

NAGOOR PITCHE v. PAKEER *et al.*

D. C., Kandy, 13,455.

1901.

*April 30 and
May 8.*

*Partition case—Defendants not to be found—Ordinance No. 10 of 1863, s. 5—
“ It shall be lawful ”—Application to issue commission for partition—
Notice thereof, on whom to be served—Discretion of District Judge.*

Under section 5 of the Partition Ordinance, a District Judge having decreed partition has no power to refuse to issue a commission for partition, on the ground that notice of the application should be personally served on defendants who are not to be found in the Island.

Where in the absence of the defendants who were reported to be in India, notice of the application for a commission to partition had been given by the plaintiff to the party in actual possession of the property, who was the lessee of it,—

Held that the appointment of a commissioner to partition the land may be made without personal service of the application on the defendants.

IN this partition suit there were five defendants. The fifth defendant only appeared and the remaining four were said to be resident in Tanjore, South India. As their address was not known, the summons intended for them was, by order of the District Judge, served on one A. M. Lebbe, who was in actual possession of the property sought to be partitioned. The title of the parties having been proved, it was decreed that the plaintiff and the defendants were each entitled to an undivided one-sixth share in the houses and grounds in question, and that the shares of the plaintiff and of the fifth defendant be partitioned.

Thereupon plaintiff applied that a commission be issued to a licensed surveyor to partition the property. The District Judge ordered that notice of the application be given to the other side. Notice was given to the fifth defendant, and as the other defendants could not be found, notice was served on A. M. Lebbe as before, he being the lessee of the property. The fifth defendant did not appear.

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The District Judge (Mr. J. H. de Saran) held as follows:—

“ I have some difficulty about this matter. The Ordinance No. 10 of 1863, section 3, provides for service upon the person in the actual possession of the property if any of the defendants cannot be found. Section 6 provides that the notice which the parties should receive of the day fixed for considering the return of the commission shall be served in the same way as the original summons. Section 5 which provides for the issue of a commission is silent as to any notice being given to the other side when one of the parties applies to issue a commission for partition.

“ Now it seems to me that, although the section does not expressly provide for the giving of notice, it is clear from its terms that notice should be given. It enacts as follows:—

“ ‘ When a decree of partition has been given, it shall be lawful for the Court, on the application of any party to the suit, to issue a commission addressed to such person or persons as shall be agreed upon by all the parties to such suit as shall be willing to execute the same; or if the parties cannot agree upon any such person, then to some fit person named by the Court who shall be willing to execute the same.’

“ When I indicated my difficulty to Mr. Beven, who appears for the plaintiff, he said the action did not require notice to be given to the other side, and that although he issued notice in accordance with my order, notice was not really necessary.

“ I do not think so. The defendants are entitled to know who is to execute the commission and to agree or object to the commission being issued to him. How can they do the one or the other unless they have notice? As in my opinion the first, second, third, and fourth defendants, who are said to be in India, are entitled to receive notice, and as the Ordinance does not provide for the service of it in the same way as the original summons, I must fall back on the Civil Procedure Code and require that notice be given as therein provided for service out of the Colony.

“ I shall most likely be told that the plaintiff does not know where the absent defendants are, or may probably be found. That is his misfortune. He should endeavour to ascertain their whereabouts. I think that if he will only make some effort he will be successful.

“ I refuse the motion on the ground that the first, second, third, and fourth defendants have not had notice of it. ”

Plaintiff appealed.

Bawa, for appellant.

Cur. adv. vult.

8th May, 1901. MONCREIFF, J.—

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This was a suit for the partition of certain house property at Kandy. A partition decree was obtained on the 6th August, 1900, and thereafter the judge was approached on behalf of the plaintiff with a view to the appointment of a commissioner under section 5 of the Partition Ordinance of 1863. But on the 21st January, 1901, the judge refused to appoint the commissioner named by the plaintiff, and on the 4th February, 1901, he refused a proposal to affix notice on the premises affected by the partition decree. This he did saying, with regard to the former motion, that the notice had not been served on the second, third, and fourth defendants; and with regard to the latter motion, that there must be some evidence that the second, third, and fourth defendants were out of the Island. It seems that there has been no personal service upon these defendants: it is believed that they are in India, and their addresses are unknown. According to the affidavit of the person sent to India in the present instance to point out these defendants to the process server, he was unable to find them in Tanjore, and although he proceeded to Trichinopoly in search of them, he did not find them. Mr. Bawa contends that personal service is not necessary.

Now, upon application for sale or partition under section 2 of the Partition Ordinance, "summons shall be served upon the defendants, or such of them as can be found; or if they cannot be found, upon the person or persons in actual possession of such property; or, if there be no person in possession, in such manner as the Court shall direct."

Upon the passing of the decree of partition, "it shall be lawful for the Court", under section 5, to appoint a commissioner to partition the property, and the commissioner shall proceed, "in the presence of all parties concerned, if they will appear."

On the receipt of the return to the commission, the Court shall either confirm or modify and enter final judgment, and of these proceedings notice shall be issued under section 6 "to all the parties," and it shall be served in the same way as the original summons.

The learned judge thought that the words "it shall be lawful," used in section 5, gave him a discretion to refuse to appoint, and that there was reason for requiring personal service on all the defendants, on the motion to appoint a commissioner, which does not exist in the proceedings culminating in the partition decree and at the stage of final judgment.

I do not agree with him. It seems to me to be wholly unreasonable that personal service should be required on the motion for

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the appointment of the commissioner and dispensed with on the relatively more important occasions of final judgment and decree of partition. I cannot think that the Legislature contemplated such a distinction. The judge finds that the plaintiff and the fifth defendants are entitled each to an undivided sixth, and decrees that their shares "be partitioned and allotted to them." He acknowledges and decrees the plaintiff's right, he orders the plaintiff's share to be allotted to him without personal service on all defendants; but, when he is asked to take the next step, he says: "No. I have a discretion. I require personal service on all the defendants."

Whether there is or is not a discretion, I fail to appreciate the learned judge's reason for distinguishing. But is there a discretion? I think not. The words "it shall be lawful" imply only the conveyance of power and authority, but the context may make it obligatory on the donee of the authority to exert it. The judge in this case has decreed that the plaintiff's share shall be allotted to him; he has clothed the plaintiff with a legal right. Section 5 has given him a power to effectuate that legal right, and I think he has no power to refuse to do so. That I take to be the sense of the judgments in *Julius v. The Bishop of Oxford* (5 App. C. 214).

If there had been words in section 5 indicating that personal service on all the defendants is required, the power would be so far qualified. But the only reference in the section to the subject is contained in the provision that the commissioner shall proceed "in the presence of all parties concerned (if they will appear)," the words which do not, in my opinion, mean that the plaintiff is to hail to the spot defendants whom he has searched for in vain in Tanjore and Trichinopoly.

I think that the judge should be directed to proceed to appoint a commissioner for the purpose specified in section 5.

LAWRIE, J.—I agree.

