

1946

Present : Jayetileke and Rose JJ.

GUNAWARDENE, Appellant, and BABY NONA, *et al.*,
Respondent.

87—*D. C. Matara, 14,778.*

Partition action—Lease of undivided share—Right of lessor to bring partition action.

A person who is entitled to an undivided share of a land which he has leased to a party is entitled to bring a partition action.

Charles Appu v. Dias Abeyasinghe, 35 N. L. R., 323 distinguished.

A PPEAL from a judgment of the District Judge of Matara.

C. V. Ranawaka, for plaintiff, appellant.

L. A. Rajapakse, K.C. (with him *S. W. Jayasooriya*), for first and second defendants, respondents.

* *Vide (1945) 46 N. L. R. 461—Ed.*

January 29, 1946. JAYATILAKE J.—

This is a partition action. The plaintiff was entitled to a one-sixth share of the land, the first defendant to a one-sixth share, and the second defendant to the remaining four-sixths shares. The plaintiff had leased his share to the third defendant, who is the wife of the second defendant, by 2D7 for a period of six years commencing from January 9, 1939. The first and second defendants contended that the plaintiff could not maintain the action as the lease in favour of the third defendant had not expired. The District Judge upheld their contention and dismissed the plaintiff's action with costs. The present appeal is against that order. The District Judge has based his order on the judgment of this Court in *Charles Appu v. Dias Abeysinghe*¹, where it was held that the person entitled to the *dominium* only of an undivided share of the land, the *usufruct* being vested in another, is not entitled to bring a partition action. The reasoning of Dalton J. in that case which is summed up in these words seems to me to be applicable to the present case—

“ However the trend of opinion would appear to support the conclusion that the effect of the Partition Ordinance is that, to maintain a partition action, a person must be the owner or claim to be the owner of an undivided share, and also be in possession or be entitled to be or have a claim to be in possession of that share ”.

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.

Indeed Mr. Rajapakse who appeared for the respondent candidly admitted that he could not support the judgment. I would set aside the judgment appealed from and send the case back for trial in due course. The appellants are entitled to the costs of the contest and of this appeal.

ROSE J.—I agree.

Appeal allowed.

