1946 *Present :* **Keuneman S.P.J. and Wijeyewardene J.**

COSTA *et al.*, Appellants, *and* REITH, Respondent.

*201—D. C. Kandy, 589.*

*Deed of rectification—Retrospective effect—Date of execution is that of the original deed—Prescription.*

Where a deed is rectified by a subsequent deed it is to be read as if it had originally been drawn in its rectified form. The date of execution, for the purposes of prescription, is that of the original deed, even though the deed of rectification is executed during the pendency of the action for declaration of title in respect of the subject-matter of the deed.

APPEAL from a judgment of the District Judge of Kandy.

This action was brought by the plaintiffs on August 30, 1941, for a declaration that they were entitled to a half share of the estate known as *Springhill*. The defendant claimed this property under a deed of sale, D 30, of March 15, 1932. The vendors in D 30 intended to convey by that deed two properties, but the description of the parcels was only applicable to one of the properties and did not include *Springhill*. The defendant obtained from his vendors a deed of rectification, D 47, dated September 20, 1941.

In regard to the plea of prescriptive possession raised by the defendant it was urged for the plaintiffs that defendant's possession only dated from the time of his deed, D 30, namely March 15, 1932, and that ten years had not elapsed at the date of action, namely August 30, 1941. It was contended that the defendant could not add to his possession the period of prescriptive possession by his vendors for the reason that at the date of the plaint he had not obtained his deed of rectification and so could not be regarded for the purposes of this action as the successor in title to his vendors.

*N. E. Weerasooria, K.C.* (with him *H. W. Jayewardene*), for the plaintiffs, appellants.—A deed of transfer of land to a partnership as such operates as a transfer to the members of the partnership (*vide* Norton on Deeds p. 195). The title to the land was therefore in the names of the 4 partners, *i.e.*, the two plaintiffs and Ponniah Peries and Stanislaus Costa. The defendant asserts that the land ceased to be partnership property and was assigned to Ponniah Peries and Stanislaus Costa as their separate property. The onus of proving that was on him (*vide Seyyado Ibrahim Saibo v. Jainambeebee Ammal* [1]) and he has wholly failed to discharge that burden. The property was included in neither the deed of partition between the partners nor in the transfer by Ponniah Peries and Stanislaus Costa to the defendant. It has been suggested that it was omitted by error but there has not been even an attempt to rectify the deed of partition. The attempted rectification of the deed of transfer (D 30) is no rectification as there is no evidence of mutual mistake. One cannot rely on the

[1] *(1939) 41 N. L. R. 297.*

recitals in the alleged deed of rectification to that effect as the grantors have not given evidence. Further the deed of rectification was obtained after the institution of the action.

[WIJEYEWARDENE J.—What is the effect of a deed of rectification ?]

It would be binding on the parties to the deed of rectification. It may also be binding where parties to an action have derived title from the same source, as in *Fernando v. Fernando*[1]. In *Goonesekere v. Peries*[2] it was held that a deed of rectification takes effect retrospectively from the date of the rectified deed. In none of these cases has the question been considered whether such a deed would operate retrospectively to pass the benefit of possession short of the prescriptive period. The defendant has not possessed for 10 years on his own. Further the defendant could not prescribe against us at all because (1) we are co-owners, (2) he was in possession as our agent and there was no overt act of ouster. On D 29 our agreement was for the purchase of the interests of Ponniah Peries and Stanislaus Costa in *Springfield*. Admittedly the defendant has been transmitting monies to India of which the plaintiffs were given a share. We say this was in respect of the income of *Springfield*.

*H. V. Perera, K.C.* (with him *N. K. Choksy* and *B. D. Gandevia*), for the defendant-respondent was not called upon but referred to *Malmesbury v. Malmesbury*[3], *Craddock Bros. v. Hunt*[4], *and United States of America v. Motor Trucks, Ltd.*[5].

*Cur. adv. vult.*

September 17, 1946. KEUNEMAN S.P.J.—

This action was brought by the plaintiffs on August 30, 1941, for a declaration that they were entitled to a half share of the estate known as Springhill of about 64 acres. The plaintiffs alleged that the premises in question were by Fiscal's Transfer No. 10 of April 29, 1916 (P 1) transferred to Joseph Costa & Brothers of Matale Town, the partners of which firm at the time of P 1 were the two plaintiffs and Ponniah Peries and Stanislaus Costa, the brother-in-law and brother respectively of the plaintiffs.

The defendant alleged that in 1920 by P 15 the partnership firm acquired the estate known as Longville and that about 1923 the two estates Longville and Springhill were amalgamated and treated as one estate under the name of Longville estate and that at the time of the dissolution of the firm of Joseph Costa & Brothers in 1924, Longville estate including Springhill was at the distribution of assets allotted to Ponniah Peries and Stanislaus Costa, and that the deed D 28 of September 2, 1926, was executed to achieve that object ; and that by D 30 of March 15, 1932, Ponniah Peries and Stanislaus Costa conveyed the whole of Longville estate including Springhill to the defendant.

It appears, however, that both in D 28 and in D 30 the description of the parcels was only applicable to Longville estate and did not include Springhill. As regards D 30 the defendant obtained from his vendors a

[1] *(1921) 23 N. L. R. 266.*
[2] *(1926) 28 N.L. R. 228.*
[3] *(1862) 31 Beaven 407.*
[4] *(1923) 2 Ch Div. 136.*
[5] *(1924) A. C. 196.*

deed of rectification D 47 dated September 20, 1941, but the deed D 28 has not been rectified. The defendant also pleaded that he had obtained a title by prescription to Springhill.

After trial the learned District Judge dismissed plaintiffs' action, and the plaintiffs appeal.

Counsel for the appellants strongly contested the finding of the District Judge that it was proved by the defendant that at the distribution of assets Springhill was allotted to Ponniah Peries and Stanislaus Costa. The District Judge himself found that the defendant was obliged to rely entirely upon document D 25 to establish this part of his case. The District Judge has subjected this document to a detailed examination and has concluded that this document established the allegation that Springhill was allotted to Ponniah Peries and Stanislaus Costa. D 25 was undoubtedly in the handwriting of the first plaintiff himself, but he explained that this document was merely a suggestion made by him at an early stage of the negotiations and did not represent the final settlement. The first plaintiff's evidence has not been accepted, but the fact remains that the defendant was not able to furnish evidence that D 25 was the final settlement as to the distribution of assets. Neither Ponniah Peries nor Stanislaus Costa has given evidence, and the defendant himself was not acquainted with the facts. There are also certain other matters which tell against the District Judge's finding, for he himself drew attention to the fact that the values of the properties shown in D 25 and D 28 are not in agreement and said further that " the two plaintiffs got in addition to what was allotted to them under D 25 further assets to the value of Rs. 57,041·50." I may add also that in D 25 Longville estate including Springhill appears to have been allotted to Ponniah Peries alone and not to him and Stanislaus Costa. On the whole, I am not satisfied that there was sufficient evidence before the District Judge to establish the allegation that Springhill had been allotted to the defendant's vendors at the distribution of assets at the time of the dissolution.

The District Judge also appears to have held that at the time of the acquisition of Springhill the only two partners of the firm of Joseph Costa & Brothers were Ponniah Peries and Stanislaus Costa, and that the legal title to Springhill estate vested in them alone. I do not think it was open to the Judge to come to this conclusion in view of the pleadings in the case and of the absence of any evidence to support the finding.

I may add that it was not necessary to call upon respondent's Counsel on these points because the case could be decided on the issue of prescription. There is very strong evidence that since the purchase of Longville the two estates have been amalgamated and administered as one estate and that the amalgamated estate has for a long period been known as Longville estate, and that Springhill has been known as Springhill Division. Since the dissolution of the partnership in 1926, Ponniah Peries and Stanislaus Costa have been in possession of the amalgamated estate as owners and have dealt with the income from it. In point of fact the produce of the amalgamated estate has been dealt with by the mortgagees of Longville who have applied the income to the liquidation of mortgage debts due in respect of Longville. On no

occasion have accounts been asked for or obtained by the plaintiffs in respect of Springhill, and in my opinion the explanation given by the first plaintiff that the four partners desired to keep the property in common so as to provide for " Costa Town " or for the building of a church has been rightly rejected.

Another strong point against the plaintiffs is that they by D 29 of January 18, 1931, agreed to purchase from the defendant's vendors both Longville and Springhill of about 500 acres—the joint acreage was in fact about 468 acres. I think this amounts to a clear acknowledgment by plaintiffs that they had no title to Springhill and that the title was at the time vested in Ponniah Peries and Stanislaus Costa. I am unable to accept the suggestion of the first plaintiff that the plaintiffs were merely agreeing to purchase Longville and the *share* of Springhill of the two others. It is in evidence that the deed was read over to the plaintiffs and that they were able to understand what the deed contained. This is at any rate a good starting point for prescription, and the subsequent possession of the defendant's vendors was exclusive and adverse to the plaintiffs. I do not think there can be any question that from the date of his purchase in 1932, the defendant has been in exclusive and adverse possession.

I also think the further inference may fairly be drawn from the document D 29 read in conjunction with the rest of the evidence that since 1926 the defendant and his vendors have been in prescriptive possession of Springhill as against the plaintiffs.

It has been argued by Counsel for the appellants that there are certain facts which tell against this view. He referred first of all to the document P 9 whereby the plaintiffs as well as the vendors to the defendant leased Springhill estate bungalow to Mr. Gibb on November 8, 1930, and argued that at the time all the four persons were regarded as owners of Springhill. I have considered the explanation given by the District Judge and am inclined to the view that the argument based upon P 9 is inconclusive. As the learned District Judge further points out, the agreement P 29 was entered into after the date of P 9.

Another point urged for the appellants was that the possession by the second plaintiff of the block known as the Post Office Buildings was antagonistic to the claim of the defendant. That these buildings stood on Springhill and that second plaintiff took the income of these buildings is clear. But I agree with the finding of the District Judge that the Post Office Buildings were treated as a separate unit independent of the estate proper and that the second plaintiff has now acquired a prescriptive title thereto. In any event these buildings have now been excluded from the scope of this action. Had the second plaintiff kept this block as and for his share in Springhill it would have been natural for him to concede a half share of it to defendant's vendors. This he has not done.

The further point has been urged for the appellants that defendant's possession only dated from the time of his deed D 30, namely, March 15, 1932, and that ten years had not elapsed at the date of action, namely, August 30, 1941. It was contended that the defendant could not add to this the period of possession by Ponniah Peries and Stanislaus Costa for the reason that at the date of the plaint he had not obtained his deed

of rectification, D 47, and so could not be regarded for the purposes of this action as the successor in title to these two persons. It was argued that the subsequent deed of rectification was of no avail to the defendant.

I do not agree with this contention. In *Malmesbury v. Malmesbury* [1] it was held that "after . . . . . rectification a court of law will treat the settlement as in that form from the earliest period." In *Craddock Bros. v. Hunt* [2], the Court of Appeal held that after rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had originally been drawn in its rectified form." See also the decision of the Privy Council in *United States of America v. Motor Trucks, Ltd.* [3] The same principle has also been accepted in Ceylon, see *Goonesekere v. Pieris* [4]. I hold that in view of the deed of rectification, the defendant was vested with his vendors' title to Springhill, not at the date of the rectification but from the date of the original deed to him, namely, March 15, 1932, and that the defendant could from this date regard himself as the successor in title to Ponniah Peries and Stanislaus Costa and also avail himself of any prescriptive possession by these two persons.

In the result I hold that the defendant and his predecessors in title have been in prescriptive possession of Springhill since the date of the dissolution of the partnership in 1926, or in any event since January 18, 1931. More than ten years have elapsed before action brought and the title of the plaintiffs has been extinguished.

The appeal is dismissed with costs.

WIJEYEWARDENE J.—I agree.

*Appeal dismissed.*