IBRAHIM
V
THE BOARD OF TRUSTEES OF THE JAMIUL HARIRATH JUMMA MOSQUE AND OTHERS

SUPREME COURT.
G.P.S. DE SILVA, C.J.,
KULATUNGA, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 97 /94.
S.C. SPL. L. A. NO. 166/94.
C.A NO 202 /86 F.
D.C. PANADURA CASE NO. 15212 /P.
10 JANUARY & 7 MARCH, 1995.

Partition- Prescription Title- Family settlement by Administrator's Conveyance distributing properties - Does Family Settlement by deed constitute an ouster? - Effect of Partition decree on Administrator's Conveyance.

An administrators's conveyance distributing the family property will result in an ouster. Even though by a later Partition decree the family settlement was ignored and title on the amicable settlement effected by Administrator's Conveyance would have been wiped out, continued possession on the basis of acceptance of the family settlement will result in the parties in possession acquiring prescriptive title.

Cases referred to:

1. *Ponnambalam v. Vaithialingam* (1978) 79 NLR 166
2. *Alexander v. Jayamanne* 79 (2) NLR 184
3. *Alithamby v. Bastian* [1984]1 Sri LR 243, 246.
4. *Wijesena v. Fernando* 78 NLR 193.
5. *Corea v. Iseris Appuhamy* (1911) 15 NLR 65
6. *Wickramaratne v. Alpenis Perera* [1986]1 Sri LR 190, 194.

APPEAL from judgment of the Court of Appeal.

N.R.M. Daluwatta P.C. with *Samantha Abeyjeewa* for Plaintiff-Appellant-Appellant.

K.H.J. Peiris with *U. Gunawardena* for 3rd, 5th, 6th, 9 A and 10th Defendants-Respondents-Respondents.

Cur.adv.vult.

March 23, 1995.
WADUGODAPITIYA, J.

The Plaintiff-Appellant instituted these proceedings to partition the land described in the schedule to the plaint and shown in plan 1155 made by Y.B.K. Costa, Licensed Surveyor, and produced marked "x". The land actually sought to be partitioned is Lot 10 in final partition plan 2412 of the District Court of Panadura in case No 211 (Plan PI, made by Lucas H.de Mel, Licensed Surveyor).

The case proceeded to trial on several points of contest, the main point of contest being whether the contesting Defendants-Respondents had acquired prescriptive title to the corpus. The District Court held in favour of the contesting Defendants-Respondents, and dismissed the action. The Plaintiff- Appellant's appeal to the Court of Appeal was also unsuccessful. Hence the present appeal by the Plaintiff- Appellant to this Court.

The facts unfold in this way: Kalutantrige Haramanis Peiris Goonetilleke was the orginal owner of the larger land, Dawatagahawatte, in extent A 4 -R0- P10,(vide Plan 2412 dated 17.4.1950 and made by the said Lucas H. de Mel, Licensed Surveyor), of which the corpus in the instant partition action, viz, Lot 10, in extent Al- R2- P22(vide the said plan 2412 and plan 1155 dated 11.8.78 and made by the said Y.B.K. Costa, Licensed Surveyor and marked "x") , forms a part. He transferred the said Dawatagahawatte to his two sons, Cornelis Peiris Goonetilleke and Johanis Peiris Goonetilleke.

Cornelis Peiris Goonetilleke died, leaving as his heirs, his widow Dona Johana Siriwardane Hamine, and his five children-

(i) Herman Peiris Goonetilleke,
(ii) James Peiris Goonetilleke,
(iii) Albert Peiris Goonetilleke,
(iv) Richard Peiris Goonetilleke, and
(v) Leonora Peiris Goonetilleke.

Johanis Peiris Goonetilleke died , leaving as his heirs, three children, one of whom was Aron Peiris Goonetilleke.

On 25.7.1946, Dona Johana Siriwardane Hamine, the widow of Cornelis Peiris Goonetilleke (who was the Administratrix of the estate of Cornelis), excuted Deed No.1876, an Administrators Conveyance (marked 5 D4) for the purpose of distributing the several lands owned by Cornelis amongst his heirs, including herself. All the lands which had belonged to Cornells were divided into Six Schedules labelled A, B, C, D, E, and F , and the distribution was as follows:-

The lands in Schedule A went to Siriwardane Hamine
The lands in Schedule B went to Herman
The lands in Schedule C went to Leonora
The lands in Schedule D went to Albert
The lands in Schedule E went to James
The lands in Schedule F went to Richard.

Where the larger land Dawatagahawatte (in extent A4- R0- P10) was concerned, by the said Administrators' Conveyance (5D4) , half of it was given to James and the other half to Richard, so that, by virtue of 5 D4 the entirety of Dewatagahawatte became vested exclusively in James and Richard in equal shares. This however, was in the teeth of the transfer of the said Dawatagahawatte by Kalutantrige Haramains Peiris Goonatilleke to his two sons Cornelis and Johanis.

A significant point here is that all the heirs of Cornelis signed the Administraters Conveyance 5 D4, whereby each accepted what was given to him and relinquished all rights to the rest.

Learned Counsel for the Respondents submitted that the Administrator's Conveyance (5D4) constituted a family settlements of Cornelis' lands and that such settlement finally put an end to the co-ownership of those lands by his heirs. He cites the case of *Ponnambalam v. Vaithialingam*[1] in support. He submits further, that a family settlement would amount to an ouster even if not reduced to the form of an actual conveyance and cites *Alexander v. Jayamanne*[2] in support. He most strongly urges that, inasmuch as the other children of Cornelis viz., Herman, Leonora and Albert have in fact signed the Administrators' Conveyance (5D4) , it " points unequivocally to a voluntary abandonment which is stronger than ouster, and brings to an end co-ownership"; *Alithamby v. Bastian.*[3]

Things went awry however, when after the execution of the Administrator's Conveyance (5D4), Aron Peiris Goonetilleke the son and heir of Cornelis' brother, Johanis (and in one way an heir of Cornelis) filed a partition action , D.C Panadura Case No 211, to partition the ancestral land, Dawatagahawatta, as he found his cousins enjoying it exclusively. This partition case however, proceeded to a conclusion without any reference to the Administrator's Conveyance (5D4) and wound up with a final decree dated 8.5.1951 (P2), allotting, in common, Lot 10, (which was a portion of Dewatagahawatte) not only to James and Richard (who already owned and possessed it) but also to Herman, Leonora and Albert who had already relinquished all rights to it. It is common ground that the said Lot 10 constitutes the corpus of the present partition action, and was, after the said partition decree (P2), owned in common by all five children of Cornelis viz. the said Herman, Leonora, Albert, James and Richard.

The dispute in the instant case lies in the fact that whilst the Appellant claims a share of the corpus by virtue of purchases made from the heirs of Herman, Leonora and Albert, basing their title on partition decree (P2), the Respondents claim title to the same corpus (Lot 10) from James and Richard, basing their title on acquisitive prescription of Lot 10 by the said James and Richard to the total exclusion of Herman, Leonora and Albert, after the partition decree (P2).

The Appellant contends that rights, if any, acquired by James and Richard in terms of the Administrator's Conveyance (5D4) were wiped out by the partition decree in D.C Panadura Case No 211 (P2), and that the new title created in the names of Herman, Leonora and Albert was capable of transferring ownership to him.

The Respondents' position on the other hand, was that even though they concede that the said final decree(P2) conferred title upon Herman, Leonora and Albert, the latter never exercised rights of ownership in view of the family settlement entered into by the Administrator's Conveyance (5D4) and that therefore even after the final partition decree(P2) was entered, James and Richard continued to possess the said Lot 10, exclusively and adversely to all others without recognising the rights of Herman, Leonora and Albert, and that they (i.e James and Richard) thereby acquired prescriptive title to the said Lot 10 subsequent to the partition decree(P2).

At this point, it may be necessary to consider the effect of the subsequent partition decree (P2) on the earlier Administrator's Conveyance (5D4). It was conceded by learned Counsel for the Respondent that 5D4 was rendered void by the operation of section 17 of the Partition Ordinance (which was the operative law at the relevant time), as 5D4 was not written subject to the partition action, D.C. Panadura No 211. It was also conceded that this position was correct; but only to the extent of the disposition with regard to Dawatagahawatte, and not as regards the disposition with regard to the other lands in 5D4, which latter remained untouched by the partition decree (P2). Thus, since the partition case 211 only related to Dewatagahawatte, James and Richard lost their sole title to Dewatagahawatte which title they had originally got from the Administrator's Conveyance 5D4.

It is however correct to say that even though the rights acquired by James and Richard by virtue of 5D4 were wiped out by the partition decree (P2), the said James and Richard were not precluded in law from acquiring fresh title, subsequent to the partition decree (P2), by acquisitive prescription.

First, it seems to me, in this connection, that in the minds of Cornelis' children, the family settlement of their father's lands by 5D4 was the operative writing which was sacrosanct where they were concerned. The children were united and friendly at all times, and there is no reason to think that any of them would have wanted to violate the terms of 5D4; least of all, for three of them, Herman, Leonora and Albert to deprive their brothers, James and Richard of what they received under 5D4 and what Herman, Leonora and Albert in fact abandoned under 5D4. Therefore, to my mind, the reasonable presumption in the circumstances would be that, in terms of the family settlement, (5D4), James and Richard continued to physically possess the *corpus* as their own, to the total exclusion of Herman, Leonora and Albert. It is also reasonable to presume that , inasmuch as Herman, Leonora and Albert had relinquished and abandoned their rights to the corpus, having got in exchange, rights in other lands, they were no longer interested in any way in the corpus.

It must not be forgotten that the Partition Action 211 was not filed by any member of Cornelis' family since their land matters were set-

tled by 5D4. That action was filed by their cousin, Aron who wanted to partition Dewatagahawatte because he found that James and Richard were enjoying it exclusively. Not knowing about the family settlement 5D4, Aron named all the five children of Cornelis as defendants to the Partition Case 211.

At the trial in the District Court, various suggestions were made by the Appellant. One was that in addition to James and Richard, the others, *viz.*, Herman , Leonora and Albert also physically possessed Lot 10. However, the Learned District Judge after carefully examining the evidence on the point rejected this contention.

The Appellant thereafter contended that James, by himself, physically possessed Lot10, but that such possession was not solely on his own behalf, but on behalf of Herman, Leonora, Albert and Richard as well. The Respondents deny this and point out that Richard was a mental patient whose person and property were both looked after by James, and that the exclusive possession by James was in fact, on behalf of himself and his incapacitated brother Richard only, and never on behalf of Herman, Leonora and Albert. The Respondents add that it is common ground that there was amity and total friendliness amongst the family members, and that, as the Learned District Judge observed, " It is unimaginable that having got their share in the estate, Herman, Albert and Leonora would also try to possess a share in a land given to James and Richard".

The Appellant attemps to muster support for his contention that James physically possessed Lot 10, after the partition decree (P2) for and on behalf of himself and his sister and brothers as aforesaid , by drawing attention to what happened at a subsequent stage in the partition action No.211, where James and Richard had to eject some squatters from the *corpus*, and for this purpose joined Herman, Leonora and Albert.The Appellant says that this showed common possession.

The Respondents, *contra*, state as follows:- The partition action D.C.Panadura No.211 was filed by Aron Peiris Goonetilleke. There is no evidence of the participation of Herman, Leonora and Albert in the partition case No.211 up to the stage of entering final decree, presumably because, in terms of the family settlement (5D4), they had no

claim to the *corpus*. Therefore, it was only James and Richard (who had been given a half share each of Dawatagahawatte by (5D4) who filed their proxies and statements of claim. It was after final decree (P2) was entered that the question of ejectment of squatters from Lot 10 arose. Since Lot 10 was allotted by P2 not only to James and Richard, but also to Herman, Leonora and Albert, upon the Court so directing, the same Proctor who was appearing for James and Richard, filed the proxies of Herman, Leonora and Albert, and thereupon writ was allowed. The Respondents therefore submit that, far from what the Appellant suggests, Herman, Leonora and Albert came into the case not for the purpose of setting up a claim, in which case they ought to have come in much earlier and filed their statements of claim but only to assist their brothers James and Richard to overcome the legal impediment to the issue of writ, since it was necessary that all the five co-owners of Lot 10, as declared by the final decree P2, should join in asking for writ.

Much was made in this connection by the Appellant, of 5D7 which is the Journal Entry No:377 dated 7.1.52 which stated as follows:-

> "Writ of possession returned with report that possession of Lot 10 was delivered to the 2nd Defendant on behalf of 1,3,4 and 5 Defendants."

James and Richard were the 2nd and 4th Defendants respectively, while Herman, Albert and Leonora were the 1st, 3rd and 5th Defendants respectively.

While the Appellant insisted that this Journal Entry showed joint possession, the Respondents submitted that if this item of evidence, is viewed from its proper perspective, it would be apparent that both the legal necessity to file the proxies of Herman, Leonora and Albert, and the necessity for the Journal Entry (5D7) to state that possession was handed over on behalf of all stemmed from the fact that the final decree (P2) created title in all five. The Respondents stress that until acquisitive prescriptive title is created at a future date, the final decree (P2) would be paramount and that therefore whether they liked it or not,if James and Richard wanted the squatters ejected from Lot 10, there was no alternative for them, but to conform to the legal proce-

dure necessary for the purpose. Learned Counsel for the Respondents cited a *dictum* by Sharvananda, J. in *Wijesena v. Fernando*[4] to the effect that it was necessary for a Court at times to take a "realistic" rather than a "legalistic" view of facts, and submitted that the real question was, not whether an act of a "legalistic" nature was done to conform to the final decree (P2), but whether, in actual fact James accepted delivery of possession on behalf of all, not as a mere formality, but with intent to benefit Herman, Leonora and Albert as well. The question Learned Counsel for the Respondents further poses is, whether Herman, Leonora and Albert asserted title on their own behalf and adversely to James and Richard so as to negative their earlier abandonment of their rights under the family settlement (5D4). The answer to this question seems to be in the negative.

I have considered the above questions carefully and am compelled to the view, having taken into account all the material set out above, that James possessed Lot 10 on behalf of his incapacitated brother Richard and himself only, and further, that he did so adversely to Herman, Leonora and Albert. I am also of the view that in the circumstances of this case it cannot be said that James accepted delivery of possession on behalf of Herman, Leonora and Albert, as set out in the Journal Entry(5D7), which entry was, I feel, an act of a "legalistic" nature done in order to conform to the final decree (P2).

As may be seen then the main question that arises for decision, namely whether the possession of Lot 10 by James and Richard was adverse to the other three members of the family, viz., Herman, Leonora and Albert, must be answered in the affirmative.

A further question arises as to whether ouster is necessary. This question must be looked at in the context of this case having regard to the peculiar facts of this case.

In the instant case, James and Richard originally entered into exclusive possession of the larger land,Dawatagahawatte by virtue of the Administrative Conveyance (5D4), the very purpose of which was to settle the lands amongst the family members and to put an end to co-ownership. As set out above, in terms of 5D4, James and Richard were allotted Dawatagahawatte and the other three children, *viz*; Herman,

Leonora and Albert relinquished and abandoned their rights to Dawatatagahawatte. Therefore James and Richard entered upon the possession of Dewatagahawatte as sole owners. As set out above, the partition decree in case No.211 (P2) reduced their holding to Lot 10 only, but nevertheless James and Richard continued to possess even the said Lot 10 as sole owners; the Conveyance 5D4 being still valid and sacrosanct in the minds of the family members who signed it. In these circumstances, it appears that there was, in effect, an ouster of Herman, Leonora and Albert. Thus the entirety of the co-owned property after P2, was Lot 10, and it is clear that James and Richard, having entered into exclusive possession thereof much earlier, continued in possession of Lot 10 in the belief that they were the sole owners, inasmuch as the other three had already relinquished and abandoned their rights to it in writing and continued to be of the same mind even after the partition decree, (P2).

In any event, even if ouster is considered a necessary ingredient in terms of *Corea v Iseris Appuhamy*,[5] the Court of Appeal in *Wickramaratne v. Alpenis Perera*[6] held that, "If in fact there was evidence that the separation of the *corpus* was with the prior approval of all the co-owners, then that fact may be sufficient evidence of ouster."

In the instant case, the "separation" occurred on 25.7.1946 after 5D4, and as has been seen, such "separation" continued unbroken despite the partition decree (P2). In terms of the above *dictum*, it seems that, that fact alone would amount to sufficient evidence of ouster. It must of course, be mentioned that the Appellant has failed to present any convincing evidence to the contrary.

Another fact relevant to this issue is that whereas neither Herman, Leanora nor Albert, although declared to be co-owners by P2, ever dealt with any rights to the *corpus* during their lifetime, it is in evidence that both James and Richard executed deeds on the basis that they were the sole owners of the corpus. Eg. Deed P9 (page 576) which was produced by the Appellant himself was one of the earliest deeds written by James after partition decree (P2) was entered. Thus in 1952 itself, James has dealt with the land as owner. Also Deed 5D1 (page 630) was written in 1964 by Richard, also after the partition decree (P2). Here too, Richard has dealt with the land as owner. (This deed

was attacked as it was executed at the Mental Hospital.) Thereafter, on 28.8.1967, the Deed 2D1 (page 485) was executed by James, also as owner.

Another significant fact is that it was only on 15.12.1976 that the Appellant made his first purchase from the heirs of the other three "co-owners". *(viz:*, Herman, Leonora and Albert) i.e., full quarter of a century after the entering of the partition decree P2 on 8.5.1951. By that time, a successor in title to James had, as shown by plan 5D8 of 8.9.1968, even gone into divided possession of an extent of 2 Roods on the South by erecting a barbed-wire fence.

Thus, it appears that James Peiris Goonetilleke and his brother, Richard Peiris Goonetilleke had been in exclusive possession of the *corpus* from the date of delivery of possession of the said Lot 10 on 7.1.1952, after partition decree (P2), and that they had held the *corpus* adversely to the other three members of the family, *viz.*, Herman, Leonora and Albert, and had thereby acquired prescriptive title to the said Lot 10.

In the circumstances, I can see no basis for interfering with the concurrent findings in favour of the Respondents.

I hold accordingly, and dismiss this appeal with costs.

G.P.S. DE SILVA, C.J. – I agree.

KULATUNGA, J. – I agree.

Appeal dismissed.