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Present: Schneider, Garvin, and Lyall Grant JJ.

FERNANDO *et al v.* CADIRAVELU.

143—D. C. (Inty.) Colombo, 786.

Partition—Sale of property—Order for delivery of possession—Right of purchaser—Power of Court—Civil Procedure Code, ss. 287, 839.

Per SCHNEIDER and GARVIN JJ. (LYALL GRANT J. dissentiente).—

A court has no power to make an order for delivery of possession in favour of a person to whom property has been sold in pursuance of a decree for sale, entered under the Partition Ordinance.

CASE referred to a Bench of three Judges on the point whether a purchaser of property sold in pursuance of a decree for its sale entered under section 4 of the Partition Ordinance is entitled to an order for the delivery of the possession of the property from the Court.

H. V. Perera, for 2nd and 3rd defendants, appellants.

Hayley (with *Ameresekere*), for purchaser, respondent.

June 8, 1927. SCHNEIDER J.—

The only question for decision in this appeal is whether the purchaser of property sold in execution of a decree for its sale entered under section 4 of the Ordinance No. 10 of 1863 for the partition or sale of lands held in common is entitled to an order for the delivery of its possession from the Court which make the decree. In this action the District Judge issued such an order on the Fiscal upon the *ex parte* application of the purchaser, the respondent to this

appeal, to whom a certificate of title had been issued under section 8 of the Ordinance. In execution of the order, the appellants who were the second and third defendants in the action and were in possession were ejected. Thereupon they moved the Court to be restored to possession on the ground that the order for the delivery of possession was *ultra vires*, and also on one other ground which is not material to this appeal. The District Judge held that the order was not *ultra vires* and disallowed the application. The appellants appealed. The two Judges before whom the appeal came on for hearing referred it to a bench of three Judges. Accordingly the appeal has come before us.

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The learned District Judge gives three reasons in his judgment in justification of his holding. He says first that it has been the invariable practice in the District Court of Colombo, and in many other Courts, to issue such orders, and that a *cursus curiae* should be regarded as having been established. He next says that as this Court held in *Hadjar v. Mohamadu*¹ that a Court after entering a final decree allotting to a particular party a particular portion of the land, has jurisdiction to issue an order for the delivery of the possession of that particular portion to the particular party although the decree itself contains no express order to that effect, it follows that a purchaser of property under a decree for the sale of the property is likewise entitled to such an order. Lastly, he says that section 839 of the Civil Procedure Code "invests" him "with power" to make such orders as are "necessary for the ends of justice," and that the present was an appropriate case for the Court to "grant relief" under that section.

No other reasons than those given by the learned Judge were adduced before us. Nor can I for myself think of any other reason. The learned Judge has discussed the question very well, if I may presume to say so, but I find myself unable to agree with him. I differ from the view taken by him with reluctance, because in most cases the procedure he has chosen to adopt will be found to be very convenient, but on the other hand, I can conceive cases where that procedure might result in injustice. For that reason I would not uphold an argument based solely on the ground of convenience as justification for the procedure he had adopted. The whole object of the Ordinance is to put an end to ownership in common. That object is accomplished when the Court has entered up its final decree allotting shares in severalty or directing the sale of the land. The obtaining of possession is a step subsequent to such a decree, and therefore, strictly speaking, outside the object of the Ordinance. If it had been intended that the Ordinance should be concerned with such a step it is not easy to conceive why no provision has in fact been made in the Ordinance itself for that purpose, especially as we

¹ (1917) 4 C. W. R. 371.

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find that the Ordinance does provide express or special procedure for every material step in an action instituted under its provisions. There are to be found in the Ordinance provisions as to the manner of the institution of the action, its constitution, the issue and service of the summons, the evidence which should be adduced, the several forms of the decrees and their effect, and the procedure in detail for their execution. It provides for the summary recovery of costs. It confers a right of appeal, and as regard that matter alone enacts that regulations to be found elsewhere are to govern the appeal. Accordingly, it would appear that the fact is not without significance that the Ordinance is silent about the obtaining of possession in consequence of a decree. But on the other hand that silence cannot be regarded as concluding the matter. It must be conceded that where necessary, we should resort to the Civil Procedure Code which enacts the general procedure to be followed in all actions in Courts. It is only the existence of any special procedure which will render any provision in the Civil Procedure Code inapplicable. It becomes necessary, therefore, to inquire whether there is any provision in the Civil Procedure Code for the order for the delivery of possession issued, in this action by the District Judge. That order clearly cannot be brought under the provision in section 287, which is intended only for those cases where property has been seized and sold in execution of a "decree to pay money." What this Court held in *Hadjar v. Mohamadu (supra)* was that a final decree in a partition action awarding shares in severalty to the parties should be construed as a decree coming under head C of section 217, that is, as commanding all persons whomsoever against whom it operates "to yield up possession" of the particular portion of land to the particular person to whom it is allotted by the decree. The District Judge seeks to extend this construction to a decree for the sale of the entire land, arguing that before the Court can rightly enter up such a decree it must be satisfied that the parties are entitled to the land. He also argues that such a decree should be construed as containing by implication a declaration that the parties are entitled to the possession of the land and to be restored to that possession. He has to argue that, or *Hadjar v. Mohamadu (supra)* would not help him. If he stopped there his argument would still fail, so he is obliged to go further. He has to argue that the purchaser of the land steps into the place of the parties to the decree. Several reasons suggest themselves against this argument. It is not correct to regard a decree for sale as being identical with a decree allotting shares in severalty. The two decrees differ widely regarding essential particulars, although there may be some elements common to both. In the final decree partitioning the land the parties are, in effect, declared entitled to the particular portions allotted to them in severalty in lieu of their undivided shares in the whole land to

which they were entitled previously. Such a decree permits the construction given to it in *Hadjar v. Mohamadu (supra)* that the decree by implication declares the several parties to be entitled to be placed in possession of the several divided portions. In the final decree for sale of the land the parties are declared entitled to undivided shares in the whole land which is a declaration to be found in the preliminary decree for partition, and it orders that the land be sold. There is no room for such a decree to be construed as containing by implication a declaration that the parties should be placed in possession. On the contrary, the declaration that it should be sold negatives such a construction. Clearly one of the parties to the decree, on the strength of it, cannot seek the assistance of the Court to be restored to possession or to be given possession, nor can he ask for ejection of any person from the land. It seems to me, therefore, clear that the case of *Hadjar v. Mohamadu (supra)* cannot be invoked to support the order for the delivery of possession issued by the Judge. I am unable to see how the purchaser can be regarded as stepping into the place of the parties to the decree. Those parties are the decree holders. A decree holder's right to the decree can be transferred to a third party only by an assignment of the decree and that assignment can only be effected either by operation of law or by contract between the parties. By purchasing the land the purchaser acquires no more than those rights to the property which the decree confers upon the purchaser. Section 9 of the Ordinance for partition of lands declares what that right is. It is clearly not an assignment of the decree, and in no sense can the purchaser be said to become a party to the decree by the purchase of the land. Even if he be regarded as having obtained in some unaccountable way an assignment of the decree, his rights would be confined to claiming that the land be sold, for that is what the decree directs, and that he be paid the entire proceeds of the sale.

Before proceeding to discuss the effect of section 839 of the Civil Procedure Code and of the argument based upon the existence of a *cursus curiae* or long-standing practice, I think it necessary to consider what is involved in the issuing of an order for the delivery of possession of land. Clearly something more than mere procedure is involved. Before an order for the delivery of possession can be issued, the Court must be in possession of proof of the existence of a substantive right in the person claiming to have delivery of possession, that he is entitled to be placed in possession of the land. A substantive right is by its very nature something very different to procedure. To use the language of jurisprudence—one belongs to the domain of substantive law and the other to that of adjective law.

The Civil Procedure Code first provides the procedure by which a person is to obtain a declaration of a right to possession (section 217 (c)) and then proceeds to provide for the obtaining of

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the delivery of that possession. The order for a delivery of possession must have for its foundation a substantive right. From what I have already said, a purchaser cannot be regarded as having obtained a declaration of such a right. Practice is procedure. It cannot, however long its duration be, create or confer substantive rights.

I am accordingly unable to uphold the argument based upon the existence of a *cursus curiae*. I am unable also to take the same view of the effect of section 839 of the Procedure Code as the learned District Judge. He is wrong in regarding it as investing him with any right. Its language is clear that it does no more than conserve such "inherent power" as a Court has, in order to enable the Court "to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the Code." I do not consider it necessary to discuss the decisions of the Indian Courts on the section corresponding to section 839, for the District Judge has omitted to indicate, nor can I for myself see, that a Court has any inherent power to confer a substantive right of the nature I am considering. The express provision of the Civil Procedure Code negatives the assumption that a Court has such power. The right can come into existence only after due adjudication in an action. I would therefore hold that a Court has no jurisdiction to issue an order or writ for the delivery of possession to a purchaser of land sold in pursuance of a decree for its sale entered in proceedings under the Ordinance for the partition of lands.

In regard to the only other ground upon which the appellants sought to be restored to possession, the Court has held against them so far as that matter could be inquired into summarily, and I think no useful purpose will be served by disturbing the purchaser's possession at the present time. The appellants have succeeded on their main contention on appeal. They will therefore have their costs of the appeal from the respondent. The District Judge's order refusing to restore them to possession is affirmed.

GARVIN J.—

The short point raised by this appeal is whether the District Court has the power to make an order for delivery of possession of premises sold in pursuance of a decree for sale entered under the provisions of the Partition Ordinance, in favour of the purchaser to whom a certificate of sale, in terms of section 8 of the Ordinance, had been issued.

The appellants who were party defendants to a proceeding under the Partition Ordinance were dispossessed in pursuance of such an order. Ten days later they petitioned the Court to vacate the order for delivery of possession which was made *ex parte*, and

without notice to them. The District Judge refused to vacate the order which he thought he had a right to make. From this order the petitioners appeal.

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It is conceded that there is no provision of law which expressly confers upon District Judges power to make such an order. The Partition Ordinance is silent on the point while the Civil Procedure Code only contemplates the making of such an order in the case of purchasers at sales in execution held by a Fiscal (*vide* section 287). The provision of section 839 of the Civil Procedure Code were referred to in the course of the argument, but I am unable to see that that section confers or was ever intended to confer on Courts powers which they did not possess at the time of that enactment. Its true intent and purpose is to declare that the provisions of the Civil Procedure Code are not to be deemed to be exhaustive of or to set a limit to the powers of the Court. Nor do I think the case of *Hadjar v. Momamadu* (*supra*) cited by Counsel for the appellants is of any assistance in the determination of the question before us. The decision in that case was that a final decree for partition must be treated as a decree in favour of each of the persons to whom a share in severalty had been allotted declaring him entitled to that allotment and also to the possession thereof. If such a decree may properly be regarded as a decree for possession under section 217 (c) of the Code it becomes enforceable as such. All the powers and the whole machinery created by the Code then becomes available to meet and deal with any situation which may arise in the enforcement of that decree. But it is unnecessary to consider whether *Hadjar v. Mohamadu* (*supra*) was rightly decided since we are not concerned with a final decree for partition, nor is it possible to regard the purchaser of property sold in pursuance of a decree for sale made under the Partition Ordinance as the holder of a decree for possession of that property within the meaning of section 217 (c) of the Civil Procedure Code. Section 287 of the Code empowers a Court to make an order for delivery of possession in favour of a purchaser in the case of a sale in execution held by the Fiscal and expressly declares that such an order may be enforced as an order for possession under section 217 (c). The Legislature has not thought fit to extend the provisions of section 287 to every case in which property is sold under order of Court. The main grounds upon which it was sought to support the order under appeal are these. First that the power to make such an order is impliedly conferred upon the Court by the terms of the Partition Ordinance, and secondly that a Court has inherent power to render sales held under its orders effective by placing the purchaser in possession. The foundation of the first of these lines of argument is that all powers, though not expressed but which are necessary to give effect to the purposes of the Ordinance, must be presumed to be inherent in the Court. When common

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ownership becomes burdensome the Partition Ordinance enables it to be determined at the instance of a co-owner by the conversion of undivided shares into shares in severalty by partition, or when that is not possible by the sale of the land. Upon the issue of a certificate of sale to the purchaser under decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser, and the lands cease to be held in common by the original owners. The purpose of the Ordinance is expressed in the preamble to be "the partition or sale of lands held in common." When the land held in common is sold and a certificate of sale issued, the purpose of the Ordinance has been fully effected. However desirable and convenient it may be that the purchaser should be placed in possession of the land bought by him, I am unable to agree that the purposes of the Ordinance are not fully carried out until that is done, nor can I assent to the contention that those purposes are not fulfilled till such sale is made effectual in the manner suggested.

If this order under appeal is to be sustained it must be upon the broad ground that a Court has inherent powers to render sales held under its orders effective by placing the purchaser in possession. It is a proposition which, if sound, applies to all sales held under the orders of a Court and not merely to sales under the Partition Ordinance, and it implies that there has always been inherent in the Court all those powers to make orders and hold inquiries which are contained in section 287 and in the provisions of the Civil Procedure Code relating to the enforcement of decree for possession.

It is difficult to believe that section 287 which specially empowers the making of an order for delivery in the single case of a Fiscal's sale and in terms give to that order the effect of decree for possession would have been enacted if all powers necessary to place purchasers at sales held under orders of Court were inherent in our Courts.

The only citation made in the course of argument as authority for the proposition is a passage in the judgment of Wood Renton J. in the case of *Abeyratna v. Perera*.¹ It is by no means clear that the learned Judge intended to say that Courts of law had an inherent power in all cases of sales held under its orders to order that the purchaser be placed in possession. He was considering the case of opposition to the purchaser by the defendant in a hypothecary action. What Wood Renton J. said was this:—

"The sale has taken place in conformity with the directions contained in a decree which is certainly binding on him, and the Court must have inherent power to render that section effectual."

His view would seem to be that inasmuch as the decree for sale was binding on the defendants the Court could render the sale effectual against them by an order for delivery.

¹ (1912) 15 N. L. R. 347.

This is a much narrower proposition, but with all respect I question the soundness of the proposition even as so limited. Apart entirely from special legislation all powers necessary to execute its lawful orders and decrees may be presumed to be inherent in a Court. In appropriate cases persons bound by such orders and decrees who refuse to conform to or comply therewith may be dealt with as for a contempt. But where the decree or order is fully executed in accordance with its tenor there is no need to presume the existence of any further powers merely on grounds of convenience. A decree authorizing the sale of property is fully executed when the property is sold and the necessary document of title is granted to the purchaser. The mere fact that the original decree for sale is binding on the defendants to the action does not and cannot authorize the purchaser to demand, or the Court to order that possession of the premises which formed the subject of the sale should be delivered to him. It is not an order which it is necessary to make to procure execution of the original decree which has been fully executed nor is it an order which in my judgment a Court has an inherent power to make.

A purchaser at a sale held under orders of Court is in no worse position in this respect than a purchaser at any other sale. The right and title of those against whom the property is sold is conveyed to him and he must like any other purchaser rely on this title and obtain possession by regular action unless and until the Legislature thinks fit to place all purchasers at sales held under orders of Court in the same position as purchasers at Fiscal's sales. The appellants are only two of several persons who were in this action declared to be jointly entitled to the premises. To reverse the order and direct that the purchasers be dispossessed will be to place them in a better position than they occupied at the time the order for delivery of possession was made effective. The most they can ask for is to be restored to the possession of those shares of which they were dispossessed.

But I am not satisfied that under all the circumstances the possession of the purchaser should now be disturbed. The titles is in him. The appellants' contention that the purchase was in trust from them and their co-owners failed both in the summary inquiry held by the District Judge and in the regular action brought to enforce the alleged trust. That judgment is under appeal and the decision in appeal will settle the respective rights of the parties.

The appellants having succeeded in their main contention are entitled to the costs of this appeal.

LYALL GRANT J.—

I agree with the judgment proposed that the possession of the respondent should not be disturbed, but I respectfully dissent from that part of the judgment which relates to costs.

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The appeal was taken from an order of the District Court dismissing an application to be restored to possession and that order has not been disturbed. The appeal has, in effect, failed, and I am unable to see any grounds upon which the respondent can not only be deprived of his order for costs but also have costs awarded against him. It is true that my brother Judges are of opinion that the grounds upon which the learned District Judge refused the application are incorrect in law, but with great respect I cannot see that this is a reason for departing from the usual rule as to costs.

On the question of the correctness of the District Judge's finding in law, I must, though with great diffidence, differ from the conclusions arrived at by the other members of the Court.

I cannot see any reason why a Court which has ordered a sale of property under the Partition Ordinance should not give possession of that property to the purchaser without compelling him to bring a separate action for that purpose.

The powers given to the Court by the Ordinance are very extensive. It is empowered to issue a commission for the sale of the property.

The property is sold by the commissioners, that is to say, by the Court, and after payment of the purchase money by the purchaser into Court a certificate is delivered to him by the Judge, narrating the fact of the sale, setting forth his name, and the fact that he has paid the purchase money to Court. This certificate constitutes a complete title to the property without any necessity of a deed of transfer and combined with the decree for sale it is, by virtue of section 9, a title good against the world. The previous owners of the property are, by the Judge's certificate, completely divested of any right, title, or claim to the property.

The conditions of sale are approved by the Court and the purchase money is paid into Court agreeably to the conditions of sale. One of the conditions approved by the Court in this case was that the purchaser should be put in possession, and it was on the faith of this condition that the money was paid into Court.

The ordinary obligation of a person who sells property is to convey full ownership (*dominium plenum*) to the purchaser and one element of full ownership is right to possession. In other words, the right of the purchaser to possession is implied in an ordinary transaction of sale, and it is the duty of the seller to hand over possession.

That this implication has been deemed to apply to sales under the Partition Ordinance is, I think, sufficiently apparent from the fact that an undertaking to give possession is included in the form commonly used for sales under the Ordinance.

Is there any reason why a Court should be in a position different to that of an ordinary vendor? To all intents and purposes the Court, acting partly through its commissioners, deals with the

land as if it were the owner. It is given the right to sell it without the consent of the co-owners, it fixes the conditions of sale irrespective of the wishes of the co-owners, and it gives an absolute title to the land.

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This last, it could certainly not do unless it were in the eye of the law entrusted with the full rights of ownership for the purpose of sale.

It appears to me to follow from the above that it is not only entitled but bound to give the purchaser possession of the property.

It has been argued that no procedure has been laid down by which the Court can put the purchaser into possession. I am not specially concerned to inquire whether the Civil Procedure Code has laid down any special procedure to be followed in such a case. On the ordinary principles of Roman-Dutch law in regard to purchase and sale, I am satisfied that a right to possession exists, and that it is not necessary for any further proceedings to be brought in order to establish that right.

The question of how the Court is to give effect to the right is not a question of substantive law but is a mere question of adjective law or procedure.

Is there any reason why the decree of the Court coupled with the certificate of title should not be considered to be equivalent to a decree in favour of a judgment-creditor under section 323 ?

Any difficulty there might possibly be in the application of that section is to my mind removed by the provisions of section 839. If the point of procedure is a *casus improvisus*, it is open to the rule-making committee appointed by section 53 of the Courts Ordinance to lay down the procedure whereby the Courts shall give full effect to orders made under section 8 of the Partition Ordinance.

I find it quite impossible to accept the proposition that, because the Civil Procedure Code does not lay down a specific procedure for giving full effect to a right conferred upon a party by a Court, the Court is not bound to carry out its obligations like any other person, and for that purpose to exercise all the powers of execution it possesses.

The only effect of requiring the purchaser to bring a separate action to enforce his right would be to compel him to prove with great trouble, delay, and expense, a fact which already is perfectly well known to the Court, namely, that it is bound to give him possession of the property.

In conclusion, I may perhaps add that the distinction between what is substantive law and what is a mere question of procedure would be clearer if this Colony had a Civil Procedure Ordinance of a more modern type. A common and convenient practice nowadays

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when Legislatures deal with procedure is that they confine themselves to laying down a few general rules, leaving details to be settled by a rules committee consisting usually of Judges and practising lawyers. This form of legislation makes it easier to provide procedure suitable for the various situations with which the Courts may be confronted.
