

1922.

Present : De Sampayo and Schneider JJ.

DULLEWE *et al.* v. DULLEWE *et al.*

32—D. C. Kandy, 28,349.

Partition Ordinance, 1863, s. 9—Action for damages against parties to a partition action for depriving plaintiff of his share by not disclosing same to Court—Act of omission.

A purchaser from one of the heirs of X instituted a partition action on the footing that only the children of the brothers of X were the heirs of X, and that the sisters of X were not heirs. After preliminary decree the children of the brothers came to a settlement with the children of the sisters and gave them in the testamentary case a smaller portion than they would have been entitled to had the sisters been intestate heirs. On the report of the Commissioner in the partition case being received, the plaintiff issued notice to the defendants (children of the brothers) to show cause against the scheme of partition being confirmed, and as they did not appear to show cause, final decree was entered. The children of the sisters thereafter brought this action for damages against some of the children of the brothers under section 9 of the Partition Ordinance, 1863.

Held, that they were not entitled to damages.

The act of omission contemplated in section 9 implies some element of wilfulness and intention to produce a prejudicial result; the omission must be of an act which one is bound to do.

THE facts are set out in the judgment.

Hayley, for defendants, appellants.

M. W. H. de Silva (with him *H. V. Perera*), for plaintiffs, respondents.

July 6, 1922. DE SAMPAYO J.—

The plaintiffs brought this action for damages in pursuance of the provisions of section 9 of the Partition Ordinance on the ground that in D. C. Kandy, 21,664, which had been brought for the partition of two lands, the defendants caused the plaintiffs to be deprived of their share of the lands. The circumstances of the case are somewhat peculiar, and on one or two points require serious consideration. Abraham Dullewe Adigar died in 1904 issueless, and left him surviving two sisters, Tikirikumarihamy and Lokukumarihamy, and a brother Punchi Banda, and the children of a predeceased brother, Meedduma Banda. The plaintiffs are the children of the two sisters, Tikirikumarihamy and Lokukumarihamy, who are now

dead. The first, second, and third defendants are children of Medduma Banda, and the fourth defendant is a purchaser of a share from Medduma Banda, junior, who is another child of Medduma Banda, brother of the Adigar. At the trial the case against the fourth defendant was withdrawn, as it was bound to fail, because the fourth defendant purchased long after the conclusion of the partition action (D. C. Kandy, 21,664).

1922.
 DE SAMPAYO
 J.
 Dullewe v.
 Dullewe

The Adigar left a large estate, and among other lands he was the owner of two lands called Walawwawatta and Gorakgahawela. In the year 1910 in execution against the children of Punchi Banda, who had in the meantime died, half of half share, *i.e.*, one-fourth share, of the two lands, was sold, and purchased by one Don Manuel Appuhamy. The case No. 21,664 above referred to, which was an action for the partition of the said two lands, was brought on July 19, 1912, by Don Manuel Appuhamy, claiming for himself a one-fourth share, and assigning to the children of Medduma Banda, namely, the first, second, and third defendants to the present action, half share of the land, and to the children of Punchi Banda the remaining one-fourth share. The case took its usual course, and on June 24, 1913, a preliminary decree was entered by the Court declaring the parties entitled to the property in the above proportion, and ordering a partition. A commission was issued to effect the partition, and the Commissioner having submitted a scheme of partition, the Court on March 2, 1915, confirmed the same and entered final decree, allotting divided portions to the various parties.

The standpoint of the two brothers of the Adigar and of their children was that the two sisters were married out in diga, and were not, therefore, heirs of the Adigar, and that the two brothers became solely entitled to the two lands in question and other property of the Adigar in the proportion of half share to each of them. That question was fought out in two previous actions, Nos. 19,609 and 21,309, of the District Court of Kandy, in both which the claim of the sisters was rejected by decree both in the lower Court and in appeal, and it was held that the two brothers alone were entitled to the property as the sole heirs of the Adigar. The decree in the first case was given in the District Court in 1908 and in appeal in 1911, and the decree in the second case was given in the District Court in 1911 and in appeal in 1913. The subject of these two actions was some other property of the Adigar's estate, but the District Judge has rightly considered that the decisions in those cases show that the sisters of the Adigar were not his heirs, and that the plaintiffs had no title on that footing to any share in the lands Walawwawatta and Gorakgahawela, and were properly not made parties to the partition action No. 21,664. But an order made in the testamentary case 2,375, in which the estate of the Adigar was administered first by his brother Punchi Banda, and on his death in 1907 by Loku Banda, the first defendant in the present action, is said to have

1922.
 DE SAMPAYO
 J.
*Dullewe v.
 Dullewe*

given them a title to one-third share of the said two lands. Administration had been taken out and proceeded with on the footing that the only heirs of the Adigar were his brothers, and the sisters were not named as respondents at all. In February, 1913, however, Tikirikumarihamy, sister of the Adigar and mother of the fourth plaintiff in this action, and the first, second, and third plaintiffs, children of the other sister, who had died in 1905, applied to the Court by petition for a judicial settlement of the administrator's account, and prayed that the administrator "may be compelled to make a judicial settlement of the said estate, on the footing that the petitioners are entitled to a half share thereof." The parties, however, appear to have made an amicable arrangement among themselves, and in terms thereof an order was entered on March 19, 1914, declaring the petitioners "entitled to an undivided one-third share of the estate of the said deceased" in the proportion of one-sixth to the first petitioner (Tikirikumarihamy) and one-sixth to the other petitioners, and the defendants and their co-heirs to the remaining four-sixths of the estate in proportion to their respective interests. It will be noticed that this order was entered after the date of the preliminary decree in the partition action No. 21,664, but before the date of the final decree. The present action for damages is brought apparently because the defendants omitted to inform the Court of the settlement in the testamentary suit before final decree in the partition decree was entered. It is alleged that they "fraudulently made the Court to understand that they (the defendants) were the sole heirs of the late Dullewe Adigar," and had a partition decree entered in their favour.

In the partition action the defendants, in addition to the defendants in this action, were their brother Medduma Banda, junior, and the four children of Punchi Banda, deceased. The present defendants acted exactly in the same way as the other defendants in the partition action, and did nothing more or less. I cannot understand why they should be selected as the parties responsible to the plaintiffs in damages. As a matter of fact, it was Don Manuel Appuhamy as plaintiff, who, on the report of the Partition Commission being received, had notice issued to all the defendants to show cause why the scheme of partition should not be confirmed and final decree entered. It took a long time to serve this notice, and when it was finally served, and the matter came before the Court, none of the defendants appeared, and only the third and sixth defendants (not defendants in the present action) appeared by a proctor. In these circumstances, the question naturally arises whether the defendants in this action can be made liable under section 9 of the Partition Ordinance, which enacts that "nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued." There was certainly no

“act of commission” done by them. Was their failure to inform the Court of the settlement in the testamentary case, an “act of omission” such as the section contemplates? It seems to me that the expression “act of omission” implies some element of wilfulness and intention to produce a prejudicial result, and that the omission must be of an act which one is bound to do. Is their abstention from objecting to the steps taken by Don Manuel Appuhamy to carry out the preliminary decree for partition as ordered such an act of omission? I doubt it. The plaintiffs singularly failed to establish their allegation that the defendants “fraudulently made the Court to understand that they were the sole heirs of the Adigar.” As the District Judge rightly found, the preliminary decree was quite correct, and the plaintiffs had no cause to complain of it. As regards the final decree, even if the Court was informed of the settlement, there would have been a practical difficulty in introducing it into the partition case. Don Manuel Appuhamy was not a party to the settlement, and was not bound by it, nor were two out of the four children of Punchi Banda. They must get their full shares under any circumstances. Is the share, which the plaintiffs got under the settlement, to come out of the defendants’ shares alone? Or is the plaintiffs’ one-third share to be proportionately reduced? In either case the settlement by which the defendants and their co-heirs were to get four-sixths shares and the plaintiffs one-third share of the estate would itself be upset. These perplexities make it difficult to say that the defendants were guilty of a culpable act of omission.

There is another and more important aspect of the matter. The ground of the District Judge’s judgment is that the plaintiffs had no title to any interest in the two lands before the settlement, as they were not heirs of the Adigar, but that by the consent order in the testamentary case one-third share of the lands was “transferred” to them. The Court did not and could not make such a transfer. A proprietary decree is not a mode of transfer, it can only be, under certain circumstances, the basis of an estoppel. If there was a transfer, it could only have been by the defendants and their co-heirs, the respondents, to the application for judicial settlement, and in that case the transfer would be obnoxious to the provision of section 17 of the Partition Ordinance and invalid, and the plaintiffs should be in no better position than they were before. Again, what is the real meaning of the consent order? It does not declare the plaintiffs entitled to one-third share in the lands in question, or in any particular property. It declares them entitled to one-third share of the “estate.” I think it has not the effect of giving to the plaintiffs one-third share in every individual asset of the estate. It at best declares that in the ultimate distribution of the estate they shall get what may be equivalent to one-third share of the whole. Consequently I think the plaintiffs never had title to one-third share of

1922.

DE SAMPAYO
J.*Dullewe v.*
Dullewe

1922.
DE SAMPAYO
J.

the specific lands which were partitioned by the action No. 21,664, and were therefore not prejudiced by any act done or left undone by the defendants.

Dullone v.
Dullone

The above being my opinion on the main questions in the case, it is unnecessary for me to deal with the defendants' plea of prescription. I need only say as at present advised that if I had to decide that point I should have said the plea was good. For the reasons above stated, however, I think the judgment under appeal should be reversed and plaintiffs' action dismissed, with costs, in both Courts.

SCHNEIDER J.—I agree.

Dismissed.

