

KALU MENIKA v. KERALA.

1902.
July 21.

C. R., Matale, 4,387.

Partition—Interlocutory decree made under s. 4 of the Ordinance No. 10 of 1863—Courts Ordinance, s. 80—Right to appeal therefrom.

A person aggrieved by a preliminary or interlocutory order made by a Court of Requests under section 4 of the Partition Ordinance has the right to appeal at once to the Supreme Court.

THE plaintiff in this case prayed for a partition of the land described in the plaint, on the footing that he was the owner of one-fifth share of it and the defendants the remaining four-fifths. The Commissioner (Mr. W. Dunuwille), after hearing evidence, decreed, in terms of section 4 of Ordinance No. 10 of 1863, that a partition of the land described in the schedule annexed to the plaint be effected, allotting to plaintiff one-fifth share.

The defendants appealed.

The case came on for argument before Middleton, J., but upon a preliminary objection raised on behalf of the respondent that section 80 of the Courts Ordinance limited the right of appeal given by section 19 of the Partition Ordinance, his Lordship directed the case to be listed before the Full Court.

E. W. Jayawardane and Prins, for appellants.

H. Jayawardane, for respondent.

By the following judgments delivered on the 21st July, 1902, their Lordships over-ruled the objection raised, and directed that the appeal be listed for argument on the merits.

21st July, 1902. MONCREIFF, A.C.J.—

This case came before my brother Middleton on appeal from the Court of Requests of Matale. The action was for the partition of land, and we are asked to say whether the defendant is entitled to appeal from the preliminary or interlocutory decree made in the case under section 4 of the Partition Ordinance of 1863.

I think he is entitled to appeal. Section 19 of the Ordinance gives an appeal from "all decisions and orders of any Court made under the authority of the Ordinance." It was said that this provision was repealed, by implication, by section 81 of the Courts Ordinance, which grants an appeal for any error in law or fact from any final judgment or order having the effect of a final judgment. I think it was not repealed. The section in

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the Courts Ordinance is affirmative, not negative; and it is a recognized rule that—except when a contrary intention is clear—a general provision will be presumed to have silently excluded existing special provisions from its operation.

I do not think it necessary to discuss whether the so-called interlocutory decree in a partition action is a final judgment, or an order having the effect of a final order.

WENDT, J.—

I am of the same opinion, and I may add that ever since I have been at the Bar appeals from Courts of Requests from what is called an interlocutory decree in partition cases have been entertained and dealt with without objection. Appeals from Courts of Requests, ever since appeals were allowed at all, have been limited to appeals from final judgments, or orders having the effect of final judgments. Notwithstanding this limitation, such an appeal as that now in question has, as I have just stated, been uniformly permitted. It seems to me also that a decree of a Court determining the title of the parties before it to lands under partition must be regarded, subject of course to appeal, as final between those parties, and if this view be correct appeals will be competent from such a decree under the very terms of section 80 of the Courts Ordinance. It is unfortunate that there is nothing definite in that Ordinance as to the term judgment. There can be no appeal from a judgment as defined in the Civil Procedure Code, because a judgment is merely the reasons given by the Court for its decision.

MIDDLETON, J.—

The question in this case is whether a person aggrieved by a preliminary order under section 4 of the Partition Ordinance, No. 10 of 1863, can appeal at once to the Supreme Court. There can be no doubt that by section 19 of the same Ordinance an appeal would lie, but it has been contended that the effect of section 80 of the Courts Ordinance, No. 1 of 1889, is to limit the right of appeal in Courts of Requests cases to persons dissatisfied with final judgment, or any orders having the effect of final judgment. I understand that it has always been the practice to hear appeals from these preliminary orders, a practice beginning with the original right under section 19 of the Partition Ordinance and continuing unquestioned after the passing of the Courts Ordinance. We have, therefore, the usage of the Courts for at least twenty-six years in favour of the theory that an appeal will lie in these cases.

There is also the presumption that the Legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of the Supreme Court without an explicit expression of its intention (see Maxwell on the *Interpretation of Statutes* p. 178). By section 19 of the Partition Ordinance a special right of appeal is given against all decisions and orders of any Court made under the authority of the Ordinance, and the use of the word "decision" to my mind contemplates a right of appeal co-extensive with the exigencies of the Ordinance, which may make it necessary that at different stages decisions have to be given, such as an amendment or alteration of a Commissioner's apportionment in point of place against which an appeal might be taken. The words in section 80 of the Courts Ordinance declare the general power of appeal in Courts of Requests cases, and on the principle *generalia specialibus non derogant* by mere implication, I would hold that section 80 of the Courts Ordinance does not limit the special right under section 19 of the Partition Ordinance.

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It may further, I think be said that such orders as are made under section 4 of the Partition Ordinance are orders having the effect of a final judgment. They certainly have this effect if no appeal is taken, or no other parties intervene or are cited. For these reasons, therefore, I am of opinion that an appeal will lie, against orders made under section 4 of the Partition Ordinance, and that section 19 of that Ordinance is not affected by section 80 of the Courts Ordinance.
