

PERIS v. PERIS.

1903.

D. C., Colombo, 14,181.

January 27.

Partition—Ordinance No. 10 of 1863—Inherited lands and shares of lands—action for partition or sale of such lands—Parties necessary to the suit.

Where the plaintiffs and defendants had inherited numerous lands and shares of lands, and the plaintiffs prayed for a partition or sale of such lands, without making the co-owners of the deceased ancestor parties to the suit,—

Held, that the Ordinance No. 10 of 1863 permits an action to be raised for the partition or sale of several lands held in common.

An undivided portion of a larger extent of land cannot be the subject of a partition suit unless the co-owners of the whole *corpus* be made parties to it.

If many entire lands are sought to be partitioned together with a land not held in common by all the plaintiffs and defendants, the proper course is to leave it to be dealt with in a separate suit.

THE plaintiffs prayed for a partition or sale of numerous lands and shares of lands which belonged to one Peris and his wife, and which after their death devolved on the plaintiffs and defendants as their offspring. The first defendant filed answer objecting *inter alia* that the twenty-six allotments of land described in the plaint being separate and distinct from one another, the plaintiffs could not claim in one and the same action decrees in respect of them all; that some of these allotments appeared to be not whole lands, but only undivided fractional parts owned by the deceased Peris and his wife; and that the partition or sale of such undivided shares, without the co-owners of Peris and his wife being made parties to the case, was impossible.

The District Judge over-ruled these objections and directed the case to be set down for hearing.

The first defendant appealed. The case was argued on 27th January, 1903.

Walter Pereira, for appellant.—In D. C., Colombo, 9,212, decided on 23rd January, 1901, Bonser, C. J., held that two entirely distinct pieces of land could not be sought to be partitioned in one action, although the parties concerned in respect of those lands were the same, and their interests identical. The Ordinance No. 10 of 1863, section 2, shows that only one property may be the subject of one partition suit. In the present case what is prayed for is not a partition of one or two lands, but of an entire inheritance among those who are alleged to be co-heirs. The Partition Ordinance cannot be utilized for such a purpose, even if all the co-owners

1903. of the undivided shares are made parties to the suit. *Sado v. Mendis* (2 S. C. C. 127). [LAYARD, C.J.—What is the practice of our Courts? Does it not allow several lands held in common among the same co-owners to be joined in one partition suit?] Yes. But that practice has been virtually condemned by Bonser, C.J., in the case cited.

H. J. C. Pereira, for respondent.—Chief Justice Bonser only held in that case that the leave of the Court was necessary to join in one suit the two lands. There is no such provision in the Ordinance, nor any such practice. To simplify the case, the plaintiff will withdraw the action in regard to all those lands in which the deceased Peris and his wife had only fractional interests, but the action is maintainable in regard to all the rest of the lands. Such actions are common in England. *Agar v. Fairfax* (17 Vesey, 533). Walker on *The Partition Acts* (1882) gives many such cases. The Civil Procedure Code, section 36, permits union of several causes of action, and section 6 covers a partition action, which is an application for relief.

January 27, 1903. LAYARD, C.J.—

The only difficulty that presented itself to me has been got over by the respondent's counsel agreeing to withdraw the action in respect of all the portions of land which are undivided.

It is obvious that an undivided portion of land cannot be the subject of partition under the Partition Ordinance. An undivided portion of land is only a portion of a larger extent of land, and all the co-owners of the whole *corpus* must be parties to the partition suit. The Ordinance No. 10 of 1863 appears to provide for the sale or partition of lands held in common, and I can find nothing in the Ordinance which restricts its provision to one single land held in common.

It is admitted that ever since the Ordinance No. 10 of 1863 the practice of the Courts has been to allow several lands which are held in common among the same co-owners to be joined in one partition suit.

I would affirm the order of the District Judge.

Should it appear, in the course of the investigation of the titles of the plaintiffs and defendants, that any particular land included in this action was not held in common by all the plaintiffs and defendants, I think the Judge should not order a partition of that particular land, but leave it to be dealt with in a separate suit.

MONCREIFF, J., agreed.