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## MATHER *v.* TAMOTHARAM PILLAI.

*D. C. Jaffna, 2,429.*

*Partition suit—Reference to arbitration—Ordinance No. 10 of 1863—Ordinance No. 15 of 1866—Civil Procedure Code, s. 691.*

A partition suit is not a mere proceeding *inter partes* to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed.

In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge.

In enacting the Ordinance No. 15 of 1866, the Legislature did not confer on a Judge power to refer the matters in dispute in a partition suit to arbitration.

The award of an arbitrator given upon such a reference is wholly bad, and no interlocutory decree can be entered in terms of it.

THIS was an appeal against an interlocutory decree entered in a partition suit in terms of the award of an arbitrator.

The plaintiff, the defendants, the substituted defendants, and the added parties applied to the Court to refer "all matters and

differences between them in the above-named action" to a person agreed to by them. The order of reference appointed the arbitrator named "to determine all the said matters and differences between the parties", and vested the arbitrator with "all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure".

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In due course the arbitrator heard evidence and gave his award that certain shares of the lands belonged to certain parties, and that the cost of the partition suit should be borne by the parties in proportion to the shares of each.

The tenth, eleventh, and twelfth added parties, and the first and second substituted defendants, objected to an interlocutory decree being entered in terms of the decree.

The District Judge (Mr. W. R. B. Sanders) entered of record as follows:—"The counsel for the parties who object to the award has not been able to obtain a copy of the judgment of the Supreme Court in which that Court is said to have held that a partition suit could not be referred to arbitration. But in the present case all the parties consented to the reference, and none of the grounds mentioned in section 691 of the Civil Procedure Code have been urged for setting aside their award. Enter interlocutory decree in terms of the award. Objectors to pay the costs of the objections".

The interlocutory decree being entered, the objectors appealed.

*H. A. Jayawardene*, for appellants, cited C. R., Chilaw, 7,128, decided by Mr. Justice Grenier on the 22nd May, 1902, and *Peris v. Perera* (*1 N. L. R. 362*). Collusion between plaintiffs and defendants is always possible in partition cases. Bonser, C. J., therefore held that the District Judge should take care that the inquiry should not be conducted in a perfunctory way. His Lordship cast upon the Court the duty of satisfying itself not only that the plaintiff had made out his title, but also that all the parties interested in the land were made parties in the action. Furthermore, it was the duty of the Court to determine what the respective share of each party was, and, in case all the parties could not be found, to allot severally the shares of the persons who have proved their rights to them, and where an order to sell has been made to retain in its hands the value of the shares of such owners as have not come forward to prove their title to it. In view of these special duties in partition cases, it is not competent to the District Court to refer a partition suit to arbitration.

*Rámanáthan, S.-G.*, for plaintiff, respondent.—The power of modifying an award given to the District Judge under section

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688 of the Civil Procedure Code and section 25 of the Arbitration Ordinance, No. 15 of 1866, makes it possible to work the Partition Ordinance together with the procedure enjoined for reference to arbitration. The Ordinance No. 15 of 1866, section 3, enacts that all matters in dispute between the parties which may form the subject of civil action may be submitted to arbitration, and there is nothing in that Ordinance or in the Partition Ordinance, No. 10 of 1863, expressly prohibiting a reference to arbitration of partition suits. Granting that there is a special duty cast on the District Judge to see that no one's title to lands sought to be partitioned is omitted to be inquired into, the only question is whether certain issues regarding certain titles of certain shareholders may not be referred to arbitration. So long as the District Judge has the power of modifying an award which is in excess of the reference or falls short of it, there does not seem to be any reason why such definite questions of title in partition cases should not be referred to arbitration, either by consent of the parties themselves or at the instance of the Court on grounds of convenience. Upon an award being brought into Court, if the District Judge sees that the special question referred to the arbitrator has been fully and precisely dealt with and the award does not require to be revised in reference to the rights of any other shareholder, why should not the District Court enter a decree in terms of the award? It has not been shown in the present case that there was collusion among the parties, or that there was an outstanding owner.

*Van Langenberg*, for eighth, ninth, tenth, and eleventh defendants, respondents.—The award is good and conclusive as between the parties who consented to the reference, though it may not be good against all the rest of the world. The effect of the application made by the parties to a reference is that the partition action, by reason of such an agreement, ceases to be an action raised under the Ordinance No. 10 of 1863. The Court can now enter final decree according to the award, and that decree will bind only the parties to this case.

*Wadsworth*, for twenty-first defendant, respondent.—If the award binds the parties to this case it cannot be set aside, except for one of the grounds mentioned in section 691 of the Civil Procedure Code. It is not challenged now for any of those reasons.

*H. A. Jayawardene*, in reply, cited judgment of Privy Council reported in *I. L. R. 9, All. 191.*

*Cur. adv. vult.*

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In this case the plaintiff seeks to partition a certain land between himself and his co-owners.

On the 21st July last year all matters in difference between them in the case were referred to arbitration. The arbitrator appointed duly made his award, and on the 13th January, 1903, the District Judge, purporting to act under the provisions of section 4 of the Partition Ordinance, No. 10 of 1863, directed that an interlocutory decree of partition should be entered up in terms of the award. The first and second substituted defendants and the tenth, eleventh, and twelfth added parties appeal on the ground that the reference to arbitration was illegal, and consequently the order of the District Judge of the 13th January is bad, and they pray that the reference to arbitration and all proceedings subsequent to the 20th July, 1902, be quashed, and that the case be returned to the District Judge to be tried in manner provided by the Ordinance No. 10 of 1863.

The question to be decided by us in this appeal is whether the Judge can, with the consent of parties, make an order referring the matters to be decided by him in a partition suit to the arbitrament of a third party. The Legislature has by the Ordinance No. 10 of 1863 provided a procedure by which co-owners can compel a partition or sale of a land held by them in common. The party who demands partition or sale is to file a libel (plaint) in a Court of competent jurisdiction, particularly describing the property and stating the extent of his share, and the names and residences of the co-owners and mortgagees, and the extent of their respective shares and interests, and praying a partition or sale thereof, as the case may be. The Court then issues summons to the parties named by the plaintiff, calling upon them to appear and show cause why a partition or sale of the common property should not be decreed. If the defendants upon being served with a summons, in manner provided by the Ordinance, make default in appearance, section 4 provides the Court shall fix a day to hear evidence in support of the application, and on the day of trial must hear evidence in support of the plaintiff's title and the extent of his share, and of the title of defendants and the extent of their respective shares. If the defendants appear, and there are any disputes between the plaintiff and defendants as to their respective shares, the Court has to examine the title of all the parties interested before it can decree a partition or sale of the common property. It is obvious from the above that the Judge cannot order a decree unless he is perfectly satisfied that the parties before the Court are entitled to the property alleged by the plaintiff to

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be held by him in common with the defendants. The Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed. It has been repeatedly held by this Court that the District Judge is not to regard the partition suit as merely to be decided on issues raised by and between the parties to the suit, and that the plaintiff must strictly prove his title, and, only when he has done so to the satisfaction of the Court, has he established his right to maintain such action. The paramount duty is cast by the Ordinance upon the Judge himself in partition proceedings to ascertain who are the actual owners of the land sought to be partitioned. As collusion between parties to a partition action is always possible, and as in such a suit the parties get their title from the decree of the Court awarding them a definite piece of land, and as a decree for partition under section 9 of the Ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the Ordinance.

The Ordinance makes no provision by which the Court can throw that duty on to some third person, and no provision is made in it for any reference to arbitration; consequently in my opinion the Court has no more power to refer a partition suit to arbitration than it has to decide on issues raised by parties to the suit. The mere consent of the parties will not justify the Court referring the case to arbitration; the Court must itself be satisfied that the property sought to be partitioned is the property of the parties, and must satisfy itself as to their respective interests in it. It is admitted by counsel who appeared for plaintiff, respondent, that as far as the Partition Ordinance goes there is nothing which would justify a reference to arbitration of any proceeding taken under it. It is, however, suggested that the Legislature in enacting by section 3 of the Arbitration Ordinance, No. 15 of 1866, that all matters in dispute between parties which may form the subject of civil action may be submitted to arbitration, directly authorized the Court to refer any proceedings under the Partition Ordinance to arbitration.

Now, the question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action; the Court has to decide in every such suit matters in respect of which the parties need not necessarily be in dispute and on which in this particular suit they are not at issue, viz., that the land is held in common by the plaintiff and defendants, and they solely have title to the land sought to be

partitioned. The Court has not only to decide the matters in which the parties are in dispute, but to safeguard the interests of others who are no parties to the suit, who will be bound by a decree for partition made by the Court under the provisions of the Ordinance. It appears to me the Legislature, in enacting the Ordinance No. 15 of 1866, did not confer on a Judge power in a partition suit to refer the matters in dispute to arbitration, and never intended to do so or to remove from the Judge the very important duty cast on him by the Ordinance No. 10 of 1863, to satisfy himself by personal inquiry that the plaintiff has made out a title to the land sought to be partitioned, and that the parties before the Court are those solely entitled to such land.

There further remains the question whether the Civil Procedure Code in any way affects or modifies the special duty cast upon the Judge by the Partition Ordinance to inquire into the title of the parties in a partition suit. By the proviso to section 4 of that Code it is enacted that nothing in the Code shall effect or modify any special rules of procedure which by virtue of any Ordinance in force at the time of its passing may have been prescribed by such Ordinance, except it has been expressly repealed or modified by the Code. The Code contains nothing expressly repealing or modifying the procedure laid down by Ordinance No. 10 of 1863 to be followed by a Judge before making his interlocutory decree under that Ordinance. Consequently the provisions of chapter IV do not apply to partition actions. Further, these provisions do not refer to the arbitration of matters other than those in difference between the parties, and, as I have pointed out above, the Court in a partition suit has to decide matters other than those in dispute between the parties, matters in which the parties themselves may have no difference.

For the above reasons I am of opinion that the original reference was void, and that the order of the District Judge decreeing a partition in terms of an award made under such reference was bad, and must be set aside.

Mr. Van Langenberg, for eighth to twelfth defendants, respondents, argued that though the Court might not be able to accept the award for the purpose of decreeing a partition in its terms, the Court might enter a final decree in terms of such award outside the Partition Ordinance. The object of the parties in agreeing to the reference was the mistaken belief that the partition of the premises could be arrived at by a reference to arbitration. Had they all agreed before such reference to convert the action into one of ordinary procedure, there would be no harm in our entering a decree in terms of the award. The award,

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however, actually settles the cost of the partition, and it is too late now to change the whole nature of the action.

I order, therefore, that the judgment of the District Judge, dated the 13th December last, be set aside, and the reference to arbitration and all proceedings subsequent to such reference be quashed, and remit the case to the District Court to be proceeded with by the District Judge in manner provided by the Ordinance No. 10 of 1863. I further award the appellants the cost of this appeal, as they were obliged to come to Court to obtain relief against the judgment of the District Judge of the 13th December last; but as the appellants were as much to blame as the respondents for the original mistake all parties will bear their own costs in respect of the abortive reference to arbitration and of the proceedings in the District Court consequent thereupon.

WENDT, J.—

I fully agree with what has fallen from the Chief Justice as to the scope and effect of the Arbitration Ordinance of 1866 and the Civil Procedure Code. To my mind, once we realize (what has been repeatedly laid down by this Court) that a partition suit is not a mere proceeding *inter partes*, to be settled by their consent or by compromise or by the opinion of the Court on such points as they choose to submit to it in the shape of issues, but that it is a matter in which in a sense the parties are all engaged in a contest with the rest of the world and seeking to establish their title to the land, then it becomes clear that a reference to arbitration can have no place in a proceeding under the Partition Ordinance. In an arbitration the parties choose their own Judge. He looks only to the determination of matters which are in difference between them, and does not concern himself with examining points upon which they are agreed. In the present case, if the parties on appearing before him chose to agree that one A B was the original owner, and that the one party claimed from him on a conveyance, while the other party denied the execution of the conveyance and claimed the land by intestate succession to A B, then the arbitrator would only have had to decide whether the conveyance or the inheritance was to prevail; whereas in a proper investigation under the Partition Ordinance the most important question for the Judge would be whether A B was the owner at all. Again, the arbitrator would not be able to bring new parties into the litigation—a power which is particularly necessary in partition proceedings.

I therefore agree in thinking that the reference and all proceedings under it should be quashed.

GRENIER, A. J.—I agree.