Present : Sir Charles Peter Layard, Chief Justice, Mr. Justice Wendt, and Mr. Justice Wood Renton.

1905
October 23.

FERNANDO *v.* FERNANDO *et al.*

D. C., Chilaw, 25,448.

Partition decree—Irregular proceedings—Setting aside decree—Final decree — Conclusiveness — Minors — Community of property — Share of children—Burden of proof—Ordinance No. 10 *of* 1863, *ss.* 6 *and* 9.

By virtue of section 9 of Ordinance No. 10 of 1863, a decree for partition is binding on all persons, including minors, whether parties or not, and the only remedy open to any one who is aggrieved by such a decree is the remedy indicated in the proviso to that section, viz., an action for damages.

Where the children of two spouses married in community of property seek to vindicate their shares in any property, belonging to the common estate, which has been alienated or encumbered by the survivor of the two spouses, the *onus* is on the children to show that without the subject-matter of the action they had not received their proper shares out of the common estate.

HEARING in review, preparatory to appeal to His Majesty in Council, of the judgment of the Full Court in Appeal in *Fernando v. Fernando* (1).

Walter Pereira, K.C. (with him *H. J. C. Pereira* and *E. W. Jayewardene*), for the appellants.

Dornhorst, K.C., for the mortgagee (C. A. Hutson).

Cur. adv. vult.

23rd October, 1905. WOOD RENTON J.—

This case comes before us in review under the following circumstances. The appellants Hugo Fernando, Mary Tisera, and Patrick Fernando are the children of one M. P. Manuel Fernando, who is now dead. Manuel Fernando, his wife Agida Fernando (the mother of the appellants), and certain other persons, whose names are immaterial, were the joint and common owners of an allotment of land called Maduwa. Agida Fernando died in 1881. In 1886 an action was brought for the partition of the land Maduwa. It is important, for the purposes of the present case, that the chronological order of events should be carefully stated. The plaint was dated 6th November, 1886. Manuel Fernando was made a

(1) (1903) 9 *N. L. R.* 237.

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defendant to the suit, but the appellants, who were then minors, were not represented. On 1st December, 1886, all parties appeared before the District Court of Chilaw and consented to the partition, and a decree was made accordingly, one-fifth share being allotted to Manuel Fernando. As the appellants' mother had been married in community, and as the land in question belonged to the community, they acquired a right on her death to their mother's share. The result of the partition action being to allot one-fifth to Manuel Fernando, it follows that the appellants became thereby entitled to one-tenth share of the land in question, and that their father was only owner of one-tenth. After the decree for a partition had been made, the steps prescribed by "The Partition Ordinance, 1863" (No. 10 of 1863) for applying the decree to the land were next taken. On 31st January, 1887, a Commissioner was appointed to survey and partition the land. After some delay, owing to the necessity of substituting new Commissioners, the survey and partition were filed on 25th November, 1887. On 30th May, 1888, the final decree for partition was made, all parties consenting. Manuel Fernando had not taken out administration to his wife's estate. But in 1895 he moved for and obtained a certificate of title for the partition of the land, and in 1901, by bond dated 9th February in that year, he mortgaged the entire one-fifth share allotted to him in the partition suit to Mr. Charles Alfred Hutson, the present respondent, for the sum of Rs. 40,000. Manuel Fernando died intestate on the 22nd of March, 1901, leaving the mortgage debt with interest thereon due and undischarged. The appellants resided with him (under his care and guardianship so long as they were minors) on the land in question during the whole period from the decree in the partition suit until his death, and they have been in possession of the property ever since. They attained majority respectively in 1895, 1897, and 1901. There is no suggestion that in mortgaging the land Manuel Fernando was actuated by fraud; but there is nothing on either side to show for what purpose the land was mortgaged or what was done with the money. Administration was taken out to Manuel Fernando's estate by one Alensu Peter Fernando on 27th August, 1901. Mr. Hutson obtained judgment on his bond on 10th February, 1902, and the mortgaged land, including the one-tenth share claimed by the appellants, was seized in execution. Thereafter, on 24th May, 1902, the appellant Hugo Fernando obtained letters of administration to his mother's estate; and on 2nd July, 1902, the appellants applied to the District Court of Chilaw that the decree in the partition suit, of which they alleged that they were unaware till the land was seized in execution by the

respondent, should be set aside on the ground of various irregularities in the proceedings; that they should be added as parties; and that the whole case should be gone through again. Mr. Hutson opposed this application. It was dismissed by the District Judge The Full Court affirmed his decision. We have now to deal with those judgments in review.

The appellants' claim is resisted by the respondents on two main grounds—(1) that a decree for partition is, by virtue of section 9 of the Partition Ordinance, binding on all persons, whether parties or not, and that the only remedy open to any one who is aggrieved by such a decree is the remedy indicated by the proviso to that section, viz., and action for damages; (2) that, in any event, the appellants could not succeed in their present application without showing (which they had significantly abstained from doing) in their petition that they had, in fact, suffered some damage from the proceedings complained of.

(1) Although both the District Judge and the Full Court on appeal have dismissed the appellants' application on the second of the grounds, above stated, and although it is, in our opinion, fatal to their case, we may say something as to the first ground which was fully argued before us. The material provisions of section 9 of the Partition Ordinance are these:—

"The decree for partition . . . . . given as hereinbefore provided, shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in the said proceedings nor the title of the owners nor of any of them truly set forth . . . . . provided that nothing herein contained shall affect the right of any party preffiudiced by such partition . . . . . to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued."

In the construction of this section by the Courts two points have given rise to controversy. In the first place, are minors "persons" within the meaning of the section? [See *Carolis v. Wattu Baba* (1) and *Randeni v. Allis Appu* (2)]. In the second place, what is the "decree for partition" which section 9 makes "good and conclusive against all persons whomsoever"? Is it the decree prior to the issue of the commission of survey? Or is it the "final judgment" referred to in section 6 of the Ordinance, and pronounced by the Court on the receipt of the Commissioner's return? The preponderance of judicial authority [*Peris v. Perera* (3), and *cf.*

(1) (1885) 7 *S. C. C.* 125.
(2) (1900) 1 *Browne*, 284.
(3) (1896) 1 *N. L. R.* 362 at p. 366.

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Perera v. Fernando (1)] accepts the former decree [*Assena Marikar v. Usubu Lebbe, ubi sup.; Edo v. Markar Uduma Lebbe Markar* (2)]. There is one decision in favour of the latter. Neither of these controversies, however, can help the appellants in the present case, in which not only a decree for partition under section 4, but also a final judgment under section 6, have been given. Section 9, therefore applies, whichever may be the decree that it speaks of. If minors are not bound by the section, it may be argued that the appellants have suffered no damage by the decree. If minors are bound by the section, then the appellants have to face a further difficulty. Here is an enactment which, in creating new machinery for partition, bars all remedies—after a certain stage in the proceedings but one, which it indicates—an action for damages. No other remedy is open to the appellants. Their present application is therefore misconceived and fails.

(2) The application fails also in our opinion on the second ground above-mentioned. From the date of the final decree in the partition suit a period of fourteen years elapsed before the present proceedings were instituted. During the whole of that period the appellants have been in possession of the land in dispute: they lived with their father till his death. One attains majority in 1895; a second in 1897; the 3rd in 1901; and yet they never discover what has taken place since their mother's death in regard to the land which they occupy. Even now, not only do they not raise any suggestion that their father acted fraudulently in encumbering the property, but they pointedly abstain from alleging that they have not in fact received any benefit from that transaction. Mr. Walter Pereira, their counsel, frankly admitted in argument that, but for Mr. Hutson's mortgage, we should have heard nothing of the irregularities in the partition proceedings. Under such circumstances it would be highly inequitable to permit the appellants to rip open a matter of such long standing, and there is, in our opinion, nothing in the state of the law that compels us to do so. It has no doubt been decided in Ceylon [*Ederemanesingham's case* (3)] that where a widower encumbers the joint estate without administration the mortgagee takes an imperfect title, subject for its validity to proof on his part of the necessity for the incumbrance. But it has been held also [No 23,338, D. C., Matara (4); *Wijeratna v. Abeyweera* (5)] that in an action by heirs to recover land, as against a stranger claiming under a mortgage created by a widower, they

(1) (1902) 3 *Browne* 5.
(2) (1879) 2 *S. C. C.* 114.
(3) (1871) *Vanderstraaten* 264.
(4) *S. C., Min. November* 3, 1871.
(5) (1882) 5 *S. C. C.* 70.

must first show that without the subject-matter of the action they had not got their " proper shares. " In the later case of *Ferdinandis v. Fernando* (1) Sir Bruce Burnside C.J. took exception to these authorities, and held that in the circumstances the heir need only aver in the first instance that the mortgage had deprived him of some part of his property which had legally descended to him; and Mr. Justice Dias explained the decision in *Wijeratna v. Abeyweera*, to which he had been a party, on the ground that the plaintiffs had made admissions indicating that there had been some division of the land from which they had derived benefit, but without disclosing to what extent. It would appear, however, that Sir Bruce Burnside's view was influenced by the fact that the Courts seemed to throw on the heirs the duty of showing that they had not got their proper shares—the effect of which would be to relieve the mortgagee of the entire burden of proof cast upon him by the law. Moreover, in the Matara case, the heirs were in possession of only part of the land claimed, and Sir Bruce Burnside was careful to point out (5 *S. C. C.* 164) that a presumption of acquiescence might well have arisen if they had been in possession of the whole. In the present case the heirs have with their father, and since his death by themselves, been in possession of the whole land comprised in the mortgage for fourteen years. They cannot be allowed to reopen proceedings which were completed at least in 1888 for the sole and avowed purpose of getting rid of an inconvenient incumbrance without saying whether or not they were benefited by it at the time.

The judgment of the Full Court, upholding that of the District Court, must be affirmed with costs.

LAYARD, C.J.—I agree.

WENDT, J.—I agree.

(1) (1883) 5 *S. C. C.* 162.