

APPUHAMY
v.
PREMALAL AND EIGHT OTHERS

COURT OF APPEAL.
ABEYWARDENA, J. AND MOONEMALLE, J.
S. C 137/77 – D. C. GAMPAHA 13409/P
NOVEMBER 21, 1983.

Partition action – Amicable division of undivided land – When amicable division is recognised by law.

The plaintiff-appellant filed action to partition a land which he claimed was at one time a portion of a larger land which was co-owned by two persons who entered into an amicable division of that larger land each taking two divided portions one of which was the land to be partitioned. The 4th defendant-respondent denied that there was such an amicable division of the larger land and averred that the corpus in this case was an undivided portion of the larger land and prayed for a dismissal of the action.

Held

(1) An amicable division to be recognised by law must be a division that puts an end to co-ownership of property.

(2) An amicable division can be given effect to—

(a) by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by a cross conveyance executed by each of the co-owners whereby the notarial deeds would be the best evidence of the termination of the common ownership ; or

(b) by proving that each of the co-owners entered into separate possession of the divided portions allotted to each and that the co-owners possessed their respective divided portions for a period of at least ten years undisturbed and uninterrupted so that the common ownership would in law come to an end.

(3) The documentary and oral evidence in this case clearly contradicts the contention that there had been an amicable division of the larger land.

APPEAL from an Order of the District Court, Gampaha.

D. R. P. Gunatilleke with K. S. Tillekeratne for plaintiff-appellant.

P. A. D. Samarasekera for 4th defendant-respondent.

Other defendant-respondents absent and unrepresented.

January 19, 1984.

MOONEMALLE, J.

The plaintiff-appellant sought to partition the land called Millagahalande *alias* Horagahalande in extent 3 acres 3 roods 25 perches described in Schedule B to the amended plaint and depicted in Plan 2180 dated 6th August, 1966 made by G. A. H. Philipiah Licensed Surveyor, marked (X).

The surveyor's report is marked (X1). At the outset of the trial the 4th defendant-respondent's mother Jayaweera Arachchige Mary Nona was appointed the Manager of his estate, as he was insane. She is the 4th defendant. In the course of the trial of consent Lots A, B, C, D, E, F, G, H and J shown in Surveyor-General's Plan No. 70/215 marked (Y) were excluded from the corpus as belonging to the Crown. These same lots are reflected in Plan X.

The plaintiff-appellant's case was that one Nonahamy who owned the entirety of the land called Millagahalande *alias* Horagahalande in extent 15 acres, 1 rood, 17.87 perches conveyed the same by deed 13223 dated 12.1.1904 (P4) to Pingamage Don Elias Appu and Jayaweera Arachchige Don John Appuhamy in equal shares. Thereafter the said Elias Appu and John Appuhamy had amicably divided the said land into four portions. By this division Elias Appu possessed the westernmost portion and easternmost portion and John Appuhamy possessed the two centre portions. According to the plaintiff-appellant the corpus of this action is the western portion of the two centre portions possessed by John Appuhamy. John Appuhamy by deed 4725 dated 26.9.1908 (P11) conveyed to Weerasinghe Patirage Anthony Appu and Weerasinghe Patirage Marathelis an undivided portion of three acres of the southern newly planted portion which is separated by a road. Elias Appu by deed 17493 dated 11.6.1910 (P7) conveyed an undivided three acres of his half share

to the said Weerasinghe Patirage Anthony Appu. Anthony Appu on deed 6218 dated 28.7.1916 (P8) gifted an undivided 2/3rd share out of the undivided three acres to his daughter Marthinahamy and son-in-law Dionis. Then by deed 13868 dated 16.1.1921 (P 9) Anthony Appu conveyed the balance 1/3rd of the undivided three acres to his wife, Engohamine who by deed 1015 dated 23.11.1938 (P 10) gifted her share to Suwaris Appuhamy and Selestinu Appuhamy. Selestinu Appuhamy by deed 24923 dated 8.1.1955 (4D1) conveyed an undivided 45200/245787 shares of the entire land of 15 acres, 1 rood, 17.87 perches to his son Weerasinghe the 4th defendant-respondent, who by deed 3247 dated 15.9.64 (6D1) leased out two acres of the cinnamon plantation for five years to Karthelis the 6th defendant-respondent. Suwaris Appuhamy's share devolved on his widow Agnes and children the 1st, 2nd and 3rd defendant respondents. Agnes by deed 48373 dated 2.10.1965 (P12) conveyed her interests to Jusey Appuhamy the plaintiff-appellant. Then Marathelis the other transferee on (P11) conveyed his interests to Mangohamy by deed 613 dated 29.11.1938 (5D1) who by deed 8419 dated 22.1.1949 (5D2) sold these interests to Dona Rejehamine and Samel Appuhamy who by deed 7383 dated 3.12.1964 (5D3) sold the interests to Pabilis Appuhamy the 5th defendant-respondent who is the plaintiff-appellant's son. On the death of John Appuhamy, one of the half share owners, his balance interests passed to his widow Marihamy and child Anahamy. On the death of Elias Appu the other half share owner, his balance interests passed to his widow and children.

The only contesting defendant was the 4th defendant-respondent who denied that Elias Appu and John Appuhamy amicably divided this land of 15 acres, 1 rood, 17.87 perches, and he averred that the corpus in this case was an undivided portion of the larger land of 15 acres, 1 rood, 17.87 perches. He therefore prayed for a dismissal of this action. He further averred that Dionis and Marthinahamy referred to in deed (P 8) were husband and wife respectively, and that Dionis died leaving as his heirs the said Marthinahamy and four children, David Singho, Jopin Nona, Sirisena and Jinasena. Marthinahamy married a second time and she died leaving as her heirs Simon Appuhamy her second husband and the said four children by Dionis and one child Somawathie by Simon Appuhamy. Simon Appuhamy and David Singho by deed 2371 dated 6.1.1943 (4D6) conveyed

their interests to Jopin Nona and Maisinghe who along with Jinasena by deed 7635 dated 12.12.1947 (4D7) conveyed their interests to Selestinu Appu. Then the said Somawathie by deed 29907 dated 8.4.1957 (4D8) conveyed her interests to the 4th defendant-respondent.

After trial the learned District Judge dismissed the plaintiff-appellant's action with costs. This appeal is from that judgment.

Learned Counsel for the plaintiff-appellant strongly contended that the plaintiff-appellant's position that there had been an amicable division of the land of 15 acres, 1 rood, and 17.87 perches by Elias Appu and John Appuhamy was corroborated by the facts that in paragraph 4 of the plaint (P 5) in D. C. Gampaha Partition Action No. 10641 filed by the heirs of Elias Appu against the present plaintiff-appellant in respect of a divided portion of this land in extent 3 acres, 2 roods and 33.7 perches, it was averred that "Elias and John amicably divided and separated off their rights into two portions and possessed as divided distinct portions," and that final decree had been entered in that case, and that the 4th defendant-respondent did not intervene in that case and challenge the averment that there had been an amicable division of the entire land, though he had rights in the land through both Elias Appu and John Appuhamy. Learned Counsel for the plaintiff-appellant further submitted that the learned trial judge misdirected himself in stating that the question of a division of the land had not arisen for decision in the Partition Action P 10641. He also submitted that deed 3444 dated 21.12.1964 (P 21) and deed 3247 dated 15.9.1961 (6D1) were suppressed by the 4th defendant-respondent and that these two deeds referred to divided portions of the land leased by the 4th defendant-respondent to Karathelis Silva.

Learned Counsel for the 4th defendant-respondent maintained that the learned trial judge had come to correct findings and that the evidence oral and documentary clearly established that there had been no amicable division as stated by the plaintiff-appellant. He submitted that the deed (P 7) executed by Elias Appu and deed (P 11) executed by John Appuhamy contradicted the plaintiff-appellant's position that there was an amicable division. He also referred to deeds P 8, P 9, P 10, P 21, 4D1 and 6D1 which all deal with undivided allotments of land. He further submitted that according to the Surveyor Mr. Philpaiah there was no physical boundary on the western side of the

corpus. Even the Surveyor-General's Plan (P 3) showed no boundaries on this land to support an amicable division. Learned Counsel for the 4th defendant-respondent also submitted that as Partition Action 10641 was in respect of only 3 acres, 2 roods, and 33.7 perches of land, while Elias Appu left a little over 4 1/2 acres, there would have been good reason for the 4th defendant-respondent not to raise any dispute as the heirs of Elias claimed less than they were entitled to.

An amicable division to be recognised by law must be a division that puts an end to co-ownership of property. An amicable division can be given effect to by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by cross conveyances executed by each of the co-owners, whereby the notarial deeds would be the best evidence of the termination of the common ownership. In the present case, the plaintiff-appellant does not rely on a partition deed or cross conveyances to establish the amicable division. Therefore, the plaintiff-appellant in order to establish the amicable division has to prove that each of the co-owners entered into separate possession of the divided allotments which were allotted to each at the division, and that the co-owners possessed their respective divided portions for a period of at least ten years undisturbed and uninterrupted, so that common ownership would in law come to an end. In the present case the deeds of Elias Appu and John Appuhamy namely (P 7) and (P 11) respectively, clearly do not reflect the existence of an amicable division. Elias Appu's deed (P 7) of 11.6.1910 dealt with an undivided portion of 3 acres of an undivided 1/2 share out of the land of 15 acres, 1 rood, 17.87 perches and John Appuhamy's deed (P 11) of 26.9.1908 dealt with an undivided portion of 3 acres on the South of the land of 15 acres, 1 rood, 17.87/100 perches. Each of those two deeds state, "held and possessed by me and another person by virtue of Deed No. 3223 dated 12.1.1904." (which is P 4). P 11 further goes on to state "and which said land exclusive of the western portion in extent 1 rood and 30 perches alienated by me the said Don John Appu and the other co-owner prior to this." The other co-owner can be no other than Elias. These two deeds show that at the time Elias Appu and John Appuhamy conveyed part of their interests in the land, they were possessing the land as co-owners. These two deeds militate against the contention that Elias Appu and John Appuhamy amicably divided the land. Even deeds P 8, P 9, P 10, P 21, P 4, D1, P 4, D 6, P 4; D 7, P 4, D 8 and 6D1 all deal with undivided portions of the land and

they do not refer to a division of the entire land of 15 acres, 1 rood and 17 8 perches and clearly contradict the position that there had been an amicable division of the land. The only deed which refers to an amicable division is P 12 dated 2.10.1965, by which deed the plaintiff-appellant gets interests in the land. The deed (P 12) was executed five months before this action was instituted. The plaint in this case was filed on 2.3.1966. The reference in P 12 to an amicable division appears to have been made for the purpose of this case.

Though it was contended on behalf of the plaintiff-appellant that deeds (P 21) and (6D1) were suppressed by the 6th defendant-respondent as they were favourable to the plaintiff-appellant's case in that they dealt with divided portions of the entire land, by (P 21) of 21.12.1964 the 4th defendant-respondent leased to Karathelis Silva for a period of two years from the western side consisting of the cinnamon plantation, an undivided portion of two and a half acres from and out of the land of 15 acres, 1 rood, 17.87 perches. It is clear that (P 21) does not deal with a divided portion of the entire land. Even (6D1) dated 15.9.1964 did not refer to any share of the entire land as a divided entity. By 6D1, the 4th defendant-respondent leased for a period of five years to Karthelis Silva an extent of about two acres containing cinnamon divided from the undivided 45200/245787 parts or shares from and out of the land called Millagahalanda *alias* Horagahalanda containing in extent 15 acres, 1 rood 17.87 perches held and possessed by the lessor (the 4th defendant-respondent) by virtue of deed 24973 dated 8.1.1955 (4D1). These two deeds (P 21) and (6D1) are deeds executed in the year 1964, and they cannot be said to buttress the plaintiff-appellant's case that there was an amicable division of the land by Elias Appu and John Appuhamy.

The plan (X) prepared for the purpose of this case shows a dark line on the western boundary of the corpus. Mr. Philipiah the surveyor who surveyed the land and prepared plan (X) stated that except for an anthill and a Hik tree to the north and a Hora tree to the south of the anthill there was no physical boundary on the ground to indicate the western boundary. The western boundary he said was indefinite and that he had failed to mark the letter "U" on the dark line on the western boundary in plan (X) to indicate this. The plaintiff-appellant in his evidence stated that there had been a live fence on the western boundary which had been broken by the 4th defendant-respondent

but he had not mentioned it to Mr. Philipiah at the survey when he pointed out the alleged western boundary to Mr. Philipiah.

The plaint (P 5) dated 6th February, 1963, filed in partition action 10641 D. C. Gampaha which refers to an amicable division of the entire land of 15 acres, 1 rood, 17.87 perches by Elias Appu and John Appuhamy, and the fact that the 4th defendant-respondent did not intervene in that action and challenge the averment referred to in the plaint as to the amicable division, are not sufficiently convincing to uphold the plaintiff-appellant's contention that there was such an amicable division. The strong documentary evidence and the evidence of Mr. Philipiah which were led in this case clearly contradict the plaintiff-appellant's contention that there had been an amicable division. On a consideration of the totality of the evidence oral and documentary, led in this case, I am of the view that the learned District Judge has come to correct findings, and I see no reason to disturb any such findings. For these reasons, I dismiss the appeal with costs payable to the 4th defendant-respondent only.

ABEYWARDENA, J.—I agree

Appeal dismissed.
