

Present: Ennis J. and De Sampayo J.

1916.

SILVA v. SILVA.

21—D. C. Kalutara, 6,263.

Petition action—Crown grant in favour of A—Action for partition by B, alleging that A purchased on behalf of both A and B.

Plaintiff brought an action for partition, alleging that the defendant and in purchasing the lot from the Crown "acted on behalf of himself and the plaintiff," and claiming to be entitled to a half share of the lot.

Held, that plaintiff was not an "owner" within the meaning of the Partition Ordinance, and was therefore not entitled to bring a partition action.

"The plaintiff has as yet no legal estate; his only right, if any, is a right of action against defendant to compel him to grant conveyance of a half share."

THE facts are set out in the judgment of De Sampayo J.

A. St. V. Jayewardene (with him Weeraratna), for appellant.

Bawa, K.C. (with him B. F. de Silva), for respondent.

Cur. adv. vult.

March 2, 1916. ENNIS J.—

This is an appeal from a refusal to grant an application for partition.

The plaint states that the defendant "became the owner" of an undivided half share in Kajugahawatta, for himself and the plaintiff, under a Crown grant dated February 10, 1906. By a partition deed the land was subsequently divided, and the defendant was given lot A, shown on plan No. 620 as the half share.

On this statement it is difficult to see how any question of prescription can arise, and it is certain that the defendant is the legal owner.

The only question is whether the plaintiff can maintain a partition action until he has obtained a conveyance from the defendant. It was urged that if a person holding the beneficial interest could maintain a *rei vindicatio* action, as in *Gould v. Innasitamby*¹ and *Ohlmus v. Ohlmus*,² an action for partition could also lie, and in support of this an English case, *Taylor v. Grange*,³ was cited, in

¹ (1904) 9 N. L. R. 177.

² (1906) 9 N. L. R. 183.

³ 13 Ch. Div. 23.

1916.
 ENNIS J
 Silva v.
 Silva

which Fry J. said that a person entitled to call for the legal estate which would have entitled him to a partition at Common law may obtain a decree for partition.

In all these cases it seems to me that an order for re-conveyance was essential. Such an order under the terms of the Ceylon Partition Ordinance would be useless, for the Ordinance makes void all alienations during the pendency of the action, and the decree in partition was never intended to operate as a conveyance. Partition is, in fact, a division among existing owners, and even in the plaint the defendant is acknowledged to be the owner under the Crown grant.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

The defendant and one Jamis Hamy bought the land called Kajugahawatta from the Crown, upon the Crown grant dated February 10, 1906. The actual Crown sale evidently took place some time in 1905, and before the Crown grant was obtained the defendant and Jamis Hamy, in August, 1905, effected a partition of the land between themselves, and lot A was allotted to the defendant. The plaintiff brought this action in March, 1915, alleging that the defendant had in purchasing a half share from the Crown "acted on behalf of himself and the plaintiff," and claiming now to be entitled to a half share of lot A, and he asked for a partition of lot A between himself and the defendant. The plaintiff also pleaded prescriptive title to a half share of lot A. The question whether in these circumstances the plaintiff could bring an action under the Partition Ordinance was discussed as a preliminary issue, and the District Judge, having decided it in the negative, dismissed the plaintiff's action.

The plaintiff's own case is that the Crown was owner of the land at the time of the sale, and that the defendant and Jamis Hamy became owners by virtue of the Crown grant. That being so, the plaintiff cannot possibly succeed on prescription, even if he has been in possession of lot A with the defendant since the Crown grant, because the period that has elapsed is less than ten years. It is, therefore, idle to send the case back, as we were pressed to do, for the purpose of taking evidence as to possession.

The only point to be considered is the legal question above indicated. Section 2 of the Partition Ordinance provides: "When any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property." It is therefore only a co-owner that is competent to bring an action for partition under the Ordinance. There are no doubt decisions, to which I need not particularly refer, showing that a co-owner for this purpose need not be one who is entitled to the absolute *dominium*, or who is

beneficially interested. Thus, it has been held that a fiduciary in the case of *fidei commissum* property, or a trustee, may bring an action for partition. But in all such cases the legal estate is vested in the plaintiff, who, therefore, is rightly considered an "owner" within the meaning of the Ordinance. The plaintiff in this case has as yet no legal estate; his only right, if any, is a right of action against the defendant to compel him to grant a conveyance of a half share of lot A. The English case of *Taylor v. Grange*,¹ cited at the argument, does not help the plaintiff. In the first place, the English law of partition appears to be much wider than ours. The case cited was concerned with property subject to an active trust, and the Court refused a partition. Counsel for the plaintiff, however, relies on a passage in the judgment of Fry J., in which he said: "No doubt an equitable owner may obtain a decree for partition if he be entitled to call for a legal estate, which would have entitled him to a partition at common law." The reference here is clearly to the class of cases where there is a bare trust, and where, therefore, the *cestui-que-trust* is entitled to call for a conveyance of the legal estate. In such cases the English Courts regard the party interested as having sufficient ownership to ask for a partition, evidently on the principle of equity, that what ought to have been done will be taken as already done. But that is quite different from the position of the plaintiff in this case. He has still to establish the existence of the trust and the right to compel the execution of a conveyance. He does not even allege that he paid his share of the purchase money, or that the defendant has held a half share of the land subject to a resulting trust in his own favour, or that the defendant has fraudulently refused to give him a share in pursuance of such trust. These defects in the pleadings may be overlooked, but he must prove the facts, as they are denied. Can he be allowed to do so in a partition action? I think not. No authority has been cited to show that even in England a partition action can be brought if the trust is denied. It appears to me that there an action is possible only in the case of an undisputed trust, the purposes of which have been exhausted. In Ceylon no relaxation of the provisions of the Ordinance No. 7 of 1940, requiring a notarial instrument for the purpose of establishing title of land, is allowed except in the case of fraud. An issue of fraud cannot surely be gone into incidentally in a partition case. Moreover, as I have said, the only proper decree which the Court can enter in favour of a person who sets up a resulting trust of this kind is one requiring the defendant to fulfil the trust specifically by executing a conveyance. Such a decree is obviously not possible in a partition action. Counsel for the plaintiff, however, cited the well-known case of *Ohlmas v. Ohlmas*,² and contended that a person in the position of plaintiff could simply "vindicate" the property,

1916.
DE SAMPAYO
J.
Silva v.
Silva

¹ (1879) 18 Ch. D. 223.

² (1906) 9 N. L. R. 183.

1916.
DE SAMPAYO
J.
Silva v.
Silva

without the necessity of a decree for execution of a conveyance, that is to say, that he could obtain a declaration of title. The expression "vindicate" undoubtedly occurs in that judgment in the description of the nature of the action, but it is not quite inappropriate in the circumstances of that action, because the plaintiff had, in addition to the claim on the ground of fraud, pleaded title by prescriptive possession. As the report of the case does not fully set out the facts in that respect, I had the record sent for, and found that the plaintiff had, apart from the prayer for declaration of title, prayed for an order compelling the defendant to execute a conveyance. In my opinion all such questions as arise from the nature of the plaintiff's claim in this case should be settled in a separate action, before resort can be had to the Partition Ordinance.

For these reasons I think the appeal should be dismissed, with costs.

Appeal dismissed.
