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SILVA v. PAULU *et al.*

C. R., Negombo, 3,974.

Partition—Action for, by party not in possession nor whose title is admitted.

As the Partition Ordinance (No. 10 of 1863) provides for the contingency of the defendants appearing and disputing the plaintiff's title, the ruling in *Perera v. Perera* (2 *N. L. R.* 370) that an action for partition cannot be brought by a party not in possession whose title is disputed, is unsound.

In partition suits the Court ought not to proceed on admissions, but must require evidence in support of the title of all the parties, and allot to no one a share except on good proof.

PLAINTIFF purchased an undivided 8-10ths of a certain land from one Isaac and four of his five children. The outstanding child (second defendant), together with her husband

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(first defendant), denying the title of Isaac and his four children, claimed the land for themselves and refused to give possession of it to plaintiff, who thereupon came into Court praying for partition. The only issue framed by the Court was whether the plaintiff's vendors were entitled to 8-10ths of the land Kumbukgahawatta.

The Commissioner, after hearing the case for the plaintiff, dismissed his action on the ground that he was admittedly out of possession and his title was in dispute; and that the case of *Perera v. Perera* (2 N. L. R. 370) was clearly in point.

Plaintiff appealed.

Prins, for appellant.

Sampayo, for respondent.

Cur. adv. vult.

20th May, 1898. LAWRIE, J.—

In this case for partition the issue framed was "Were the plaintiff's vendors entitled to 8-10ths of the land Kumbukgahawatta?"

I am at a loss to understand why that issue was not fully tried and judgment given. After the plaintiff had closed his case the Commissioner gave judgment on an issue not raised. He held that the application for a partition of the land should be refused with costs. He held that the case of *Perera v. Perera* (D. C., Colombo, 6,322), 2 N. L. R. 370, governed the present case. But in that case the action was not dismissed: the plaintiff got a declaration of title; and here the only issue was whether the plaintiffs were entitled to a similar declaration. I must set aside the judgment and remit the case for further trial on the issue framed.

I am doubtful of the soundness of my ruling in *Perera v. Perera*, that an action for partition cannot be brought by a party not in possession whose title is disputed. I am not sure that the Partition Ordinance supports these propositions. It confers the right to compel a partition or sale on any owner in common. I doubt whether it be necessary for the plaintiff to aver and prove that he is in possession. It is not necessary that the plaintiff's title be admitted. The Ordinance provides for the contingency of the defendants appearing and disputing the plaintiff's title, and indeed in partition suits the Court ought not to proceed on admissions, but must require evidence in support of the title of all the parties and allot to no one a share except on good proof.

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LAWRIE, J.

The circumstances of the case of *Perera v. Perera* were peculiar. In the present case the evidence, so far as it goes, is that the plaintiff was in possession and that he brought this action shortly after ouster.

I remit the case for further trial. The costs hitherto incurred to abide the final result.

