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Present: Wood Renton C.J. and Shaw and De Sampayo J.J.

BANDARA *v.* BABA *et al.*

438—D. C. Matara, 6,254.

Partition Ordinance, No. 10 of 1863, ss. 4, 8, and 9—Decree for sale—Conclusive effect.

The decree for sale to which a conclusive effect is given by section 9 of the Partition Ordinance, 1863, is the decree under section 4.

THE facts are as follows:—

The plaintiff-appellant instituted this action in the District Court of Matara against the defendants for the partition of a land.

On November 11, 1914, the District Judge ordered a partition of the land, or a sale thereof if a partition was impracticable. In the said order no right of way over the land in question was reserved to any one.

On January 19, 1915, the surveyor having reported to Court that a partition was not practicable, a sale of the land was ordered on March 29, 1915, but a right of way was not reserved in the said order.

On August 3, 1915, the sale was held without reservation of a right of way, and the plaintiff-appellant became the purchaser of the land.

On August 24 the intervenients, respondents, petitioned to Court that they had a right of way over the land in question.

Plaintiff-appellant urged that their application was too late, as it came after the order to sell was made by the Court, and that the right of way had not been reserved to any one in any of the orders

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made by the Court; that the sale was held subject to no right of way, and the plaintiff-appellant asked that the sale be cancelled if a right of way should be allowed over the land, as a right of way would considerably diminish the value of the land.

On November 8 the learned District Judge delivered his order, allowing to the intervenients, respondents, the right of way, and refusing to cancel the sale.

The plaintiff appealed.

E. W. Jayewardene, for plaintiff, appellant.—The order for sale is the final decree within the meaning of section 9. The certificate of sale cannot be regarded as a decree. See *10 N.L.R. 196; 1 Bal. 40; 5 S.C.C. 181. Catherinahami v. Babahamy*[1] is *obiter* as regards this point. The subsequent cases followed this case as regards a sale without examining the grounds of the decision.

Keuneman, for intervenients, respondents.—Section 9 speaks of " the decree for partition or sale given as hereinbefore provided. " In the case of a partition only, it has been held in a series of decisions that this decree is not the one mentioned in section 4, but is the final decree under section 6. In this connection it is to be noted that the only section which mentions a " decree " is section 4. Section 6 does not refer to " decree," but to " final judgment." It follows that the decree under section 4 is not final in the case of sale also.

Effect must be given to the words. " given as hereinbefore provided." The decree under section 4 of the Partition Ordinance is different from a decree in any other case. Instead of being the final stage of the proceedings, it is merely the beginning of a fresh procedure before the Court. It is the intention of section 9 to include, not only the decree under section 4, but also all the machinery which is based upon it, viz., the procedure under sections 5 to 8. When that procedure is completed, in the case of partition by " final judgment," in the case of sale by " certificate of sale," then only can the decree be regarded as conclusive against the whole world. The fact that section 9 is placed where it is in the Ordinance, and not immediately following section 4, supports this interpretation.

It would be an anomaly should the decree under section 4 be final in the case of a sale, but not final in the case of a partition. Suppose the preliminary decree is for partition, but if partition is impracticable when for a sale, and after inquiry the Court orders a sale, what would be the position of a person who intervened after the decree was entered, but before the order for sale?

Cur. adv. vult.

January 28, 1916. Wood Renton C.J.—

This case has been referred by my brothers Shaw and De Sampayo to a Bench of three Judges, for the determination of the question

[1] *(1908) 11 N. L. R. 20.*

whether the decree for sale, to which section 9 of the Partition Ordinance, 1863,[1] assigns a conclusive effect, is the original order for sale or the certificate of Court mentioned in section 8. There have been two conflicting currents of authority on the point. The view adopted impliedly by Clarence A.C.J. in *Don Mathes Appuhamy v. Wijesiriwardene*,[2] and expressly by Wendt and De Sampayo JJ. in 59—D. C. Colombo, 11,747,[3] and by Sir Charles Layard C. J. and Moncreiff J. in *Louis Appuhamy v. Punchi Baba*,[4] was that the certificate of sale is merely evidence of the purchaser's title without any deed or transfer from the former owner, and is not the decree for sale to which section 8 refers. On the other hand, Lawrie A.C.J., in 450—C. R. Matara, 622,[5] held that the decree for sale which is to be final and conclusive is the certificate under the hand of the Judge that the property has been sold under the order of the Court. The same view was adopted *obiter* by Sir Joseph Hutchinson C.J. and Middleton J. in *Catherinahami v. Babahamy*,[6] the decision that finally settled the controversy as to whether the decree for partition mentioned in section 9 of the Partition Ordinance, 1863,[1] was the decree referred to in section 4, or the final judgment spoken of in section 6, of that Ordinance. The view taken by the Judges who decided the case of *Catherinahami v. Babahamy* [6] seems to have been that, if the decree under section 9 of the Partition Ordinance, 1863,[1] is the final judgment in the partition action, it must follow as a necessary inference that the decree for sale under the same section is the last step in the proceedings, namely, the issue of the certificate of the Court. The fallacy, as I venture to think it, of this reasoning had been pointed out by anticipation by Sir Charles Layard C.J. in *Louis Appuhami v. Punchi Baba*, [4] to which the attention of the Court does not seem to have been called. *Catherinahami v. Babahamy* [6] was treated as an authority binding upon them by Benches of two Judges in *Bandaranaike v. Bandaranaike* [7] and *Perera v. Alvis*.[8]

Now, however, that the question has been formally raised before a Bench of three Judges, I have no hesitation in holding that the older authorities ought to be followed. We are not concerned here with the policy of the law, although I may say in passing that I think that the right of intervention under the Partition Ordinance, 1863,[1] so far from being extended, should be peremptorily barred in the Courts of first instance, on the expiry of a prescribed period after the interlocutory decree, and could be so barred with safety, provided always that due provision was made for securing greater publicity to partition proceedings. All that we have to do at present, however, is to construe the Ordinance itself. I do not

[1] *No. 10 of 1863.*
[2] *(1883) 5 S. C. C. 181.*
[3] *S. C. Mins., August 4, 1904.*
[4] *(1904) 10 N. L. R. 196.*
[5] *(1899) Koch 13.*
[6] *(1908) 11 N. L. R. 20.*
[7] *(1908) 11 N. L. R. 185.*
[8] *(1913) 17 N. L. R. 135.*

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see how the certificate of title can be regarded as the decree for sale to which section 9 refers. That it is not so is clear from the language of section 8, which speaks of "the certificate" under the hand of the Judge that the property has been sold "under the order" of the Court. This enactment clearly draws a distinction between the certificate of title and the decree or order for sale.

I would answer the question referred to us in the same sense as my brothers, and I concur with the order which they have proposed.

SHAW J.—

This case raises the question what is the conclusive decree within the meaning of section 9 of the Partition Ordinance, 1863, in the case where the Court has directed the sale of the property.

In *Louis Appuhamy v. Punchi Baba*,[1] following D. C. Colombo, 11,747,[2] it was held that the decree for sale is the conclusive decree, and opinion to the same effect was expressed in *Don Mathes Appuhamy v. Wijesiriwardene*.[3]

In the more recent cases, 450—C. R. Matara, 622,[4] *Catherinahami v. Babahamy*,[5] *Bandaranaike v. Bandaranaike*,[6] and *Perera v. Alvis*,[7] the Court appears to have thought that the conclusive decree was not the order for sale, but the confirmation of the sale.

In my opinion the earlier decisions are correct, and the order for sale is the conclusive decree. It is impossible, without doing violence to the provisions of the Ordinance, to read the words "decree for sale" used in section 9 to mean the confirmation of the sale. The order for sale is the order finally settling the rights of the parties to the suit, and the confirmation of the sale is a purely formal act affecting the purchaser only, analogous to obtaining a Fiscal's transfer in the case of an ordinary execution, and affecting the purchaser's title only.

I would allow the appeal, with costs.

DE SAMPAYO J.—

I am of the same opinion. With regard to my judgment in *Perera v. Alvis*,[7] I need only say that, as I there stated, I considered myself bound by the decision in *Catherinahamy v. Babahamy*.[5] My own view as to what is the final and conclusive decree in the event of a sale under the Partition Ordinance was indicated in the earlier case *Abdul Ally v. Kelaart*,[8] which was approved of in *Louis Appuhamy v. Punchi Baba*.[1] Now that the whole question has come before us I have no hesitation in giving effect to that view and in agreeing with the rest of the Court that, on the true construction of the Ordinance, the decree for sale, to which a conclusive effect is given

[1] *(1904) 10 N. L. R. 196.*
[2] *S. C. Mins., August 4, 1904.*
[3] *(1883) 5 S. C. C. 181.*
[4] *(1899) Koch 13.*
[5] *(1908) 11 N. L. R. 20.*
[6] *(1908) 11 N. L. R. 185.*
[7] *(1913) 17 N. L. R. 135.*
[8] *(1904) 1 Bal. 40.*

by section 9, is the decree under section 4, by which the title of the partes s ascertained and the property is ordered to be sold.

This being so, the respondents to this appeal, who intervened after the order for sale had been made and the sale had been carried out, and claimed a right of way over the land, were too late, and are concluded by the previous decree. I would set aside so much of the order of the District Judge under appeal as allows the path claimed by the respondents, and award them costs. The respondents should, I think, pay to the plaintiff the costs of the intervention in the Court below and of this appeal.

Appeal allowed.