Present: Sir Charles Peter Layard, Chief Justice, Mr. Justice Wendt, and Mr. Justice Grenier.

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FERNANDO *v.* FERNANDO *et al.*

D. C., Chilaw, 25,448.

Partition suit—Decree irregularly obtained—Community of property—Share of children—Setting aside decree—Fraud—Irregularity—Partition Ordinance (No. 10 of 1863).

Where the survivor of two spouses married in community of property was allotted in a partition suit the entire share in a land, which formed part of the community, and the children of the marriage applied to have the decree set aside, alleging that it was irregularly obtained, and that they were entitled, at the date of the decree, by right of maternal inheritance, to an undivided half share of the portion allotted to their father,—

Held (by the Full Court), that in the absence of any allegation of fraud in obtaining the decree, and in the absence of any proof that the children had not received their proper share out of the common estate, the decree could not be set aside merely on the *ground of irregularity.*

THE plaintiff instituted this action on 6th November, 1886, for the partition of a land called Maduwawatta, under the provisions of Ordinance No. 10 of 1863. The plaintiff claimed an undivided one-fifth share of the land and allotted one-fifth to the first defendant, two-fifths to the second defendant, and one-fifth to the third defendant. Decree was entered of consent on 1st December, 1886, for the partition of the land in the above shares; and final decree of partition was entered on 26th April, 1888. On 2nd July, 1902, the appellants intervened in the suit, alleging that they were the children of Agida Fernando, who was married in community of property to the third defendant in November, 1872; that the said Agida Fernando died on 13th February, 1881; and that on her death the appellants, who were then minors, became entitled to an undivided one-half share of the one-fifth part of the land in question, which formed part of the common estate of their parents. The appellants prayed that the decree entered in the case be set aside, and that they be added as parties to the suit and the same proceeded with according to law. The third defendant died on 22nd March, 1901, and an administrator was appointed to his estate. Prior to his death, to wit, on 9th February, 1901, the third defendant had mortgaged by bond No. 3,264 the share allotted to him in the partition decree to C. A. Hutson to secure

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the payment of a sum of Rs. 40,000. C. A. Hutson sued the administrator of the third defendant on the said bond and obtained decree dated 10th February, 1902, and registered on 7th April, 1902.

The District Judge (H. R. Freeman, Esq.) having disallowed the application to set aside the partition decree by his order dated 25th August, 1902, the intervenients appealed.

Walter Pereira (*H. J. C. Pereira* and *E. W. Jayewardene* with him), for the appellants.

Dornhorst, K. C., for mortgagee (C. A. Hutson).

Bawa, for parties noticed by the Supreme Court.

Cur. adv. vult.

11th August, 1903. LAYARD C.J.—

The judgment of my brother Wendt, which has just been delivered, expresses the united opinion of the Full Court. I only desire to add that if, as was argued, the partition decree was obtained irregularly and was invalid and inoperative, the requirements of the law as to the entering of partition decrees not having been complied with, I do not see how the applicants (appellants), are injured thereby. I understood their counsel to argue that under section 9 of the Ordinance No. 10 of 1863 a decree for partition is only good and conclusive against persons not parties to the suit, when such decree has been "given" in manner provided by the Partition Ordinance, *i.e.*, only in cases where the Court has neglected none of the procedure required to be followed in such suits so as to safeguard the interests not only of the parties to the suit but outsiders also. Assuming that contention is right, it does not appear to me that if we upheld it we would be justified in interfering with a decree purported to be given under the Ordinance to protect a person not a party to the suit and not bound by it. The decree is binding on those who were parties to it and took no exception to its being entered up, and, on the contention of appellant's counsel, is not binding on the appellants, and so there is no adequate reason why they should be allowed to come forward to disturb it.

WENDT J.—

This appeal arises out of a refusal of the District Judge to set aside a partition decree. The action was brought in November, 1886, to obtain a partition of a parcel of land on the footing that plaintiff owned one-fifth of it, first defendant one-fifth, second

defendant two-fifths, and third defendant, the father of the appellants, one-fifth, and in these proportions the land was eventually divided amongst them, and by a decree dated 30th May, 1888, the Court declared the parties' title to their parcels in severalty and certificates issued to them accordingly. The ground of appellants' application, which was first presented in July, 1902, is that of their father's undivided one-fifth share a moiety had devolved on them by the death of their mother on 13th February, 1881, and that by not having been named as parties in the partition proceedings they have lost their undivided one-tenth share of the land. At the death of their mother the appellants were minors; no administration was taken to her estate until letters issued to the first appellant in May, 1902. The father, Manuel Fernando, apparently continued in possession of the joint matrimonial estate until his death on 22nd March, 1901. Administration to his estate was in August, 1901, granted to one Alenso Perera. The appellants attained majority on the 4th March, 1895, 9th November, 1897, and 13th February, 1901, respectively. They resided with their father and under his care and guardianship until his death.

In their affidavit, read in support of the present application, the appellants deposed in general terms that until after the death of their father they were ignorant of the existence of the partition action, and that the partition decree was obtained irregularly and was invalid and inoperative, the requirements of the law as to the entering of such decrees not having been complied with, no evidence of title or possession laid before the Court, and the decree entered up simply upon the agreement of parties. There is throughout the present application no suggestion of fraud. Neither is there any proof or even suggestion that the appellants have in fact lost anything by the action of their father in consenting to the Court's allotting the whole one-fifth share to himself without mentioning the interest already vested in his children. Assuming for the moment that the partition proceedings were so irregular that they cannot stand if attacked, and that the appellants, who were no parties to these proceedings, are entitled to attack them, they must yet show that they have suffered damage by the proceedings complained of. It may be that Manuel Fernando intended to conserve his children's interest by giving them half, or perhaps even the whole, of the parcel to be allotted to him in severalty, or he may have intended in some other way to compensate them, and he may in fact have carried out this intention. Certainly the appellants are now the owners of that entire parcel, as they are the heirs of their father and they are in possession. It is true

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that they take it subject to the respondent's mortgage, an incumbrance created by their father after the partition decree, but without some account of their father's estate it is not possible for the appellants to show that he has not left to them more than enough to compensate them for the loss of their one-tenth share. It may even be that the very money raised on this mortgage was invested in the purchase of lands which have now become the property of the appellants. The first and second appellants attained majority some years before their father's death. They do not disclose what arrangement they then made with their father as to their share of the rents and profits. It is difficult to resist the impression that but for the prospect of getting rid of the respondent's mortgage nothing would have been heard of the present application. The appeal is dismissed.

GRENIER A.J.—

I am of the same opinion. The grounds upon which the appellants base their present application to set aside proceedings which they allege are irregular and inoperative are totally insufficient. The proceedings took place nearly eighteen years ago, and we have not been placed in possession of materials in order to be able to ascertain what transactions have taken place in the interval between the appellants and their father in regard to the joint matrimonial estate of himself and the appellants' mother. I do not understand the appellants to charge their father with fraud, and it is more than probable that, although the proceedings in the partition action were defective and not in accordance with the provisions contained in the Ordinance, after the decree was entered up the particular interests of the appellants in the joint matrimonial estate, which they lost by the decree, have been otherwise compensated for. At least there is no proof before us that this has not been the case; and the present application is intended, I think, to take advantage of the laxity of procedure in partition cases which was unfortunately but too common until this Court, in recent years, insisted on the provisions of the Ordinance being strictly complied with, as the decrees passed in them bind the whole world.