Privy Council Appeal No. 32 of 1968

Pattini Kuttige Jokeenu Nonis – – – – – *Appellant*

v.

Horatalpedi Durayalage Peththa alias Peththa Veda and another – – – – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER 1969

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD WILBERFORCE]

The action in respect of which this appeal is brought was a partition action, brought by the appellant against the two respondents, seeking a declaration that the appellant was entitled to an undivided one third share of certain land described in the Plaint and for partition of the land. This claim was rejected by the District Court of Kuliyapitiya and, on appeal, by the Supreme Court of Ceylon.

The lands in question, which consisted of some 7 acres comprised in three Crown Grants dated 20th September 1913, 20th February 1914 and 10th May 1919, had belonged, at the last mentioned date to Horatalpedi Durayalage Peruma who amalgamated them into a single parcel. By a Deed of Gift No. 2452 dated 15th July 1924 Peruma gifted them in equal undivided shares to his children the first respondent, the second respondent and one Sekara. Sekara, by Deed No. 29662 dated 18th March 1960, sold his share to one Sumanadasa, who in turn by Deed No. 820 dated 26th July 1962, sold it to the appellant. Thus, according to the documentary title, the appellant and the two respondents were each entitled to a one third undivided share. The first respondent however contended that he had become entitled to the whole of the 7 acres in question by prescription.

Before the year 1947 it appears that the 7 acres in question were in the occupation of and were farmed by the first respondent. The appellant's predecessor, Sekara, and the second respondent were in occupation of, and farming, other lands, specified in the Statement of the first respondent dated 17th July 1963, of approximately 14 acres, which, it appears, had also been derived from Peruma. These 14 acres, according to the first respondent, and this does not seem to be disputed, were similarly owned in one third undivided shares by the three sons of Peruma. It is not contended that prior to 1947 any of the three brothers had acquired any separate title either to the 7 acres now in dispute or to the 14 acres.

The contention of the first respondent was that on 26th June 1947 an informal partition occurred by which the first respondent was allotted the 7 acres in dispute, and the appellant's predecessor, Sekara, and the second respondent, jointly, the 14 acres; that this was acted upon so that thereafter the 7 acres were possessed and enjoyed by the first respondent

to the total exclusion of the other two co-owners. In consequence, as the first respondent claimed, he became, prior to the date of the Plaint (namely 7th December 1962), entitled to the 7 acres by prescription.

Prescription under the Law of Ceylon is regulated by the Prescription Ordinance (1956) Cap. 68. Section 3 contains the following provision:

> "3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for 10 years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. . . ."

It will be observed that this contains, by the words in parenthesis, what is in effect a definition of what is commonly, for convenience, referred to as adverse possession.

In relating this provision to the case of co-owners, it must be borne in mind that separate possession by an individual co-owner of part of the property in common ownership may, and often does, occur and continue for a considerable period, purely for reasons of convenience, and that in order to displace the title of the other co-owners, clear and strong evidence of possession exclusive of the other co-owners, and inconsistent with the continuation of the co-ownership is required. (See *Simpson v. Omeru Lebbe* 48 N.L.R. 112 per Soertsz S.P.J.) And, as was explained by Lord Macnaghten in delivering the Board's judgment in *Corea v. Appuhamy* [1912] A.C. 230, 236 a mere intention in the mind of one co-owner to displace the others is not sufficient to constitute "adverse" possession.

But, side by side with this basic rule, the Courts of Ceylon have recognised that acts of an informal character, falling short of a partition effective in law, may be sufficient to found a prescriptive claim.

In *Tillekeratne v. Bastian* 21 N.L.R. 12 it was held to be a question of fact, wherever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than 10 years before action brought. And in *Kirimenika v. Menikhamy* 22 N.L.R. 510 the alternatives were contrasted of, on the one hand, an informal but definite partition, where each party enters into possession of his share and, on the other, a permissive arrangement. In the first case, title by prescription might be acquired, and even in the second case this might follow if the arrangement continued so long that on equitable grounds it might be presumed that possession became adverse. These decisions have been followed and applied in later cases—see *De Mel v. De Alwis* 13 C.L.R. 207; *Bandara v. Sinnappu* 47 N.L.R. 249. The latter case cites with approval a passage from the judgment of De Sampayo J. in *Mailvaganam v. Kandaiya* 1 C.W.R. 175 which is apposite to the present case:

> "There is no physical disturbance of possession necessary—it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among the heirs, and the adverse character of exclusive possession may be inferred from circumstances."

To apply these authorities to the present case: it was pleaded by the first respondent that on 26th June 1947 the three brothers exchanged with one another their interests and that on this exchange the disputed

7 acres were allotted to him. The issues as framed by the learned district judge contained the following:

> "(4) Did Petta the first defendant, Sekera and Wattuwa exchange their lands as described in para. 5 of the statements of the first defendant.
>
> (5) As a result of such exchange, are the premises in suit, in the exclusive possession of Petta the first defendant."

The first (defendant) respondent gave evidence in support of his contention that there had been an exchange in 1947 and produced a document, signed by all three brothers on 26th June 1947, which evidenced the division. Neither the appellant, nor the second respondent gave evidence, and the judge accepted the first respondent's evidence. He answered the two issues (4) and (5) in the affirmative. His judgment was upheld on appeal; and not surprisingly it was argued that there were such concurrent findings of fact as should preclude their re-examination by the Board.

The argument of the appellant was based upon the terms of the document of 26th June 1947. This, it was said, merely continued a pre-existing state of affairs—the parties "agree to possess as possessed earlier until deeds are executed." It contemplated a future partition by notarially attested deeds: meanwhile the co-ownership was to be preserved, the first respondent's possession was never adverse but was, as it had previously been, on behalf of the co-owners.

There are arguments upon the language of the document alone which cast doubt upon the validity of this contention, but their Lordships are reluctant to place much weight upon verbal expressions in a writing of this character, prepared as it was by a coconut dealer who was the uncle of Sumanadasa, and written in Sinhalese from which a translated version was before the Court. It was clear from the evidence, that the document, so far from being intended to preserve the status quo, was drawn up as part of an arrangement which was meant to resolve certain difficulties between the co-owners, by attributing to the first respondent on the one hand, and to Sekara and the second respondent on the other, separate properties which thenceforth would be separately enjoyed.

The learned district judge accepted this view of the matter and held that thereafter, in fact, the lands in dispute, as well as the other lands, were to be and were exclusively enjoyed by the first respondent and by his brothers respectively. There was ample evidence on which he could so hold. The case is, in the opinion of their Lordships, clearly one of an informal partition, acted upon by the assumption, as from June 1947, of exclusive possession. This exclusive possession having continued for more than 10 years prior to the issue of the Plaint, the first respondent succeeded in establishing a title by prescription.

Their Lordships will therefore humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

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DELIVERED BY
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