[PRIVY COUNCIL.]

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PONNAMMA *v.* ARUMOGAM.

On Appeal from the Supreme Court of Ceylon.

Action for partition—Death of intestate before the passing of the Civil Procedure Code—Necessity for administration—Re-distribution of estate—Civil Procedure Code, s. 547—Ordinance No. 12 of 1904, ss. 2, 3.

In a suit brought in 1898 for partition, or alternatively for a sale of certain parts of an intestate estate, it appeared that the intestate had died in 1884; that no letters of administration had been taken out; that the widow and son had made a division of the immovable estate between themselves and the other heirs, and executed certain notarial deeds of gift for the purpose of effecting such division, and various dealings with their respective shares had been made by the grantees,—

Held, that the suit, which was one for the recovery of property within the meaning of section 547 of the Civil Procedure Code, was not maintainable without administration to the intestate's estate.

Fernando v. Fernando (4 N. L. R. 201) and *Guneratne v. Hamine (7 N. L. R. 299)* approved.

No partition could be effected by the Court without a complete administration of the whole of the intestate's estate, which would include an account of the payment of his debts and of the dealings of the grantees, with their respective shares, so as to adjust their respective rights.

It is not the practice of the Privy Council to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it.

Silva v. Swaris (1 Balasingham's Rep. 61) referred to.

APPEAL by special leave *in formâ pauperis* (see [*1902*] *A. C. 561*) from a decree of the Supreme Court of Ceylon (January 4, 1900) setting aside a decree of partition of the District Court of Badulla (October 16, 1899) and dismissing the plaintiff's action with costs.

The facts sufficiently appear in the judgment.

R. W. Lee, *F. H. M. Corbet*, and *A. St. V. Jayewardene* appeared for the appellant.

The respondents did not appear.

The judgment of their lordships was delivered by Lord Davey.

In the year 1884 one Sinnatambi, a native of Ceylon, being possessed of property of considerable value, consisting chiefly of lands and houses, died intestate. His heirs, according to the law of Ceylon, were his widow, the sixth respondent, who was entitled to one-half share, a son and five daughters, of whom the appellant is one, and a grandchild, daughter of a deceased daughter, who were entitled to the other half share in equal shares.

* Present: Lord Davey, Lord Robertson, Sir Arthur Wilson, and Sir John Bonser.

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No letters of administration were taken out, or have since been taken out to the intestate's estate. But the widow and son took upon themselves to make a division, in pursuance, it is said, of the intestate's verbal directions, of the immovable property between themselves and the other heirs, and executed certain notarial deeds of gift for the purpose of effecting such division. The appellant apparently had possession of the lands allotted to her and dealt with part thereof by letting it out for the cultivation of kurakkan. One of the daughters, the respondent Mariyayi, sold the property allotted to her and received the purchase money. The son paid debts of the intestate and mortgaged certain shops retained by him for the purpose, and also made a gift of lands of his own to provide a portion for the grandchild. And there seem to have been other dealings by the parties with the lands allotted to them, the particulars of which are not very clearly stated. What became of the movable property does not appear. Probably it was of small amount. There is not sufficient on the record to show whether the division, though irregularly made, was or was not a fair one.

On the 4th May, 1898, the appellant and her husband commenced the present action for partition, or alternatively a sale of certain parts of the intestate's immovable property (not including the lands which had been sold by Mariyayi). In their plaint they alleged that since the death of their father the family had been possessing and holding the said lands undividedly and in common. The principal defence by those defendants who opposed the plaintiffs was that they had acquired a title to the lands allotted to them by prescription.

The Judge of the District Court held that no single heir had proved a prescriptive title against any of the other heirs in respect of any of the lands which formed the subject of the action. And by his decree dated the 16th October, 1899, it was ordered that the lands in suit be partitioned, allotting to the parties their respective shares.

This decree was reversed on appeal in the Supreme Court, and by the decree of that Court dated the 4th January, 1900 (now under appeal) the action was dismissed with costs. The reasons of the learned Judges are not very clearly stated, but they appear to have thought that the division was a fair one and that the widow and son had honestly administered the estate in accordance with the intestate's instructions and that time had confirmed their acts. "It would be wrong," said Mr. Justice Withers, "in every sense of the word to disturb the division of the property as effected by them, to say nothing of the dispositions and encumbrances which have supervened."

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Their lordships agree with the judgment of the Supreme Court, though not quite for the same reasons. The first objection to the action is the absence of any administrator on the record. This is not merely a technical or a fiscal objection, but one of substance. The Charter of Justice of 1833 has been construed in the Ceylon Courts as having introduced into the Island the English Law of Executors and Administrators with this variation, that it was made applicable to the immovable property as well as the movable property of a deceased person. Rules were drawn up in the Supreme Court in 1833 for carrying into effect the provisions of the Charter of that year. But the procedure being a graft upon the Roman-Dutch Law and being new to the people, an exception was allowed to be made in favour of small estates. By the Civil Procedure Code of 1889 that practice received legislative sanction. By section 545 it was made obligatory on the Court to appoint an administrator where the estate exceeds Rs. 1,000 in value, and by section 547 it was enacted that no action should be maintainable for the recovery of any property included in the estate of a deceased person where such estate exceeds in value Rs. 1,000, unless grant of probate or letters of administration should have been first issued to some person as executor or administrator of the deceased. It has been said by learned Judges in the Supreme Court of Ceylon that before the enactment of the Civil Procedure Code the same rule prevailed, and that the only effect of section 547 was to determine what was a small estate. See the Judgment of Bonser, C.J., in *Fernando v. Fernando; 4 Ceyl. N. L. R. 201*, at page 206, quoting Clarence, A.C.J., in an earlier case, and that of Layard, C.J., and Wendt, J., in *Gunaratne v. Hamine, 7 Ceyl. N. L. R. 299*. In the latter case Wendt, J., said: "It is plain that if parties were enabled by agreement to waive the necessity for administration, the intention of the Legislature would be frustrated. Hence it is that, whenever it appears in the course of a case which a Court is trying that administration is necessary, it becomes the duty of that Court to see that the provisions of section 547 are complied with before the litigation proceeds any further."

Even if their lordships thought that the construction given to the Charter of Justice and the Code of Civil Procedure by the Colonial Court was doubtful, they would hesitate to over-rule a settled and uniform course of decision on a question of this kind. But they are of opinion that the learned Judges have taken a correct view, and their decisions ought to be followed. This appeal must therefore be decided on that footing, and not according to the undiluted principles or rules of the Roman-Dutch Law.

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It was, however, contended that section 547 was not applicable to the present case on two grounds. The first ground was that, by Ordinance No. 12 of 1904, section 2, a proviso was added to section 547 to the effect that no action for the recovery of, or involving proof of title to any property, movable or immovable, included in the estate of any person who died intestate before the commencement of the Ordinance of 1889 should be defeated by reason only that letters of administration to the estate of such person have not been issued. Secondly, it was said that this action is not for the recovery of any property within the meaning of section 547.

To the first argument it is sufficient answer to point out that the judgment of the Supreme Court was given more than four years before the new Ordinance was passed, and their lordships have only to say whether that judgment was right when it was given. It is unnecessary, therefore, to discuss the question whether any intention is sufficiently shown to take this case out of the well-known rule on the construction of statutes, that the rights of the parties must be decided according to the law as it existed when the action was commenced.

On the second point their lordships are of opinion that this action, though in form an action for partition only, is for the recovery of property. The appellant is seeking to recover her share as one of her father's heirs in the property which has been irregularly alienated in favour of the other heirs, and is in their possession, or has been dealt with by them as owners thereof.

These considerations are sufficient to dispose of this appeal, but their lordships think that the appeal fails on a broader ground. They are of opinion that the intestate's estate was not in a condition for partition. It is not the fact, as alleged in the plaint, that since the death of the intestate his heirs have been holding and possessing the lands in question undividedly and in common. Before any partition could take place the plaintiffs would require to recreate the inheritance. The irregularly alienated portions of it would have to be brought back into the corpus, and the rights of the parties *inter se* adjusted. In other words, the estate of the intestate would have to be administered before the beneficial rights and interests of the heirs could be ascertained. A perusal of the decree made by the Judge of the District Court is sufficient to show that justice could not be effectuated by it. All that the Commissioner could do under the decree would be to divide the lands mentioned in it between the plaintiffs and several defendants in certain shares. It does not even purport to be a complete division of the estate. The lands proposed to be partitioned do not include

the land sold by Mariyayi, and no account is taken of the purchase money received by her, or of the debts of the intestate said to have been paid by the son, or the lands conveyed by him to the grandchild, or of the mesne profits, or of the movable property. And to make it worse counsel for the appellant proposed to omit from the partition the item (*e*), which is held on lease only. It is impossible in fact to say, on the materials before their lordships, whether the appellant is entitled to the share which she claims in the lands sought to be partitioned. The plaint asks alternatively for a sale. But, on the theory that the estate remains undivided, no sale could be made except through an administrator.

Since the hearing of this appeal their lordships have permitted the counsel for the appellant to lay before them a report of the case of *Silva v. Swaris*, recently decided by the Supreme Court of Ceylon. As the respondents were not represented on the hearing this might be done without setting the appeal down again for further hearing. The consideration of that case has not led their lordships to alter the opinion they had formed after the hearing. It was there decided that section 2 of Ordinance No. 12 of 1904 applied to pending actions, and that an action in which final judgment had been given, from which judgment there was a pending appeal, was for this purpose a pending action, and the Supreme Court had power to give the plaintiffs appealing the benefit of the Ordinance which had been passed in the interval between the judgment in the Court of first instance and the hearing of the appeal.

It is not necessary to consider whether the case was rightly decided, as their lordships do not think that either the case itself or the cases referred to by the learned Judges in their judgment have any application to this appeal to the King in Council. The case of *Salt v. Cooper* (*16 Ch. D. 544*) seems merely to have decided that a cause in which judgment has been given, provided that judgment has not been satisfied, is still pending within the meaning of the rule relating to execution of judgments, which seems a little obvious. *Quilter v. Mapleson* (*9 Q.B.D. 672*) was decided on a rule which prescribes that "all appeals to the Court of appeal shall be by way of re-hearing." And Jessel, M.R., pointed out (at page 676) that on an appeal strictly so called such a judgment can only be given as ought to have been given at the original hearing, but on a re-hearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. In like manner the Supreme Court in *Silva v. Swaris* relied on the terms defining their appellate jurisdiction which they thought, rightly or wrongly, went beyond the correction of

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errors made by the Courts below. Without limiting the extent of His Majesty's prerogative their lordships can safely say that it is not the practice of this Board to entertain any appeal other than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it. The Board may, however, think that the Court below had not sufficient materials for its judgment, or improperly omitted to receive or to require further evidence, or to try some issue, in which case it may remit the case for further hearing.

Their lordships must, however, remind the learned counsel of what they have already said, that in this case the objection of want of administration is one of substance, and that the appellant's case does not fail by reason only that letters of administration to the intestate's estate have not been granted.

For these reasons their lordships will humbly advise His Majesty that the appeal ought to be dismissed. As the appellant is appealing *in formâ pauperis* and the respondents do not appear, there will be no costs of the appeal.