

[IN REVISION.]

1918.

Present: Bertram C.J. and De Sampayo J.

WICKRAMARATNA v. WICKRAMARATNA.

D. C. Colombo, 46,781.

*Partition—The question whether land should be partitioned or sold should be gone into before interlocutory decree—Ordinance No. 10 of 1863, section 4.*

The question whether an actual partition or a sale should be ordered should be gone into and determined by the Court as part of the proceedings preliminary to the interlocutory decree, which should, when entered, definitely order a partition or a sale, as the case may be.

**T**HE facts are set out in the judgment.

*L. M. D. de Silva*, for plaintiff.

October 2, 1918. DE SAMPAYO J.—

This is one of several partition actions in which the plaintiff applies to this Court for revision of the interlocutory decree. The District Judge investigated the title and entered a decree ordering that the land be partitioned among the plaintiff and the defendants according to the shares set out in the plaint. But when the Commissioner appointed to carry out the partition proceeded to the land, it became obvious that on account of the nature and extent of the land and the number of shareholders, a partition was impracticable, and the Commissioner made a report to that effect. An application made by the plaintiff to the District Court to enter a decree for sale instead of partition was rightly refused, inasmuch as the Court had no jurisdiction to alter its own decree. Hence, the plaintiff has

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been obliged to come to this Court, and has applied, with the consent of all the parties, that the decree be altered by way of revision. I am satisfied that the circumstances justify the application, and require the exercise by this Court of its powers of revision.

As the necessity for such applications frequently arises under similar circumstances, it may be convenient to settle the practice which should be followed in partition cases. In my opinion the question whether an actual partition or a sale should be ordered should be gone into and determined by the Court as part of the proceedings preliminary to the interlocutory decree, which should, when entered, definitely order a partition or a sale, as the case may be. This is the course plainly contemplated by the Partition Ordinance itself. For section 4, which provides for the trial of a partition action, requires the Court to examine the title of all the parties and "to decree a partition or sale according to the application of the parties or as to the Court shall seem fit." That is to say, the nature of the relief which the Court means to grant should be determined once for all and embodied in the decree which is to be entered. This is also in accordance with what was said in *Weerasuriya v. Bastian* (D. C. Galle, No. 4,381, Supreme Court Minutes, February 24, 1899). In that case the decree of the District Court had ordered that if a partition was impracticable, the land should be sold and the proceeds distributed among the parties in proportion to their respective shares, and Bonser C.J., in delivering judgment in appeal, observed: "The question ought not to be left open in the decree whether there shall be a sale or a partition. The District Judge ought to determine whether the land ought to be sold or partitioned, and enter that determination in the decree." This necessity might be obviated if the Court had the power to amend the decree for partition into one for sale, when a partition is subsequently found to be impracticable. It was once thought that the Court had this power. See *Domingo v. Don Appu*.<sup>1</sup> But that decision and any others to the same effect are no longer of any authority in view of the more recent decisions, which have ruled otherwise. It is now well settled that the Court, in a partition action, even in circumstances of obvious necessity, cannot amend its own decree. It is, I think, therefore, necessary to lay down, as a general rule of practice, that the proceedings under section 4 of the Partition Ordinance should include an inquiry into the question of partition or sale, and that the decree should make such order as the circumstances require. I would allow the present application, and in revision order that the interlocutory decree in this case be amended by decreeing a sale of the land instead of a partition, and that the case be proceeded with accordingly.

BERTRAM C.J.—I agree.

*Allowed.*