JAYAWARDENA *v.* WIJEYESINHA *et al.*

1899.
October 9.

ATTORNEY-GENERAL, added Party Defendant.

D. C., Chilaw, 788.

Procedure—Partition suit—Admission of the Crown into the case as an added defendant—Denial by Attorney-General on behalf of the Crown of plaintiffs and defendant's title—Who to begin.

Where in a partition case the plaintiff and defendant derived title from a common ancestor, and the Crown appeared and was allowed to file answer as an added defendant denying the title of such ancestor to the whole of the land, and itself claiming title to a great portion of the land, the proper procedure is for the plaintiff to begin his case.

THIS case was instituted in January, 1894, by plaintiff against several defendants, who were alleged to be part owners of a certain tract of land, for partition of the same among them.

Answers were filed by many of the defendants, and the trial was fixed for 8th October, 1897; but notice of trial not having been served on all the defendants, the case was postponed for 10th February, 1898, and thereafter for several other dates. In the meanwhile, on the 26th May, 1898, Mr. Proctor Koertz, appearing for the Attorney-General, moved that "as the Crown has an "interest in a portion of the land which forms the subject-matter "of partition, the name of the Attorney-General of Ceylon be "entered as an added party, and the trial of the case fixed for 3rd "June next." The motion being allowed, the Attorney-General's answer as an added defendant was admitted and filed.

His answer took exception to the plaint, in that it did not disclose how Tamby Mudaliyar, named in the plaint as the original owner of the land sought to be partitioned, became the owner, whether by sannas, grant, or otherwise. On the merits, the Attorney-General denied that the said Tamby Mudaliyar was the owner of the said entire land, or that heirs or descendants represented by the defendants were entitled to the same. For a further answer, the Attorney-General pleaded that within the boundaries set out in the plaint as containing 730 acres there were several allotments of land aggregating 442 acres which belonged to the Crown. And the Attorney-General prayed that in the event of a partition being decreed, the several allotments named by him as aggregating 442 acres be excluded, and the same be declared the property of the Crown.

On the trial day the issue agreed upon was: Whether the lots mentioned by the Attorney-General are the property of the plaintiffs and defendants, or the property of the Crown.

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The District Judge called upon the Crown to begin, holding the burden of proof as to its claim to be upon it. The counsel for the Attorney-General declined to call evidence, on the ground that the nature of the land in dispute raised a presumption in favour of the Crown that the land belonged to it, and that plaintiff, having admitted that the original owner, Tamby Mudaliyar, had acquired the land under a grant from the Crown, did not produce the grant itself, or lead any evidence in support of his title.

The District Judge dimissed the claim of the Attorney-General, as he declined to begin and call evidence.

The Attorney-General appealed.

Ramanathan, S.-G., for appellant.

Dornhorst (with him *Jayawardena*), for respondents.

Cur. adv. vult.

9th October, 1899. LAWRIE, A.C.J.—

Our decision on this point of practice and procedure should depend on what we think is best for the numerous parties to the action, what order will enable to try the issues with the least delay and the best results.

In the ordinary case the plaintiff should begin. He has put the Court in motion. He must make out a *primâ facie* case that there is a land to be divided which he owns in common with others.

Here the Crown has given notice that a considerable part of the land described in the plaint is land at the disposal of the Crown. I cannot say that I think that the learned District Judge was wrong when he called on the Attorney-General to lead evidence. But the Attorney-General did not avail himself of his right to begin. I am of the opinion that that right having been waived, the plaintiff must open his case.

I cannot affirm the order dismissing the claim of the Crown. In the first place it is an ambiguous order, and the order of a Court should be clear and unambiguous. It may mean that the onus lay on the Attorney-General for the Crown, and because he did not lead evidence, the issue whether the land be the property of the Crown is finally answered in the negative.

If that be the meaning which the District Judge puts on his order, it would have been well to have made it clear.

But I do not read the appearance of the Attorney-General in the case and his answer as more than a notice that the Crown asserts title to a part of the land. If that land be now lying waste or uncultivated, nor possessed by any of the parties to this partition suit; if it be virtually in the possession of the Government this

can hardly be called a claim, it is a notice warning the parties not rashly to assume that they can deal with all the land as their own.

So I think the appearance of the Attorney-General in the cause was a fair notice to the parties, and that the plaintiff's and defendants having been put on their guard, it now lies on the plaintiff to proceed to prove his title in common form.

I incline to the view that the Crown can appear in every case to watch its interest (which are the interests of the public), and here I see no objection to the counsel for the Crown cross-examining the plaintiffs and the defendants and the witnesses. It may be a question whether, having declined to lead evidence when the opportunity was given to him, the Attorney-General can before the close of the case be allowed to lead evidence to prove the Crown's right. I do not at present see any reason why he should not.

The result to which I come is, that while the Crown had right to appear and to prove that part of the land must be excluded from the partition before the title of the parties to the remainder was entered on, still that it is convenient for all that the ordinary procedure should be followed, and that the plaintiff should first be called on to make out his case.

It would be unfortunate for all parties were the Crown forced to leave the case, for except in an action to which the Crown was a party, the partition of this land would be fruitless.

I would set aside the order dismissing the claim of the Crown, and I would remit for trial in the usual way.

BROWNE, A.J.—I agree.