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PERIS *et al. v.* PERERA *et al.*

D. C., Colombo, 4,981/C.

Partition—Ordinance No. 10 of 1863, ss. 4, 6, 9—Interlocutory judgment in action for partition—Final decree, effect of—Duty of Court in partition suits—Proof of title of co-owners—Adding parties—Proceeding where all co-owners cannot be ascertained.

The effect of section 9 of Ordinance No. 10 of 1863 is to give persons taking title under the decree in an action for partition under that Ordinance a title good against the true owner, but the decree referred to in that section is not the interlocutory decree of partition under section 4, but the final judgment under section 6 awarding shares in severalty, and entered after receipt of the return of the commission for partition.

The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

After the Court is satisfied that the plaintiff has made out his title to the share claimed by him, it should direct inquiries to be made whether all the parties interested in the land are parties to the action, or have been served with notice, and, on being satisfied on these points, order a partition or sale.

If all the parties cannot be found, the Court may allot severally the shares of the persons who have proved their rights to them, and may

sell the remainder of the land, retaining the balance of the purchase money, after payment thereout of a proportionate share of the costs of the action, until the owners come forward and prove their title to it.

Dictum of PHEAR, C. J., in *Assena Marikar v. Usubu Lebbe, 1 S. C. C. 19*, disapproved.

Per BONSER, C.J.—(1) The District Judge should take care that the inquiry in a partition suit is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary for the purpose, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain shares, and directing a partition or sale, as the case may be.

(2) An interlocutory decree for partition under section 4 of the Ordinance, unless proceeded with, is useless for any purpose. It could not even support a plea of *res judicata*. Where such an interlocutory decree has been made, and not proceeded with, section 402 of the Civil Procedure Code should be applied by the Court, and its rolls cleared of the action.

Per WITHERS, J.—Claimants of shares who may have had notice of the proceedings only when the commissioner had taken steps to prepare his return should be let in, and their claims inquired into even if it should happen that they purport to modify the interlocutory judgment as to the shares of the actual parties to the record. After hearing the new claimants and the former parties, the Court may reform its interlocutory judgment.

PLAINTIFFS claimed an undivided three-fourths share of certain lands by right of inheritance from one Naide. They averred in their plaint that the defe ndants were entitled to the remaining fourth, and prayed for a partition of the lands between them and the defendants. The lands originally belonged to one Adohami and his wife Bancho. Adohami died leaving five children, two sons and three daughters ; and the plaintiffs averred that the two sons possessed the lands to the exclusion of the daughters. Naide was one of those two sons. Bancho gifted her half to Naide, and he and his brother Simitchi thus became entitled to the entirety of the lands in the proportion of three-fourths and one-fourth. Naide died leaving eight children, six daughters and two sons—to wit, the two plaintiffs ; and the plaintiffs alleged that they possessed the three-fourths share to which Naide was entitled to the exclusion of their sisters. The defendants, they averred, were, as the descendants of Simitchi, entitled to the remaining fourth. Certain added parties to the suit claimed a divided portion of the lands. The District Judge, after trial, rejected their claims, and decreed a partition as prayed for in the plaint.

The added parties appealed.

Dornhorst and *Jayewardene*, for appellants.

Wendt, for plaintiffs, respondents.

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The case was first heard before BONSER, C.J., and LAWRIE, J., but was set down for re-hearing before the Full Court.

Cur. adv. vult.

Their Lordships were of opinion that the descendants of the plaintiffs' paternal aunts, to wit, the three sisters of Naide, and the plaintiffs' own six sisters, should have had notice of this action; and in remitting the case for further inquiries as to the persons interested in the lands and their respective shares, delivered the following judgments.

8th May, 1896. BONSER, C.J.—

I agree in the judgment which will be read by my brother Lawrie, but I desire to add a few observations on these actions *communi dividundo* for the assistance as well of the District Court to which this case is remitted, as of other inferior courts who may have to dispose of similar actions. The common law of this Island following the civil law, but therein differing from the English common law, held that *nemo in communione compellitur invitus detineri.* Hence the actions *familiæ erciscundæ* and *communi dividundo*, the former having application to the case of co-heirs and the latter to the case of co-owners who had become so otherwise than by inheritance.

In 1844 Ordinance No. 21 of that year was passed, which, after reciting that "the undivided possession of landed property is "productive of very injurious consequences to the inhabitants of "the Colony," proceeded to enact *(inter alia)* and declare that "when any landed property shall belong in common to two or "more owners, it is and shall be competent to any one or more of "such owners to compel a partition of the said property, and for "that purpose to present an application to any District Court "having jurisdiction praying for a partition;" thereupon the Court was to have power to issue a commission (section 10). The commissioners were required to make a partition, and for that purpose to prepare a schedule "showing the name, situation, "extent, and estimated value of the said property; the names of "the owners; the nature and extent of their respective shares or "interests; and the mode in which the commissioners propose that "such partition should be made." A copy of this return was to be given to each owner, and the original was to be returned to the Court with a survey (section 11).

Within three months after the return of the commission a day was to be fixed on the motion of any party for deciding on the application for partition; and if on that day the owners or their

representatives appeared, and no valid objection was made to the return; and if any of them were absent and the Court was satisfied that notice of the application had been given them, or if they could not be found, then to the persons in actual possession of the property, the Court might decree a partition, and that decree was to be good and conclusive against all persons whatsoever (section 12).

Provision was also made for a sale in cases where a partition would be injurious or impossible (section 15).

By Ordinance No. 11 of 1852, which recited that the provisions relating to the partition and sale of lands held in common had been found to be attended with inconvenience, and to be in some respects injurious to parties interested in such property, those provisions were repealed, and co-owners were remitted to their rights of partition under the common law.

This state of things lasted until the passing of Ordinance No. 10 of 1863, which now governs these actions. That Ordinance, after declaring the common law right of co-owners to compel a partition or sale of the joint property, laid down a new procedure. The person desiring a partition or sale is to file a libel describing the property and specifying the names, residences, and interests of the co-owners, and the improvements made by them so far as known to him, and praying a partition or sale, as the case may be. A summons is then to issue to the parties named by the plaintiff, calling on them to appear and show cause why a partition or sale of the property should not be decreed; and such summons is to be served on the defendants, or if any of them cannot be found, then on the person in possession; or if there is no person in possession, then in such manner as the Court may direct. If the defendants make default, then the Court is to hear evidence in support of the plaintiff's title, and the extent of his share and of the title of the defendants, and the extent of their respective shares so far as may be practicable by any *ex parte* proceeding, and if the plaintiff's title is proved, to give judgment by default decreeing partition or sale.

If the defendants appear and dispute the plaintiff's title, or claim larger shares than the plaintiff gives them, the Court is to examine the title of all the parties interested, and to decree a partition or sale.

When the interlocutory decree for partition has been made, the Court may, on the application of any party to the suit, issue a commission to a commissioner or commissioners to make partition of the land, adjudging to each owner his proper share. The commissioners are in the presence of the parties to make the partition according to the ascertained proportions of the several

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owners, and make a return accompanied by a survey, as was provided in Ordinance No. 21 of 1844.

The commissioners however are, thirty days before they make their partition, to fix in some part of the land a written notice of the day on which they purpose to make the partition, and also to give further notice by beat of tom-tom or otherwise in manner best calculated for giving the greatest publicity thereto.

This provision seems intended to give notice to all persons who may be interested in the land, and who may not be parties to the proceedings of what is being done, so that they may intervene in the suit if so advised. After the return of the commission the Court is to fix a day for considering the return, when the return will either be sent back for amendment, or may be confirmed with or without modification, in which latter case final judgment for partition will be entered.

This Ordinance, like the former Ordinance, enacts (see section 9) that the decree for partition or sale is to be good and conclusive against all persons whomsoever, whatsoever their rights may be, and whether they are parties to the proceedings or not, but it gives persons injured a remedy against the party by whose acts they have been damaged.

It has been held by this Court (*Don Carolis v. Watta Baba*, *7 S. C. C. 125*) that the effect of this section is to give the persons who take title under the decree a title good against the true owner. It is not necessary now to decide whether this decision is right or not; but having regard to the whole scope of the Ordinance and to the provisions as to the publicity, I incline to think that it is. It is in the highest degree desirable that a title given by the Court should not be impeachable, and that purchasers and mortgagees should be able to deal safely with the persons declared by the Court to be the owners. At the same time I venture to doubt whether the decree of partition referred to in section 9 is the interlocutory decree of partition, as seems to have been the opinion of PHEAR, C. J. (see *Assena Marikar v. Usubu Lebbe, 1 S. C. C. 19*). This was merely a *dictum*, for it was not necessary for the decision of the case. Section 9 appears to me to refer to the final judgment in each case. In the case of a partition it is to be a judgment by which shares are awarded in severalty. Now, the interlocutory judgment for partition does not award any shares in severalty. It merely declares that the parties are entitled to certain undivided shares, and directs the commissioners to partition the land. It is the final judgment which awards the shares in severalty. These provisions appear to be borrowed from the English Act, 8 and 9, William III., chap. 31, which was the last

English Act dealing with partition at the dates of the passing of the Ceylon Ordinances.

That Act provided that the final judgment was to include all persons, though not named in the proceedings; but a year was allowed within which a claimant could come in and apply to have the judgment set aside. That Act was repealed in 1867, and proceedings in partition in all English Courts are now governed by the Partition Acts of 1868 and 1876. It is to be regretted that the Legislature of this Island has not thought fit to legislate on this matter since the passing of these Acts.

It is to be observed that no conveyances are required, as in the case of partition made by the English Court of Equity. The party gets his title from the decree of the Court awarding him a definite piece of land. So Justinian lays down : *Quod autem istis judiciis (i.e., Judiciis Communi Dividundo) alicui adjudicatum sit, id statim ejus fit, cui adjudicatum est.* (Institutes, 4, 17, 7.)

Whether or not the judgment be binding on the true owner who is not a party to the suit, it is obvious that the Court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained ; and he must prove his title strictly, as has been frequently pointed out by this Court.

When he has done this, he has proved his right to maintain the action. The next step, according to the practice of the English Equity Courts, would be to make a decree directing inquiries to be made, whether all the parties interested in the land were parties to the action, or had been served with notice of the decree, and in that case ordering a partition or sale. I think that practice should be followed as nearly as may be. Section 508 of the Civil Procedure Code makes provision for inquiries of this kind.

Collusion between plaintiffs and defendants is always possible in these cases, and therefore the District Judge should take care that the inquiry is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain aliquot shares, and directing a partition or sale, as the case may be. It would be desirable that where practicable the decree should be

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prefaced with such a declaration as follows :—"It appearing that "all persons entitled to or interested in undivided shares in the "land in the plaint described are parties to the action."

If all the parties cannot be found, I think that the Court may allot severally the shares of the persons who have proved their rights to them, and may sell the remainder of the land, retaining the balance of the purchase money after payment thereout of a proportionate share of the costs of the action until the owners come forward and prove their title to it.

In considering whether it should make a final decree for sale, or merely an interlocutory judgment for partition, the Court must take into consideration the circumstances referred to in the proviso to section 4 of the Ordinance. It is obvious that in the majority of cases a sale will be more beneficial to all parties. I would add, in conclusion, that an action under the Partition Ordinance cannot be made—as I suspect is not infrequently attempted—a substitute for an action *rei vindicatio*. An interlocutory decree for partition, unless proceeded with, is useless for all purposes. It would not even support a plea of *res judicata*. Where such an interlocutory decree has been made, but not proceeded with, provisions of section 402 of the Civil Procedure Code should be applied by the Court and its rolls cleared of the action.

WITHERS, J.—

I also agree with the judgment of my brother LAWRIE. I have had the further advantage of reading the CHIEF JUSTICE'S judgment, and my Lord's observations on the procedure of partition actions have my hearty concurrence.

The importance of the subject induces me to add a few observations of my own. A plaintiff who has an interest in the soil and trees of a land in common with others, and desires to procure a partition or sale of the premises, may not know who all the co-owners and mortgagees of a land are. It goes without saying that he should do his best to ascertain who they are before he comes to Court. If the shares of the co-owners of soil and trees named in his libel do not *ex facie* exhaust the land, the Court, before making any order of partition or sale, should in my opinion by notice and advertisement, or in such manner as the Court thinks best for the purpose, endeavour to procure the attendance of all who claim to have common interests in the land.

This course should be followed where, after inquiring into the claims of the plaintiff and the defendants named in the libel, the parties are not found to own the entire land between them.

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If it so happens that all the co-owners of a land cannot be ascertained, and that land is one proper to be partitioned, then in my opinion the Court is entitled to divide amongst the claimants according to their shares so much of the land as those shares amount to, and to order the sale of the unassignable parcel, the net proceds thereof being reserved for possible claimants on the fund. If the entire land ought to be sold, then the net balance of the sum equivalent to the unascertained shares will be reserved in the same way.

So much for cases in which all the co-owners of a land cannot be discovered before the judgment on the return to the commission for partition or sale, which is the final and conclusive judgment in these actions.

Considering that the final judgment binds others than the immediate parties to the partition suit, claimants to shares who may have had notice of the proceedings only when the commissioner has taken steps to prepare his return should be let in and their claims inquired into, even if it should happen that they purport to modify the interlocutory judgment as to the shares of the parties to the actual award. After hearing the new claimants and the former parties it may be that the Court will have to re-form its interlocutory judgment. This course seems to me to be in harmony with the provisions of the 18th section of the Civil Procedure Code. It is the paramount object of the Court in these cases to ascertain who are all the co-owners of the particular land sought to be partitioned or sold.

Again, it can hardly be too often repeated that unless a plaintiff strictly proves his title to a share in common with others, his action should be dismissed; that no share should be assigned to a claimant without strict proof of title; and that the interlocutory judgment as to the shares of the parties then before the Court does not determine the statutory action of partition.

LAWRIE, J.—

In this partition suit the learned District Judge decided that certain added parties had no share in the family lands. I am not satisfied that the decision is right, but counsel for the respondents was not fully heard because we found that all the necessary parties are not before the Court.

The plaintiffs seek a partition on the footing of a custom of inheritance in their family, unusual in the maritime provinces

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and opposed to the common law and to the Ordinance of 1876, viz., a custom that the daughters do not share with their brothers in the succession.

It is on this footing that the plaint is framed. The plaintiffs omit not only the descendants of their paternal aunts, but also their own six sisters. It is in vain to adjudicate piecemeal on the rights of parties in a partition suit. It would be embarrassing if we were now to decide on the evidence before us, whether the added parties have shares, because, if others are to be cited as defendants they would not be bound by a judgment at this stage to which they were not parties, and the question might require to be tried anew. Therefore it is necessary to set aside the partition decree and to send the case back for further inquiries as to the persons interested and their shares. Plaintiffs must give to the District Court the names of all the known living descendants of the paternal aunts and of the six sisters, and the descendants of such of them as have died.

By the law of the country these persons had by inheritance a right to share. It may be they have not possessed the lands in question, either because of other family arrangements or because the custom of exclusion of the females has been recognized and acquiesced in by them. Anyhow, it cannot be presumed that this abnormal custom exists in the absence of those whom the plaintiffs desire to exclude.