FERNANDO *et al.* *v.* MOHAMADU SAIBO *et al.*

1899.
May 5.

D. C., Chilaw, 1,632.

Partition suit—Ordinance No. 10 of 1863—Denial of plaintiff's title in toto *—Denial of plaintiff's possession—Propriety of action for partition.*

Where plaintiffs alleged common possession and common title with defendants and subsequent ouster by defendants, but defendants claimed the whole land as their own and pleaded that an action for partition was not open to the plaintiffs until they established their title in a separate action—

Held, it was irregular to reject the prayer for partition and to order the case to proceed as an action for declaration of title.

Per LAWRIE, A.C.J.,—Neither the fact that the title of plaintiff or defendant is denied, nor the fact that neither plaintiffs nor defendants are in possession, is a good objection to an action for partition.

The Court must in all cases of partition carefully investigate all titles, and must refuse to make title on admissions or insufficient proof.

Perera v. Perera (2 *N. L. R. 370*) considered and explained.

THE plaintiffs in this case claiming to be the owners of three-fourths of a certain garden, paddy field, and tank called Sangattotam, by virtue of purchases made at Fiscal's sales in 1871 and 1882, and admitting the defendants to be the owners of the remaining one-fourth share, complained that the defendants had since the month of April, 1896, kept forcible possession of the whole of the said garden, paddy field and tank, to the exclusion of plaintiffs, and had taken and appropriated to themselves all the produce therefrom. They prayed for a declaration of title in their favour to an undivided three-fourths of the lands; that a fair and equitable division be made of the said premises; and that plaintiff's three-fourths share be partitioned off and separated from the share of the defendants.

Defendants claimed the whole land, but before answering to the merits took the objection that, on the face of the plaint, plaintiff appeared not to be in possession of any portion of the land in dispute, and the plaintiffs were not entitled to maintain this action for partition until they proved title thereto in a separate action.

The District Judge rejected the prayer for partition, but ordered the case to proceed as an action for declaration of title.

Plaintiffs appealed.

Wendt, for appellant.

Dornhorst, for defendants, respondent.

Cur. adv. vult.

The Supreme Court set aside the order of the District Judge, and remitted the case to the lower Court for investigation of the

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title of all the parties, under section 4 of the Partition Ordinance, and for proceeding thereafter in due course according to law.

5th May, 1899. LAWRIE, A.C.J.—

The learned District Judge has refused to allow this action to proceed as a partition suit, relying on the judgment in the case of *Perera v. Perera*, D. C., Kalutara, 1,567, pronounced by me and concurred in by my brother WITHERS on 27th July, 1897, reported in *2 N. L. R.* p. 370.

We have been asked to reconsider that judgment, and after careful consideration I recommend that the record be sent back for investigation of the titles of parties and procedure under the Ordinance No. 10 of 1863.

The earliest Partition Ordinance was No. 21 of 1844, sections 10–18. That Ordinance enacted that, when any landed property shall belong in common to two or more owners, it shall be competent to any one of such owners to compel a partition.

In a Galle case, D. C., Galle, 134 (reported *Ram. 1843–55, p. 140*), this Court in 1848 held that the sections 10, 11, and 12 of the Ordinance No. 21 of 1844 made no provision for the case of a disputed ownership nor contemplated such an event, and if such a case arises the parties must settle their rights by an action at law ; in another case from Galle D. C., 152, *Buller v. Koelman*, 11th October, 1848 (reported *Ram. 1843-55, p. 148*), this Court more fully discussed the provisions of the Ordinance. It held that the application for a sale must be made by one or more owners, and as no one else is competent to do so the Court is not authorized to make any order of sale when the right of ownership is denied until the title of the parties is ascertained.

The Judges said that " in the absence of any express directions " in the Ordinance as to how the respective rights and proportions " of the owners should be ascertained, when they are disputed in " these summary applications. the Supreme Court considers that the " proper course is for such contested claims to be tried in an " incidental suit and the proceedings on the application to be " stayed."

By Ordinance No. 11 of 1852 the sections 10-18 of Ordinance No. 21 of 1844 were repealed. This Court held in *Duff v. Crosbie* (D. C., Kandy, 28,688, 21st January, 1857) that there was a common law right to demand a partition, and, notwithstanding the repeal of Ordinance No. 21 of 1844 by the Ordinance of 1852, that the course prescribed by the Ordinance No. 21 of 1844, " which " to a great extent accords with the common practise in " such cases, should in applications of that kind be followed as far " as practicable."

The civil law applicable to partitions is fully stated in *2 Burge, p. 676.* Burge says, "it is not material whether the plaintiff's "*dominium* be *directum* or *utile*, or whether one or more or all "the joint owners be or be not in possession of the property."

The present Ordinance No. 10 of 1863, section 4, expressly gave power to the Court to determine questions of title.

When the defendant did not appear, the Court was directed to hear evidence in support of the title of the plaintiffs, the extent of their shares or interests, as also the title of the defendants and the extent of their respective shares and interests in so far as may be practicable by an *ex parte* proceeding, and shall, if the plaintiff's title be proved, give judgment by default decreeing partition or sale. Provision is also made where the defendants or any of them appear and dispute the title of the plaintiffs, or shall claim larger shares or interests than the plaintiffs have stated to belong to them, or shall dispute any of the material allegations in the title. The Court shall in the same cause proceed to examine the titles of all the parties interested therein and the extent of their several shares and interests, and to try and determine any of the material questions in dispute between the parties. It seems clear that the investigation and determination as to the title "shall be in the same cause:" expressly meeting and removing the difficulty experienced in construing the older Ordinance of 1844.

But it cannot be doubted that this Court has frequently deprecated and disapproved of the use of the Partition Ordinance by a plaintiff whose title is doubtful, because it has often appeared that the object in view was not a partition but a declaration, by a final decree, of a title which was at the commencement of the action, to say the least of it, shaky.

Plaintiffs resorted to the Partition Ordinance rather than to action in ejectment, partly because a partition suit in the end gave them an indefeasible title good against all the world, a result not attainable in an ordinary action in ejectment, and partly because it was always easier to get a partition decree than an ordinary decree. There were no pleadings, the procedure was simpler. It was easy to call as defendant's only claimants, who were satisfied with the shares allotted to them, and to leave out the real disputants.

While I am of the opinion that a denial of the plaintiff's title is not an objection to a partition suit, it seems very clear that looking to the serious consequences of a partition decree, the Court should abstain from declaring any right to the land except on the best proof. A partition decree should be more difficult to get, not less difficult to get, than an ordinary decree in ejectment, for in the latter parties may settle matters between themselves, and the

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decree affects them only, whereas in a partition suit others are interested and their rights are excluded by the decree.

On full consideration of the Ordinance, I am of the opinion that neither the fact that a title either of plaintiff or defendant is denied, nor the fact that neither the plaintiff nor defendants are in possession, is a good objection to the maintenance of a partition suit.

The Court must in all cases carefully investigate all titles, and must refuse to make title on admissions or insufficient proof.

WITHERS, J.—

The plaintiffs appeal from an order of the District Judge, which virtually changes this suit under the Partition Ordinance to one for a declaration of title only.

Perera v. Perera, 2 N. L. R. 370, was relied on by the District Judge. *Perera v. Perera* was, I think, rightly decided. There the plaintiff had never been in possession of the property, nor had his wife, through whom on her death he claimed an interest in the land. His alleged title was altogether denied and contested. He was fortunate, indeed, in not being made to bring a separate action for a declaration of title.

But the Judge, in refusing the present plaintiff the benefit of proceedings under the Partition Ordinance, has relied on a passage in my brother Lawrie's judgment, which is expressed as follows: "It has often been held by this Court that a partition suit should "not be brought by a man not in possession whose title is "disputed." If that is a correct statement of the law laid down by this Court, we must observe the law. But it does not apply to the facts of the present case in appeal.

The plaintiffs herein set out a title which is not seriously disputed. The plaintiffs alleged a common possession as well as a common title, and this possession they say they have enjoyed for some fifteen years during the lifetime of the defendant's father without interruption till April, 1896, when the defendants deprived them of their shares.

It is an audacious defence to use this alleged ouster as a lever with which to lift the plaintiff out of the Partition Ordinance. The case ought to be dealt with under section 4 of the Partition Ordinance, and I would remit the record with that direction.