 1966. Where a co-owner who owns exclusively property which adjoins the common land fences off a portion of the common land and incorporates it with his own land and possesses both as one lot, an ouster is presumed. Vide *De Mel Vs. De Alwis,* 13 C.L.R. 207 and *Perera Vs. Jayatunga,* 71 N.L.R. 338.

According to the Survey Report 'X1' lot 6 now consists of 10 acres, 2 roods and 30 perches, and lot 7, 20 acres 2 roods and 4 perches. Together they comprise an extent of 31 acres and 34 perches. The original extent of the land that Ossen was declared entitled to on decree 4D10, was a little over 15 acres. The increase in the present extent of lots 6 & 7, to 31 acres and 34 perches is no doubt due to the addition of the various shares that Ossen and Ibrahim had from time to time purchased and amalgamated with the original lot A in Plan No. 3055A, which lies to the north of the road towards the east. This is also the conclusion that the learned District Judge has arrived at.

Ibrahim has in 1959 transferred about 10 acres on P11 to Joseph, the 8th respondent. Ibrahim and Ossen have sold a divided extent of 20 acres on 7D1 to the 7th respondent in 1956 and it was agreed at the commencement of the trial that these extents be excluded from lots 6 & 7 in favour of the 8th and 7th respondents respectively. Ibrahim was therefore left with 1 acre and 34 perches out of lots 6 & 7. But by deed P16 dated 23.2.1966 he sold an undivided extent of 30 acres to the plaintiff and before executing the deed he has made out to the plaintiff that he was entitled to 23 acres of land to the north of the road and also to land to the south of the road. Although Ibrahim at one stage of his evidence said that he possessed land to the south of the road, under cross-examination he admitted that he never had possession of any land to the south of the road. The Plaintiff agreed to purchase an extent of 25 acres but at the suggestion of the Notary the deed was made out for an extent of 30 acres. This is clearly a speculative purchase. Ibrahim had pointed out to the appellant lots 6 & 7 and some land to the south of the road. But he stated that he informed the plaintiff that he did not have possession of the land and advised the plaintiff to amicably divide it and if that was not possible to file a partition action. The appellant was thus clearly aware of Ibrahim's position. Ibrahim undoubtedly could not have instituted an action for the partition of

the land on the basis of common ownership so that the deed he has executed in favour of the appellant cannot place the appellant in a better position than he was in.

The learned trial Judge in answering the points of contest has held that the land had been dividedly possessed for over 10 years and has dismissed the appellant's action on the basis that co-ownership of the land had ceased. In my view he has come to a correct finding on this question.

The appeal is dismissed with costs.

Abeywardena, J.- I agree.

Appeal dismissed.