

1922.

*Present* : Ennis and Porter JJ.FERNANDO *v.* MARSAL APPU *et al.*

314—D. C. Negombo, 1,444.

*Partition—Decree obtained by fraud and collusion—Conclusive effect of decree—Evidence Ordinance, s. 44.*

In an action for declaration of title the defendants claimed under a partition decree. The plaintiff impeached it on the ground that it was obtained by fraud and collusion.

*Held*, that under section 9 of the Partition Ordinance the plaintiff was bound by the decree.

“ I have not considered it necessary to go into the question as to whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the Court could not on proof of fraud take away the property from them.”

THE plaintiff sued the defendants for a declaration of title to a land called Kendakanattewatta, situated at Kaluwairappuwa, of which she alleged that the defendants were in wrongful possession.

The defendants denied the right of the plaintiff, and pleaded that they were entitled to the land upon partition decree in case No. 14,137, D. C. Negombo.

The plaintiff admitted that a decree had been obtained, but she averred that the same had been obtained fraudulently and collusively by all the parties to the said partition action, and as such was liable to be set aside.

The case went to trial on the issue as to whether, even if there was fraud and collusion on the part of the defendants, the partition decree can be set aside.

The District Judge (W. T. Stace, Esq.) held that, even if there was fraud and collusion, the partition decree cannot be set aside, and dismissed plaintiff's action, with costs.

The plaintiff appealed.

*Samarawickreme*, for plaintiff, appellant.

*Zoysa*, for defendants, respondents.

March 9, 1922. ENNIS J.—

This was an action for declaration of title, ejectment, and damages. The defendants pleaded in answer that they were entitled under a partition decree, whereupon certain issues were framed, the plaintiff asserting that the partition decree had been obtained by the defendants by fraud and collusion. The learned Judge held that, even if the defendants had so obtained the partition decree, the plaintiff

would be barred from bringing this action by virtue of section 9 of the Partition Ordinance, No. 10 of 1863, and he dismissed the plaintiff's action. The plaintiff appeals from this decision, and it is argued that under section 44 of the Evidence Ordinance the question of fraud and collusion could be gone into in the present action. I had at first some doubt as to whether this question can be gone into in any proceedings other than in proceedings for *restitutio in integrum*. A number of cases have been cited to us which show that the question could be gone into in cases in which they arise. In *Buyzer v. Eckert*<sup>1</sup> it was held that where fraud or collusion arose incidentally in a case, the question could be decided in the action. The case of *Neelakutty v. Alvar*<sup>2</sup> was a case where the plaintiff sought to set aside a partition decree on the ground, *inter alia*, that it had been obtained by fraud and collusion, and the matter was considered in that case, although it was decided on other grounds. Passing then to the effect of section 9 of the Partition Ordinance, I find a series of cases in which the question has arisen, and one in which the point was directly in issue. That case is *Jayawardene v. Weerasekera*.<sup>3</sup> There Sir Alexander Wood Renton said :—

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“ It is as well settled as any point of law can be that a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned, whose title even by fraudulent collusion between the parties had been concealed from the Court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages.”

In support of that proposition Sir Alexander Wood Renton cited the cases of *Carolis v. Ratnaike*<sup>4</sup> and *Nonohamy v. de Silva*.<sup>5</sup> In other cases the matter was considered although judgment was based on other grounds. In the case of *Neelakutty v. Alvar (supra)*, the Chief Justice referred to the rulings of this Court that “ the effect of section 9 of the Partition Ordinance precludes any person from impeaching a decree of a Court in a partition action even on the ground that it was obtained by fraud and collusion.” But in that case the partition decree was held to be void on the ground that the Court which passed it had no jurisdiction. The case of *Fernando v. Fernando*<sup>6</sup> was a Full Court case, and in the judgment in that case there was a dictum that section 9 of the Partition Ordinance was binding on all persons, and that the only remedy left to a person claiming the land thereafter was a remedy by an action for damages. In that case again the decision of the case turned on the question of jurisdiction. I see no reason to think that these decisions should not be followed. The principle of the Partition Ordinance is to free

<sup>1</sup> (1910) 13 N. L. R. 371.

<sup>2</sup> (1918) 20 N. L. R. 373.

<sup>3</sup> (1917) 4 C. W. R. 406.

<sup>4</sup> (1891) S. C. R. 374.

<sup>5</sup> (1889) 9 S. C. C. 198.

<sup>6</sup> (1906) 9 N. L. R. 241.

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the land from all encumbrances and to substitute thereafter an action for damages in place of the action to recover the land. We are not in the present case in a position to say definitely that no other persons than the defendants in the action have interests under the partition decree, so that I have not considered it necessary to go into the question as to whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the Court could not on proof of fraud take away the property from them. It is unnecessary in this case to consider that matter.

I would accordingly dismiss the appeal, with costs.

PORTER J.—I agree.

*Appeal dismissed.*

