1971 *Present :* **Sirimane, J., and Samerawickrame, J.**

N. ROSALIN PERERA, Appellant, *and* M. ROSALIN NONA and others, Respondents

*S. C. 169/69 (Inty.)—D. C. Kuliyapitiya, 973/P*

*Partition action—Lease of portion of corpus—Position of overholding lessee as against the co-owners—Prescription.*

Where, in a partition action, the corpus had been possessed in lots divided by fences, and one of the lots was possessed for a period of about 14 years by the lessees of the true owners after their lease had expired—

*Held*, that the mere possession of one of the lots by the lessees could not, in the absence of any definite denial by them of the true owners' rights, be looked upon as adverse possession giving rise to prescriptive rights. In such a case there must be proof of some definite act or acts of ouster which show that the possession of the lessees had changed its original character.

APPEAL from a judgment of the District Court, Kuliyapitiya.

*Ralph de Silva*, for the plaintiff-appellant.

*W. D. Gunasekera*, for the 2nd, 3rd and 4th defendants-respondents.

*Cur. adv. vult.*

September 21, 1971. SIRIMANE, J.—

This was a partition action filed by the plaintiff to partition the land called *Irawellahena* depicted as lots 1 to 6 in the preliminary Plan X.

The 2nd defendant, and his children, the 3rd and the 4th, claimed an exclusion of lot 1, on the footing that it formed a part of their land called *Kosgahawatta alias Siyambalagahamulawatta alias Kongahawatta.*

The original owner of *Irawellahena* had obtained a Crown Grant for this land, and the Title Plan P1A clearly shows that lot 1 is a part of *Irawellahena.*

The learned District Judge though he correctly held that lot 1 was a part of the plaintiff's land, held further that the contesting defendants had prescribed to it.

Title to the entire corpus being in the plaintiff and her co-owners, the burden was on the contesting defendants to prove that they had gained a prescriptive title to a part of that land.

The contestants based their title on an auctioneer's conveyance, 2D4 of 1932.

On this deed (2D4 of 1932) the southern and western boundaries of *Kosgahawatta* are described as the land appearing in the plaintiff's title Plan (P1A) showing clearly that lot 1 was not a part of the land conveyed by 2D4. The defendants relied strongly on a Plan they had made in 1933 which took in lot 1. The reason for making such a Plan is not

at all clear, as the auction sale at which the 2nd defendant's brother purchased *Kosgahawatta* was held in 1931. There is no evidence that any of the co-owners of *Irawellahena* knew anything about this plan.

Despite this Plan, in 1937, the 2nd defendant took an assignment of a lease of an undivided share in the entirety of *Irawellahena* including lot 1, (P17). Thereafter he obtained two more leases from the plaintiff's predecessors in title on the same basis, P18 and P19, the second of which expired in 1949, so that the possession of the 2nd defendant which is not disputed is referable to these leases.

The plaintiff also called as a witness, one Jamis Fernando, 82 years of age, who is a brother of the original owner, who had planted and possessed the land from the time his brother purchased it in 1914 till about 1936. His wife Amaritha Fernando had taken a lease of this land from the plaintiff's predecessors for a period of 8 years, on P15 of 1933, and sublet it to one Dingiri Menika on P16 of 1936. It was an assignment of this lease that the 2nd defendant obtained on P17 in 1937. His evidence showed that he possessed lot 1 as a part of *Irawellahena*, and that the house in which he lived is now occupied by the 2nd defendant. The learned District Judge has not rejected his evidence, but merely stated that he knows nothing of the land after 1936, but that is surely sufficient for the purposes of the plaintiff's case. There was also the evidence of the 5th defendant, the owner of an adjoining land, who gave evidence against the plaintiff with reference to another contest which is not the subject matter of this appeal. He stated in cross-examination that the 2nd defendant had been in possession of lot 1 from about 1940.

It is also significant that at the preliminary survey the 2nd defendant did not claim an exclusion of lot 1. According to the surveyor's report, he claimed some of the plantations on lot 1 without specifying them, and also stated that the rest were in common.

The learned District Judge has apparently not accepted the 2nd defendant's version that he had been in adverse possession of lot 1 prior to 1949, when his lease (P19) expired. He holds that when the 2nd defendant handed back possession to the plaintiff's predecessors, he did not give up lot 1, and goes on to hold that he had been in adverse possession from that date. This action was filed in 1963.

When title to a land is in the plaintiff, and a defendant's possession of a part of it is referable to leases from the plaintiff's predecessors in title, there must be proof of some definite act or acts of ouster which show that the possession of the contesting defendants has changed its original character. The learned District Judge has not addressed his mind to this aspect of the matter, nor is there evidence to support such an inference. The mere fact that the contesting defendants continued to remain in possession of a part of the land after the expiry of the lease for a period of about 14 years is in my opinion insufficient to claim title by prescriptive possession

The Plan X shows that the land had been possessed in lots, divided by fences, and the mere possession of one of these lots by the lessees of the true owners after their lease has expired, in the absence of any definite denial by them of the true owners' rights cannot be looked upon as adverse possession giving rise to prescriptive rights.

The order of the learned District Judge allowing an exclusion of lot 1, and the interlocutory decree entered in this case are set aside.

The interlocutory decree filed in the case gives directions for the allotment of specific lots in the preliminary plan. These directions are unnecessary and confusing.

A fresh interlocutory decree must be filed in accordance with the plaintiff's evidence, allotting an undivided extent of one acre of the soil out of the entire corpus depicted in Plan X to the 1st defendant, and the balance to the plaintiff. The buildings and plantations should be allotted according to the findings in the judgment and where there is no definite finding in accordance with the claims made before the surveyor.

The Commissioner will thereafter divide the land in a just and equitable manner in accordance with sections 31 and 33 of the Partition Act. The plaintiff is entitled to pro rata costs fixed at Rs. 1,000 plus costs of both surveys and also to costs of appeal against the contesting defendants.

The order for costs against 5th defendant in the lower Court will stand.

SAMERAWICKRAME, J.—I agree.

*Interlocutory decree set aside.*