

Counsel: Faisz Mustapa, P.C., with Shantha
Jayawardena for the 12th Defendant-
Appellant.
Athula Perera for the Plaintiff-Respondent and
3rd Defendant-Respondent.
(No Written Submissions have been filed by
Both Parties.)

Argued on: 24.05.2019

Decided on: 03.06.2019

Mahinda Samayawardhena, J.

The 12th defendant-appellant filed this appeal against the Judgment of the District Court of Horana dated 24.03.1997 entered in Partition Case No.3799/P.

The 12th defendant has filed two statements of claim. In the first statement of claim dated 16.09.1993 she has asked 30 perches on Deed marked 5D6. By this Deed, Emalin has sold 30 perches to the 12th defendant. Then in the undated amended statement of claim the 12th defendant has sought exclusion of Lot 17 of the Preliminary Plan marked at the trial X on prescription. The issues of the 12th defendant have been raised on the amended statement of claim.

The learned District Judge in the Judgment rejected the claim of the 12th defendant to exclude Lot 17 from the corpus on prescription. This he did on the strength of Deed 5D6, which goes to prove that the 12th defendant is a co-owner of the land.

Hence he took the view that mere possession of a portion of the larger land for convenience, does not itself establish prescriptive possession.

However the learned Judge in the Judgment gave only 12/1008 share to the 12th defendant, which, according to the learned counsel for 12th defendant-appellant, equals to roughly 8 perches.

It is the contention of the learned counsel for the 12th defendant-appellant that, if the learned Judge relied on Deed 5D6 to hold that she is a co-owner of the land and therefore not entitled to seek exclusion a portion on prescription, he must give the 12th defendant the share stated in the Deed.

It is not clear how the learned Judge calculated the said share. In the Judgment—vide last paragraph of page 9 of the Judgment, which continues to page 10—the learned Judge has accepted that Emalin has sold 30 perches to the 12th defendant (by 5D6). The learned Judge in the Judgment does not say that Emalin did not have rights to sell 30 perches to the 12th defendant by 5D6. There is no doubt Emalin did have rights so to alienate.

Upon the death of the 2nd defendant pending trial, the widow of the 2nd defendant has been substituted as 2(a) defendant. The 2(a) defendant has given evidence at the trial. According to her evidence, her husband, who was the original 2nd defendant, is the son of Emalin. Emalin's husband and the 2nd defendant's father is Abraham. The 2(a) defendant in her evidence in chief itself has stated that, her mother in law, Emalin, has (by 5D6), sold 30 perches to the 12th defendant, and she does not dispute it. She has further stated that she shall get rights after

apportioning that 30 perches to the 12th defendant—vide page 346 of the Brief. I must emphasize that this she stated in her evidence in chief and not during the course of cross examination.

Although both the learned Judge and the 2(a) defendant accepted that the 12th defendant is entitled to 30 perches, ultimately, the learned District Judge in the Judgment has not given effect to it. In the Judgment the 12th defendant has been given about 8 perches.

According to the Judgment, excluding 1 ½ acres, from the balance portion of the corpus, the 2nd defendant shall get 150/1008 share and the 12th defendant as I stated earlier 12/1008 share. (In addition, according to the Judgment, the 2nd defendant gets 93/672 share from 1 acre.) If Emalin did not execute 5D6, the 2nd defendant would also have got the aforesaid 12/1008 share given to the 12th defendant making the 2nd defendant's share to increase up to 162/1008 share (150/1008+12/1008=162/1008).

As some portions of the land depicted in the Preliminary Plan have been excluded in accordance with the 1st admission recorded, it is not possible at this stage to state exactly the fractional share for 30 perches.

Taking all the circumstances into account, including the voluntary admissions made by the 2(a) defendant in evidence, I decide that out of such 162/1008 share, which should have gone to the 2nd defendant, 30 perches shall go to the 12th defendant.

Improvements shall go as claimed before the surveyor. In preparing the final scheme of partition, the surveyor will observe the provisions of section 33 of the Partition Law, which says: *“The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be.”* This does not mean that the surveyor shall necessarily give the portion of land where improvements have been effected to the party who is entitled to soil rights. But he shall endeavor to give *“so far as is practicable”*.

The above variation in the District Court Judgment does not affect the rights of the other parties including the plaintiff and the 3rd defendant, who were represented at the argument. This will only affect the rights of the 2nd defendant. But the aforesaid conclusion of mine is in complete consonance with the evidence of the 2(a) defendant. Therefore there is no ground or grouse for her to complain.

Appeal of the 12th defendant is allowed.

Subject to the above variation, the Judgment of the District Court is affirmed. No costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal