

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv. A No. 131 of 1999

BETWEEN

ROSIE GANGOO

Appellant/Plaintiff

AND

JASSODIA	GANGOO
ELVIN	GANGOO
DOLLY	BOHAL
GLORIA	RAMKISSOON
VERNA	NARINE
CHRISTINE	RAMKISSOON
MARGARET	GANGOO
JOAN	GANGOO
RHONA	GANGOO
ELVIS	GANGOO

Respondent/Defendants

Panel:

R. Hamel-Smith, J.A.
M. Warner, J.A.
R. Nelson, J.A.

Appearances:

Ms. Carol Gobin
appeared on behalf of the Appellant

Mr. Gaston Benjamin
appeared on behalf of the Respondents

Delivery date: 23rd September, 2002.

JUDGMENT

Nelson, J.A

The instant case concerns Torrens system land or registered land. The subject-matter of the case is a legal joint tenancy. Therefore one is dealing with the legal estate in land. The issue is how is a legal joint tenancy severed.

The appellant in an amended statement of claim pleaded an agreement in 1977 between Mahabir Gangoo and Sookdeo Gangoo to formalize and effect a partition of the said lands whereby Mahabir Gangoo would exercise exclusive rights of ownership over that portion of the said lands east of Cunjal Road, while the respondents' father Sookdeo Gangoo would exercise exclusive rights of ownership over the said land west of the Cunjal Road. The pleading further relied on a survey done by Mr. Kallicharan, a licensed land surveyor, and on instructions given to prepare a deed of partition. Subsequently, it is pleaded, Sookdeo Gandoo refused to complete the agreement.

The appellant's case on the pleadings and in the court below was that Sookdeo and Mahabir had entered into a specifically enforceable contract to partition the subject land held in co-ownership. The substance of the argument was that although the agreement was not performed it

was specifically enforceable, and so must be regarded in equity as an actual partition of the subject land and a termination of the joint tenancy.

The respondents denied the alleged agreement and admitted that Sookdeo and Mahabir Gangoo opened negotiations for the partitioning of the said lands, which were not concluded because Mahabir Gangoo refused to continue negotiations and the terms and conditions of the partition were not agreed and finalized.

The respondents further alleged that the proposal was that the southern portion of the land to the east of the Cunjal River would be transferred to Mahabir, and the remaining portion of the land would be transferred to Sookdeo Gangoo. Mahabir Gangoo is said to have withdrawn from and rejected such proposals and left the attorney's office where these proposals were being made.

The learned judge held on the evidence that there was no concluded agreement. It is essential to go back to first principles to ascertain what is a binding contract. An agreement on broad matters of principle may not be enough to bind the parties unless there is agreement on all the essential terms of the contract. Among those terms must be the description of the property and the consideration: see Chitty on Contracts (27th edition) at para. 2-080.

No doubt with these legal principles in mind the learned judge held that there was no completely constituted agreement in the sense that there was no meeting of minds as to the physical division of the lands

between them. I have examined the learned judge's findings against the backdrop of legal principle, and hold there was adequate material on which he could come to such a conclusion.

Quite apart from there being no completely constituted agreement to partition the subject lands, the submission that the alleged agreement to partition or the alleged common intention to partition effected a severance of the joint tenancy is fundamentally flawed. The fact that co-owners, whether joint tenants or tenants in common, wish to partition lands owned by them does not by itself effect a severance, but constitutes a desire to put an end to co-ownership. Severance of a joint tenancy continues co-ownership, albeit as tenants in common. Accordingly a proposal for partitioning or an agreement to partition cannot be evidence of the continuation of co-ownership as tenants in common.

Partition may be achieved by deed or by order of the court under the Partition Ordinance Ch. 27 No. 14. No issue arises here as to partition by order of court. The learned judge held that there was no specifically enforceable agreement to partition. There is no appeal from that finding.

In essence severance of a joint tenancy involves an intention to exclude the right of survivorship on the part of persons who want to continue in co-ownership of land. Thus, while partition by deed or by order of the court does sever or terminate a joint tenancy, an agreement to partition that is not completely concluded or specifically enforceable says nothing about the right of survivorship prior to partition and so does not

without more sever a joint tenancy. Partition destroys the unity of possession; severance does not.

In my opinion joint tenants of a two-storey house may continue to be joint tenants, even though they agree that one party is to occupy the top floor exclusively and the other the ground floor. Once they have not addressed the issue of survivorship they remain joint tenants.

I conclude therefore that an incomplete or abortive agreement to partition land even though amounting to an agreement to the principle of partition, does not effect without more severance of a joint tenancy.

However, out of respect for the arguments advanced by counsel for the appellant I proceed to consider the matter as if there was evidence of severance by any method known to the law.

Counsel for the appellant stressed that she was relying on severance by mutual agreement. However in argument counsel appeared to be relying on dicta of Lord Denning in Burgess v Rawnsley [1975] Ch. 429 for the proposition that a mere declaration of intention communicated to a fellow joint tenant would be sufficient to effect a severance of a joint tenancy. I further understood counsel to be contending in the alternative that negotiations not otherwise resulting in an agreement would suffice to sever a joint tenancy. Neither of these two grounds was pleaded. However I raised with counsel the question whether these two arguments deriving from Burgess v Rawnsley (supra) were still good law in this country.

In Burgess v Rawnsley a 63-year old widower met a 60-year old widow at a scripture rally in Trafalgar Square, London. When the house he was renting became available for purchase, he invited the widow, with whom he became friendly and wished to marry, to join him in putting up the purchase price equally. It was agreed he would have the ground floor flat, and she the upstairs flat. The house was conveyed to them jointly upon trust for sale for themselves as beneficial joint tenants.

The widower never mentioned marriage, but the widow made it clear that she did not contemplate him as a marriage partner. The widower consequently made an oral offer to buy out the widow's interest for £750 and she orally agreed. Subsequently the widow went back on the agreement and demanded £1000. The widower died without arriving at an agreed figure and his estate claimed a half share of the proceeds of sale of the house. The widow contended she was entitled to the full proceeds.

The Court of Appeal held that the widower's estate was entitled to a half share in the proceeds of sale.

Three methods of severance at common law and in equity were identified by Page-Wood V-C in Williams v Hensman (1861) 1 John & H. 546, 557-558; 70 ER at p. 867. In Trinidad and Tobago these three ways of severing a joint tenancy still exist:

- (1) "An act of any one of the persons interested operating upon his own share may create a severance as to that share"

(2) “Secondly, a joint tenancy may be severed by mutual agreement”

(3) “... in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.” Page-Wood V-C added: “When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.”

The first method – acting upon one’s share

This method involves destroying one of the four unities: possession, interest, title or time. The standard way to do so was unilaterally to assign one’s interest to trustees, or to sell or mortgage one’s interest.

Nothing turns upon this method of severance.

The second method – mutual agreement

The ratio of Burgess v Rawnsley. (supra) was that there was a severance of the beneficial joint tenancy by mutual agreement: see per Lord Denning M.R at p. 440E, per Browne LJ at p. 444D and per Sir John Pennycuik at p. 445G.

As indicated earlier in this judgment, I have found nothing in the evidence which suggests that there was any agreement on the description of the property that the proposed tenants in common were to take.

Further, I find it difficult to conjure up a mutual agreement to sever the joint tenancy in the face of the following evidence:

“We asked why the two brothers didn’t separate the land while living and sign to it. Seenath said the land went to both of them. Mahabir just get up and walk out and say leave it like that,”

In my judgment this statement constitutes an election to keep the joint tenancy alive rather than to change the nature of co-ownership. It does not point to a mutual agreement or an agreement to become tenants in common.

Whether there is a severance by mutual agreement is ultimately a question of fact. In Burgess v Rawnsley [1975] Ch. 429 both Browne LJ (at page 443G) and Sir John Pennycuik (at page 445H) felt that the evidence of mutual agreement was thin, but nonetheless upheld the trial judge’s finding of fact and based their decision on severance by mutual agreement. In the present case I accept the learned trial judge’s finding that there was no agreement to partition the subject land, and a fortiori no agreement to sever the joint tenancy on the evidence before him. There is no evidence that the parties considered excluding the right of survivorship pending the making of any partition order or agreement.

The third method – a course of dealing intimating severance

Counsel for the appellant contended that there was a course of dealing which evidenced a common intention to sever the joint tenancy.

She also relied on negotiations with regard to a division of the property as effecting a severance of the joint tenancy.

The first submission was based on a passage from the judgment of Lord Denning M.R in Burgess v Rawnsley (supra) at p. 439C:

“It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasise that it must be made clear to the other party.”

I raised with counsel whether those dicta were now accepted principle. I did so particularly because the dicta were obiter.

Lord Denning M.R. based his decision in Burgess v Rawnsley (supra) primarily on severance by mutual conduct (page 439C) although he also favoured mutual agreement. He relied on a “course of dealing” in which one party makes it clear to the other that their shares should no longer be held jointly but be held in common. However, both Browne LJ (at page 444E) and Sir John Pennycuick (at page 447B) doubted that there was sufficient evidence of such a course of dealing once the evidence of the alleged agreement was rejected. Thus, in the final analysis the majority did not approve the notion that abortive negotiations between joint tenants for a sale and purchase in that case amounted to a severance of the joint tenancy by mutual conduct.

Lord Denning's dicta would give effect to a unilateral declaration of intention. Such declarations without more are no more effective than a statement in a will and lack the irrevocability associated with severance. Indeed the High Court of Australia has not followed the dicta of Lord Denning.

I referred counsel to the dicta of Lord Hardwicke L.C. in Partriche v Powlet (1740) 26 E.R. 430, 431 which suggests that the declaration of one of the parties that a joint tenancy should be severed was not sufficient unless it amounted to an actual agreement. With great respect, it would appear that dicta to the contrary of Plowman J in Re Draper's Conveyance [1969] 1 Ch. 486 are not correct. Lord Denning considered that opinions such as those and that of Sterling J in Re Wilks [1891] 3 Ch. 59 were valid only when one was considering how a legal joint tenancy could be severed. Joint tenancies in England could only be severed in equity, and in that context conduct that was not irrevocable could sever a joint tenancy in equity.

I agree with the position taken in Australia that the existence of intention alone cannot sever a joint tenancy: see Corin v Patton [1989-1990] 169 CLR 540, 548. Firstly, a statement of intention without more, does not affect the unity of title. Thus, no severance is effected. Secondly, if statements of intention could effect a severance, it would become difficult to identify precisely which interests had been the subject of declarations of intention. Thirdly, there would be no point in maintaining

mutual agreement as a method of severing a joint tenancy. The mere intention would be enough. Fourthly, I adopt the criticism in Hunter v Babbage (1995) 69 P. & C.R 548, 559:“... it was held that the consequence of the agreement made three years previously [sc in Burgess v Rawnsley] was not that the parties had been holding the house since severance as tenants in common in shares corresponding to the ratio between the £750 and the balance of the value of the house, but that they had been holding the house in equal shares....” In other words, the shares had no relationship to the alleged agreement or declared intention.

The second aspect of the third method of severance relates the effect of negotiations between joint tenants which do not result in an agreement.

Sir John Pennycuik in Burgess v Rawnsley [1975] Ch. 429, 447A said:

“I do not doubt myself that where one tenant negotiates with another for some rearrangement of interest, it may be possible to infer from the particular facts a common intention to sever even though the negotiations break down. Whether such an inference can be drawn must I think depend upon the particular facts. In the present case the negotiations between Mr. Honick and Mrs. Rawnsley, if they can be properly described as negotiations at all, fall, it seems to me, far short of warranting an inference. One could not

ascribe to joint tenants an intention to sever merely because one offers to buy out the other for £X and the other makes a counter-offer of £Y.”

Although the proposition is clearly obiter since no common intention was inferred from the negotiations, Lord Denning M.R supported the principle.

He said at page 440 F:

“Even if there was not any firm agreement but only a course of dealing, it clearly evinced an intention by both parties that the property should henceforth be held in common and not jointly”

Browne LJ expressed no concluded view on the point.

I agree with Judge Blackett-Ord in Gore and Snell v Carpenter (1990) 60 P. & C.R 456, 462 that negotiations are not the same as a course of dealing. He said, quite correctly in my view:

“A course of dealing is where over the years the parties have dealt with their interests in the property on the footing that they are interests in common and not joint.”

In my judgment the kind of mutual course of dealing which properly falls within the third method of severance can be gleaned from Joseph v Garner (Vol.1 Judgments of the Supreme Court 239) and Olton v Olton

(unreported) H.C.A. No. 117 of 1974, February 9, 1990. In Joseph v Garner (supra) three joint tenants divided land by metes and bounds into four equal shares and took possession of the portions allotted to them. One of them built a house on her portion. The Court of Appeal of Trinidad and Tobago held that the agreement to divide followed by possession of each lot allocated had the force of actual severance.

In Olton v Olton (supra) a large family occupied different portions of family land as their own with the tacit agreement of the others and built their homes on the allotted land. It was held that a severance of the joint tenancy was effected by the course of dealing from 1930 to 1974 and their treatment of one another as tenants in common.

Counsel for the appellant considered Gore and Snell v Carpenter (supra); Greenfield v Greenfield [1979] 38 P. & C.R 570 and Hunter v Babbage (supra). However, in none of these cases was severance by a mutual course of dealing in the form of negotiations successfully argued.

With the greatest respect therefore, I am not disposed to accept the proposition put forward by counsel for the appellant. I hold that mere negotiations, without de facto occupation and treatment of the occupiers inter se as tenants in common together with conduct inconsistent with the continuation of a joint tenancy, would not suffice to sever a joint tenancy of land.

If the matter were to turn on a question of fact I would hold that it was not possible to infer from the course of dealing, i.e. the negotiations

for partitioning the subject lands, a common intention to sever. I endorse the finding of Kangaloo J., as he then was, that “Mahabir who apparently was better off financially than Sookdeo and in better health was willing to run the risk of his outliving Sookdeo, thereby getting all the lands for himself.”

Indefeasibility of title

It is to be noted that the respondents are the registered proprietors of the subject parcel of land by virtue of a memorandum of assent.

I raised with counsel for the appellant the question whether the appellant who claimed that there was a severance of the joint tenancy of the legal estate could now set up that claim after the death of the other joint tenant had activated the ius accrescendi and the respondents were entered on the register as proprietors. In other words, since there had been no attempt to have entered on the Register or the certificate of title the statutory words of severance “no survivorship” pursuant to section 120 of the Real Property Ordinance Ch. 27 No. 11 (“the RPO”), it was not open to the appellant to challenge the title having regard to section 45 of the RPO (conclusiveness of registration) except on the ground of fraud and subject only to interests entered on the register and inter alia, any possessory title. Further, by section 141 of the RPO no one who takes from the proprietor of an estate or interest in land is affected by notice of any trust or unregistered interest “any rule of law or equity to the contrary notwithstanding.”

No question arises here of any equitable interest or equity being created. If the legal joint tenancy was severed a record of such severance had to be entered on the register or certificate of title pursuant to section 120 of the RPO. Upon the death of Mahabir his interest passed to the surviving joint tenant.

Since one is dealing with the legal interest there could be no alteration of it effective to pass title except by an instrument of transfer duly registered: see section 44 of the RPO or an endorsement of the severance on the register pursuant to section 120 of the RPO. If severance took place, an immediate legal interest arose there and then. There is here no question of any specifically enforceable equity on the facts of this case or of any severance of a joint tenancy in equity of RPO land as counsel for the appellant contended at length. We are dealing with severance of a legal joint tenancy of RPO land.

In the present case there has been no severance of the legal joint tenancy either at law or in equity. The appellant concedes that there is no specifically enforceable agreement. Therefore, there has been no alienation in equity, and so no tenancy in common in equity. As to severance in equity otherwise, all that is pleaded and contended even now is that there was a common intention to partition. Nothing is said about the exclusion of the right of survivorship while Mahabir and Sookdeo remained co-owners. Alleged negotiations for partition did not address this issue.

There is no suggestion here of any constructive trust imposed by the court on the legal title of the respondents on the ground of unconscionability or on any other ground. At all material times this case has concerned a claim that by reason of certain events the registered title indicating that Mahabir and Sookdeo were co-owners had been altered as a result of severance of the legal joint tenancy. No note of such severance is on the registered title.

It is said that there was an alleged common intention to partition the subject lands; they were not partitioned; nothing is advanced as to any change in the nature of co-ownership pending the alleged partition.

Regrettably I see no room for the operation of equity or any equitable interest.

In the result I am firmly of the view that there had been no severance of the joint tenancy at the date of Mahabir's death either in fact or in law. Even if I were wrong on that point I would hold that in the events which have occurred the respondents, as registered proprietors, have an unencumbered fee simple in the subject lands.

I therefore agree with Hamel-Smith J.A. that this appeal should be dismissed with costs fit for counsel.

Rolston F. Nelson,
Justice of Appeal.