

1900.  
November 15  
and 21.

WIJEWARDENE *v.* SEETALAHAMY *et al.*

*D. C. Ratnapura, 910.*

*Partition Ordinance, No. 10 of 1863, s. 17—Meaning of "owner".*

The word "owner" in section 17 of Ordinance No. 10 of 1863 means an owner who is a party to the legal proceedings instituted under the Ordinance.

*De Silva v. Carlina, 9 S. C. C. 141, questioned.*

ON the 29th June, 1899, the plaintiff instituted this action against three defendants for partition, and in his plaint he allotted to himself thirteen-sixteenths of the land, to the first defendant one thirty-second share, to the second defendant one thirty-second share, and to the third defendant the remaining two-sixteenth shares. Some time after the filing of the action, *i.e.*, on the 12th September, 1899, one O. M. Obeyesekere purchased one-eighth share of the land from certain persons whom the libel of

1900,  
November 16  
and 21.

partition had not named as entitled to any share, and on the 6th November, 1899, petitioned for declaration of his right and for partition to him of his share. He was made the fifth added defendant in the case.

At the trial the District Judge disallowed the claim of the fifth added defendant, on the ground that the transfer in his favour was dated later than the institution of the action.

He appealed.

*Wendt*, appeared for appellant.

*Van Langenberg* and *Schneider*, for plaintiff, respondent.

*Walter Pereira*, for first added defendant, respondent.

*Cur. adv. vult.*

21st November, 1900. BROWNE, A.J.—

The District Judge has quoted no precedent for his decision. The current of reported authority then was against his ruling, the decisions of this Court in 1 S. C. C. 24 and 4 *ibid.* 52 having been, on 9 *ibid.*, p. 141, held to define the operation of section 17 of the Partition Ordinance to be limited to the prevention of partition proceedings from being defeated or embarrassed by alienations or encumbrances made *pendente lite*; and in that decision itself it was held, "though not without doubt," that the prohibition of the section was against alienation by "owners" who are parties to the proceedings. I do not know whether these authorities were reconsidered in 7,717, D. C., Colombo, "*Lux*" *Rep.* 10, when a question was raised whether the prohibition could be given only a limited operation, when the Legislature had declared that the act prohibited should not be lawful; and perhaps I may be permitted to ask whether the act prohibited, if done after or pending a certain event, could be one whit less unlawful, because parties had previously agreed to do what they did then.

The result of such a ruling as has here been made could be only that the appellant's vendor himself (or the appellant constituted his attorney for that purpose) should come forward in this partition action to prefer his claim. This would entail delay and further cost, and so the enforcement of the section, to a degree stricter than 9 S. C. C. 14 construed it necessary, would work that which the section was intended to obviate. I am not disposed therefore to change the interpretation then given to the section, but I would follow it, and set aside the order and remit the proceedings for fifth added defendant's claim to be investigated. The objection was apparently taken by the Court, and I would not give costs.

1900.  
November 15  
and 21.

LAWRIE, J.—

The decision of this Court in the case of *De Silva v. Carlina*, decided on 13th March, 1891, reported in 9 *S. C. C.* 141, seems to me to be on all fours and to govern the present case.

I am bound to follow that decision until it be overruled by the Full Court, or until the Legislature re-considers the law as to partitioning land in Ceylon. If my brother Browne and I had been agreed that the decision in *De Silva v. Carlina* was wrong, we would have ordered this appeal to be listed for argument before the Full Court, but as my brother is satisfied with that decision, I acquiesce, not because I think it a good decision, but it is binding on me and it must be followed.

I am unable to approve of it, the words of the 17th section of the Ordinance seem to be very clear. These words were given effect to in *Perera v. Perera*, 9 *S. C. C.*, p. 105. That case was originally argued before Burnside, C.J., and myself; it is reported that we did not agree. The ground of my disagreement was not as to the meaning of the 17th section, but as to whether the deed in that case was an alienation. If I remember right, that partition suit was instituted when one of the co-owners was on her death-bed. It was held to be immaterial whether summons had been served or not, because the action had been instituted upon her death, and the judge who decided the case did not share my doubt or opinion as to the notice of the death. The judges were unanimous in holding it was an alienation, and if an alienation that it was void because executed after the institution of legal proceedings. I thought it was a *mortis causa* deed to distribute an estate after the grantor's death. It seemed to me essentially a testament, though it took the form of a deed of gift with reservation of a life rent, and as I thought there was no alienation which the 17th section declared unlawful. After a co-owner's death pending a partition suit, new parties must be added. I do not see that those who appear as the devisees under a will can be objected to as falling under the 17th section. but that does not touch the question whether in the 17th section "owners" are limited to plaintiffs or defendants in the partition action. I cannot understand how such a limited meaning can be given to owners, but I am bound by the decision in question, and I on that ground only yield to the judgment proposed by my brother.