

1897.
November 3.

SATHIANADEN *et al.* v. MATTHES PULLE *et al.*

D. C., Negombo, 2,453.

*Partition Ordinance—Its applicability to land subject to fidei commissum—
The Entail and Settlement Ordinance, 1876.*

Since the Entail and Settlement Ordinance, 1876, a Court of competent jurisdiction may proceed under the Partition Ordinance in respect of land subject to a *fidei commissum*.

IN this case the plaintiffs sued the defendants for the sale, under the Partition Ordinance, of a land held by them in common. The defendants, in addition to questioning the correctness of the shares allotted to them in the plaint, pleaded that the land was subject to a *fidei commissum*, and could not therefore be sold under the Partition Ordinance. On the trial date, after hearing arguments of counsel, the District Judge held as follows:—"In my opinion the Court cannot order a sale unless the procedure prescribed by Ordinance No. 11 of 1876 is adopted, and a petition is presented under section 5 of that Ordinance. This has not been done, and the land cannot at present be sold. The Court is of opinion, therefore, that the plaintiff cannot bring a suit under the Partition Ordinance. The suit is therefore dismissed with costs."

The plaintiffs appealed.

Sampayo, for appellants.

Dornhorst, for respondents.

3rd November, 1897. LAWRIE, A.C.J.—

In 1877 it was decided by this Court (affirming a judgment of Berwick, D.J.) that property which was subject to a *fidei commissum* could not be sold or partitioned under the Ordinance of 1863 (*Ram. 1877, 304*).

That action was brought before 15th June, 1877, when the Ordinance No. 11 of 1876 came into operation.

Since then, by the 4th section of the later Ordinance, it is lawful for the District Court of the district in which property held subject to entail, *fidei commissum*, and settlement, is situate to authorize a lease, exchange, or sale of the whole or any part or parts of such property, if it deems it proper and consistent with due regard for the interests of all parties entitled under such entail.

This removes the difficulty felt by the Court in the case referred to, and I see no difficulty in proceeding under the Partition Ordinance.

I would set aside and remit the case for further investigation.

BROWNE, A.J.—

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I agree. Plaintiff does not admit that any valid *fidei commissum* was either ever created, or, if created, still subsists. He could not therefore be expected to petition under the Entail and Settlement Ordinance; but if the Court were to hold that a restriction on alienation did presently exist, I see no reason why it should not act under that Ordinance (whose provisions in section 6 are so akin in their object to the requirements of No. 10 of 1863, section 4, as to the ascertainment of all parties possibly interested) even without any formal petition being filed supplemental to the plaint.

In view of the antiquity of the alleged creation of the *fidei commissum*, I would suggest it may be a question whether its restrictions have not now expired.

