

Present: Pereira J. and Ennis J.

1913.

KELAART *v.* MORTIER *et al.*

51—D. C. Colombo 32,412

Partition action—Questions as to title—Parties should not be referred to a separate suit.

When questions as to title arise in a partition suit, whether it be between the original parties to it or an intervenient who seeks to come in after the interlocutory decree and another party, the Court should not refer the parties concerned to a separate action to have such questions in the first instance decided, but the same should be adjudicated upon in the partition suit itself.

THE facts appear from the judgment.

V. Grenier, for seventh defendant, appellant.

E. W. Jayawardene (with him B. Koch), for added defendant, respondent.

May 17, 1913. PEREIRA J.—

This is a suit under the Partition Ordinance (Ordinance No. 10 of 1863), and the present contest is between the seventh defendant and the added defendant. The seventh defendant was allotted an eighth share of the property sought to be partitioned, and a decree was entered that the property be sold and the proceeds distributed among the co-owners. Pending the sale the added defendant filed a petition of intervention and claimed the share of the property sought to be partitioned that had been allotted to the seventh defendant. He did so on the strength of a conveyance executed in his favour by the seventh defendant dated July 6, 1894. The seventh defendant raised certain objections to the added defendant's claim, and no less than five issues were framed by the District Judge to be decided on evidence. Evidence was duly called by both the parties, and the District Judge reserved his judgment. On the supposed authority of a case, however, cited to the District Judge thereafter, he has stayed his hand, and held that certain questions raised by the seventh defendant cannot be tried in this case, but must be tried upon proper pleadings and in a separate suit, and has referred the seventh defendant to a separate action. Now, it is clear that under the Partition Ordinance it is the duty of the Court to decide all questions relating to the title to the property sought to be partitioned. In the case of disputes as to title, section 4 of

1918.
 PEREIRA J.
 Kelcart v.
 Mortier

the Ordinance enacts that the Court shall in the partition suit itself "proceed to examine the titles of the parties interested, and the extent of their several shares or interests, and to try and determine any other matter in dispute between the parties," and although it was at one time thought that when questions as to title were raised, the proper course was to refer the parties in the first instance to a separate suit for the determination of those questions, the Collective Court in the case of *Sinchi Appu v. Wijeygoonesekere*¹ restored to the words of the Ordinance cited above their full effect by holding that all questions as to title and possession should be gone into in the partition suit itself. I can see neither principle nor policy to support a contrary opinion. Questions may, of course, be conveniently decided on "proper pleadings," but there is no magic in pleadings, and the same questions may as conveniently be tried by embodying them in issues to be framed after examination of the parties or on statements made by them in their petitions and affidavits; and unless there is the strongest authority for departing from the rulings of the Collective Court in the case referred to above, I would rather adhere to them. I do not forget the fact that in the present case the contest arose after the interlocutory decree had been entered. That fact, however, made no difference, because this Court had held more than once that a party might come into a partition suit after the interlocutory decree as well as he might before. The case from the Matara reports relied on by the District Judge could not be given greater effect than the decision of the Collective Court cited above. Anyway, what Wendt J., who wrote the judgment in that case, said was, that it was irregular to try an issue such as that raised in it incidentally in an application to distribute the proceeds of sale. The issues in the present case were not raised in any proceeding incidental to an application to distribute the proceeds of sale. They were framed on a petition of intervention duly filed after the interlocutory decree, but before the sale of the property dealt with in the case. Moreover, what Wendt J. says in the Matara case is that he is disposed to think that the issue should be tried in a separate action. This is mere *obiter*. What he holds is that such an issue as that raised in the case should be tried on proper pleadings. That is quite a different matter from instituting a separate action. There is no objection to statements analogous to pleadings being filed even in a partition suit to elucidate the matters in issue. I can, however, see no necessity for such a proceeding in the present case.

I would set aside the order appealed from, and remit the case to the Court below for proceedings in due course. I think that the appellant should have his costs of appeal.

ENNIS J.—I agree.

Appeal dismissed.