KARUNARATNE
v.
RANASINGHE HAMINE (since deceased and substituted by S. R. A. KARUNAWATHIE) AND OTHERS

COURT OF APPEAL.
WIJEYARATNE, J., AND EDUSSURIYA, J.
C.A. 2/82(F) D.C. GAMPAHA NO. 18408/P
MARCH 16TH AND 19TH, 1992.

Partition Action – Right to bring a partition action – Pactum antichresis – *Usufructuary mortgage bond.*

Subject to a few exceptions, only a person who has the ownership and possession or has the right to possession can bring a partition action.

Held : that a plaintiff whose share is subject to a usufructuary mortgage bond in favour of a defendant has full ownership though possession is lost until the redemption of the bond. Such a person can be said to be in possession through the mortgagee and is entitled to file a partition action.

A mortgage is a right over the property of another which serves to secure an obligation. It is accessory to a principal obligation and cannot subsist without it.

There is sometimes a stipulation in a mortgage bond (called *pactum antichresis*) that the mortgagee shall have the use of the property and its fruits in lieu of interest, the mortgagor retaining the power at all times of redeeming the property.

This type of mortgage bond is called a *usufructuary mortgage* bond and is not uncommon in our rural areas.

Gunawardena vs. Baby Nona (47 N.L.R. 31) followed.
Charles Appu vs. Dias Abeysinghe (35 N.L.R. 323) and
Aines vs. Salman Appuhamy (68 C.L.W. 68) distinguished.

Cases referred to :

1. *Aines v. Salman Appuhamy* 68 C.L.W. 68.
2. *Charles Appu v. Dias Abeysinghe* 35 NLR 323.
3. *Sinchi Appu v. Wijegunasekera* 6 NLR 1.
4. *Fernando v. Mohamadu Saibo* 3 NLR 321.
5. *Silva v. Paulu* 4 NLR 174.
6. *The Attorney-General v. Herath* 62 NLR 145, 147.
7. *Abdul Rahaman v. Muttu Natchia* 1 Br. Reports 250.
8. *Silva v. Silva* 19 NLR 47.
9. *Appuhamy v. Marihamy* 25 NLR 421.

10. *Baby Nona v. Silva* 9 NLR 251.
11. *Gunaratne v. The Bishop of Colombo* 32 NLR 337, 343.
12. *William Perera v. Theresia Perera* 46 NLR 398.
13. *Gunawardena v. Baby Nona* 47 NLR 31.

APPEAL from the judgment of the District Judge of Gampaha.

G. L. Geethananda for the 1st plaintiff-appellant.

Respondents absent and unrepresented.

Cur. adv. vult.

March 27, 1992.

WIJEYARATNE, J.

The 2nd plaintiff, Harriet Randunu Hamine (since deceased) filed this action along with the 1st plaintiff (her daughter Charlotte Griselda Rupasinghe Karunaratne) for the partition of the land called the B portion of Bogahalanda, Dangolla and Dangollahena situated at Magalegoda, depicted in Plan No. 107 dated 26.9.78 made by Surveyor Hubert Perera and filed of record.

According to the plaint B. S. Randunu Appuhamy was the original owner of this land and he died leaving as heirs three children, namely, Harriet the 2nd plaintiff, Luvina and Luvinis, who became entitled to 1/3 share each.

The 2nd plaintiff by usufructuary mortgage bond No. 20983 of 25.9.37 executed a usufructuary mortgage in respect of 1/3 share of the land and 16/180 share of the house in favour of the 1st defendant-respondent. Thereafter by Deed of Gift No. 159 of 1.2.55 she gifted her 1/3 share of the soil and 40/180 share of the house to her daughter the 1st plaintiff.

The plaint avers that the share of the 1st plaintiff is subject to the aforesaid usufructuary mortgage bond in favour of the 1st defendant-respondent.

At the commencement of the trial it was urged by counsel for the 1st defendant-respondent that the plaintiffs cannot maintain this action and the following preliminary issue was framed :–

Can the (1st) plaintiff maintain this action as her rights are subject to a usufructuary mortgage bond in favour of the 1st defendant?

After submissions the learned District Judge by his order dated 12.1.82 answered this issue in the negative and dismissed the plaintiff's action with costs, from which order this appeal has been filed.

The learned District Judge held that the plaintiff did not have possession, and relying mainly on the decisions of *Aines vs. Salman Appuhamy* [1] and *Charles Appu vs. Dias Abeysinghe* [2] held that the 1st plaintiff did not have possession and accordingly dismissed the action.

At the hearing Mr. Geethananda for the 1st plaintiff-appellant submitted that a person who has ownership and possession or a right to possession is entitled to file and maintain a partition action.

The old Partition Ordinance No.10 of 1863 by its section 2 provided as follows :–

" When any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property ; or..... ..... apply for a sale thereof,....."

This Ordinance was repealed and replaced by Partition Act No. 16 of 1951, which by its section 2 provided as follows :–

" Where any land belongs in common to two or more owners, any one or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Act. "

This Partition Act, No. 16 of 1951, was repealed and replaced for a short period by the Administration of Justice (Amendment) Law, No. 25 of 1975, which by its section 632 (1) made very similar provision.

By Gazette Notification No. 293/7 of 1.12.77 the Partition Law No. 21 of 1977 now applicable, came into operation from 15.12.77 and section 2 (1) of the said Law provided as follows :-

" Where any land belongs in common to two or more owners, any one or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Law."

Thus it is seen that all these enactments refer to ownership in common and not to possession.

In the early years a view was taken that a partition action can only be maintained by the plaintiff who is in possession and whose title is not disputed. However in the case of *Sinchi Appu vs. Wijegunasekera* [3] a bench of three Judges reviewed these authorities and Wendt, J., stated at page 11:

" In this state of judicial opinion on the construction of the Ordinance, I think we are free to hold, and ought to hold, that the effect of the plain words of the enactment is that a person claiming to be owner of an undivided share of land, and to be therefore entitled to possession of it, is competent to maintain an action to have that land partitioned, although neither he nor his predecessor in title has had possession, and although the defendants wholly deny his title. In the present case, however, as I have pointed out already, possession of the share plaintiff claimed by a predecessor in title is admitted. "

In the cases of *Fernando vs. Mohamadu Saibo* [4] and *Silva vs. Paulu* [5] similar observations were made by Lawrie J. This view accords with the wording of all the enactments referred to above, which refer to ownership in common and not to possession. However it is important to keep in mind that a plaintiff who has been out of possession for long years though he is able to maintain a partition action runs the risk of having his action dismissed on the ground that he has lost all his rights by adverse prescriptive possession.

Thus it is seen that the right to file a partition action flows primarily from the right of ownership.

Professor R. W. Lee in his book " An Introduction to Roman-Dutch Law " (5th Edn. 1953) at page 121 states as follows :-

" DOMINION or Ownership is the relation protected by law in which a man stands to a thing which he may : (*a*) possess, (*b*) use and enjoy, (*c*) alienate. The right to possess implies the right to vindicate, that is, to recover possession from a person who possesses without title to possess derived from the owner. Grotius selects this right as the most signal quality of ownership, which he says is the relation to a thing by virtue of which a person not having the possession may obtain the possession by legal process. "

(See also Grotius " Jurisprudence of Holland " – Commentary by R. W. Lee, 1936 Edn. Vol. II at p. 68).

Similar observations were made by L. M. D. de Silva, J., in the Privy Council case of *The Attorney-General vs. Herath* [6].

Certain rights which fall short of *plena proprietas* or full ownership have been made the subject of partition actions.

In the case of *Abdul Rahman v. Muttu Natchia* [7] it was held that a *superficies* (namely a boutique standing on a land) could be the subject matter of a partition action. It should be kept in mind that this was a partition action brought under the old Partition Ordinance, No. 10 of 1863, which in its section 2 refers to " landed property ". It was held that " *superficies* " was included in the term " landed property ".

In the case of *Silva vs. Silva* [8] where a plaintiff brought an action claiming to be entitled to a half share of a land which had been bought on a Crown grant taken in the defendant's name and where he alleged that in purchasing the land from the Crown the defendant acted on behalf of himself and the plaintiff, it was held that the plaintiff was not an " owner " within the meaning of the Partition Ordinance as he had no legal estate, and that his right, if any, was an action to compel the defendant to grant a conveyance of a half share to him. Here the defendant had denied the trust.

The facts of this case were distinguished by Jayawardena, A. J., in the case of *Appuhamy vs. Marihamy* [9] where a co-heir paid the Crown half improved value (contributed by all the co-heirs) and obtained a Crown grant in his favour and held the land in trust for

all the co-heirs, it was held that another co-heir can bring an action for partition although he was not the legal owner.

In this case Jayewardene, A. J., stated as follows :-

" Here the trust is not denied, and it would be futile to refer the plaintiff to a separate action to obtain a conveyance to support a title which is admitted to be in him. "

It has also been held that in respect of a property burdened with a *fidei commissum* the fiduciary who has a life interest in the property is entitled to maintain an action to partition the property. In the case of *Baby Nona vs. Silva* [10] Lancelles A. C. J. stated that by the Roman-Dutch law the fiduciary was a true owner, and that he had a real though burdened right of ownership. Now it is settled law that a fiduciary can institute a partition action in respect of a land burdened with a *fidei commissum* though old decisions were to the contrary – *Gunaratne vs. The Bishop of Colombo* [11] and *William Perera vs. Theresia Perera* [12].

Thus it is seen that the general rule is that it is only a person who has the ownership and possession or a right to possession is entitled to file a partition action though there have been a few exceptions.

In this case the 2nd plaintiff has executed the usufructuary mortgage bond of 1937 in favour of the 1st defendant-respondent and thereafter she gifted the aforesaid share in 1955 to the 1st plaintiff, who takes it subject to the said usufructuary mortgage bond.

" In its comprehensive sense a mortgage is defined as a right over the property of another which serves to secure an obligation " – The Law of Mortgage and Pledge in South Africa by Wille (2nd Edn. 1961) p. 1.

It is accessory to a principal obligation and cannot subsist without it. There is sometimes a stipulation (called a *pactum antichresis*) in a mortgage bond that the fruits of the property mortgaged should go to the mortgagee for the interest due to him on the principal sum, the mortgagor retaining the power of redeeming his property.

" The *pactum antichresis* is an agreement that a mortgagee shall have the use of the mortgaged property in lieu of interest until the debt is paid and it is a valid agreement in a mortgage contract. The mortgagor must, however, retain the power at all times of redeeming the property. "

(The Law of Mortgage and Pledge in South Africa by Wille (2nd Edn. 1961) p. 76.)

This type of usufructuary mortgage bond is not uncommon in the rural areas of our country where the mortgagee is permitted to possess the property in lieu of interest till the debt is paid and the bond redeemed.

The question arising in the case before us is whether the 1st plaintiff had all the attributes of ownership which would entitle her to file a partition action though her share is subject to the usufructuary mortgage bond and she is not entitled to possession of this share till the bond is redeemed.

The learned District Judge has relied on *Charles Appu vs. Dias Abeysinghe (supra)*, where it was held that a person who is entitled to the dominium only of an undivided share of a land, the usufruct being vested in another, is not entitled to bring a partition action.

In this case the plaintiff was not entitled to possess the land at all. The plaintiff had not the right of use and enjoyment. Therefore the plaintiff's right fell short of full ownership to the extent the plaintiff was not entitled to have possession.

In the case before us the 2nd plaintiff is entitled to have possession at any time after the usufructuary mortgage bond is redeemed. It is within her power or that of her heirs to redeem the bond and obtain immediate possession. It can be said that the possession of the usufructuary mortgagee is on behalf of the 1st plaintiff who has stepped into the shoes of the usufructuary mortgagor (the 2nd plaintiff). Therefore this case is very similar to the facts of the case of *Gunawardena vs. Babynona* where it was held that a plaintiff who is entitled to an undivided share of a land which he has leased to a party is entitled to bring a partition action. In this case Jayatillake J. distinguished the facts from those in the case of *Charles Appu vs. Dias Abeysinghe (supra)*.

Jayatillake J. in this case at page 32 stated as follows :-

" The plaintiff in this case was at the date of the institution of the action in possession of the undivided one-sixth share to which he was entitled through his lessee, the third defendant, and his right to institute the action under section 2 of the Partition Ordinance cannot be questioned. "

The same observations apply with equal force to the 1st plaintiff who is in the position of the usufructuary mortgagor now.

In the case of *Aines vs. Solomon Appu (supra)* it was held that where two plaintiffs, one of whom is entitled only to the *dominium* and the other to the usufruct thereof instituted an action under the Partition Act, No. 16 of 1951, that neither of them is competent to be the plaintiff in view of section 2 of the Partition Act, No. 16 of 1951.

In this case though it is correctly stated that neither of the plaintiffs could maintain the partition action the question was not considered whether both plaintiffs together could not maintain the partition action. When the facts of this case are considered, it is clear that both plaintiffs together are entitled to maintain the partition action and the 2nd plaintiff who had the dominium or ownership should have been declared entitled to that share subject to the usufruct in favour of the 1st plaintiff. Then the action could be maintained by both plaintiffs together and the action need not have been dismissed.

In the case before us the 1st plaintiff remains the full owner of her 1/3 share though she has to part with her possession for the duration of the usufructuary mortgage bond. The 1st plaintiff is entitled to possession of her 1/3 share at any time she redeems this usufructuary mortgage. Till then she can be said to be in possession through the mortgagee, the 1st defendant-respondent. Therefore she is entitled to maintain this action, and the trial can proceed accordingly.

I therefore set aside the order of the learned District Judge dated 12.1.82 dismissing the action.

I send the case back to trial on the footing that the plaintiffs are entitled to maintain this action and the trial will proceed according to law.

I direct the 1st defendant-respondent to pay the costs of this appeal to the 1st plaintiff-appellant.

EDUSSURIYA, J. – I agree.

Judgment set aside.
Case sent back for re-trial.