1934 *Present:* **Garvin S.P.J. and Poyser J.**

UMMA SHEEFA *v.* COLOMBO MUNICIPAL COUNCIL.

113—D. C. Colombo, 49,139.

Partition decree—Conclusive effect wipes out vesting order under section 146 of the Municipal Councils Ordinance—Investigation into title—Admissions and agreement with regard to title without evidence—Decree not conclusive—Partition Ordinance, s. 9.

The conclusive character of a judgment entered in accordance with the provisions of the Partition Ordinance is sufficient to wipe out the effect of a vesting order made under section 146 of the Municipal Councils Ordinance, No. 6 of 1910.

The investigation into title which is an essential requirement compliance with which is one of the conditions upon which a decree in a partition case is accorded the effect of a judgment *in rem* is an investigation made by Court with the object of determining whether the title of the parties claiming to be owners of the land has been strictly proved.

Where in a partition case there were admissions and agreements in respect of the rights of parties *inter se* but no evidence that they or any of them were entitled to the premises or to any shares thereof at the dates material to the action,—

***Held,* that there was no proper investigation into title which would give the decree entered thereafter the conclusive effect given to it by section 9 of the Partition Ordinance.**

APPEAL from a judgment of the District Judge of Colombo.

Hayley, K.C. (with him *Keuneman* and *Gratiaen*), for first defendant, appellant.

M. T. de S. Ameresekere (with him *T. S. Fernando*), for plaintiffs, respondents.

Nadarajah (with him *Mahroof*), for second defendant, respondent.

Cur. adv. vult.

May 10, 1934. GARVIN S.P.J.—

This is an appeal from a decree declaring the first plaintiff entitled to the premises bearing assessment Nos. 45 to 57, 62, and 28 situated at 2nd Cross street, Maliban street, and Norris road, and more fully described in the schedule attached to the decree which, further, ordered the second defendant to pay to the first plaintiff the sum of Rs. 350 and further damages at Rs. 840 per mensem from March 1, 1933, till the first plaintiff is restored to possession of the premises.

The second plaintiff is the husband of the first plaintiff. The first defendant is the Municipal Council of Colombo, and the second defendant claims title to the premises by virtue of a conveyance from the first defendant Council bearing No. 1,586 dated October 2, 1929, and attested by N. H. M. Abdul Cader, Notary Public.

The first plaintiff pleaded as her title a certificate of title dated June 7, 1920, under the hand of the District Judge of Colombo in favour of Rahimath Umma issued in pursuance of a sale of the premises held under a decree in partition case No. 46,980 of the District Court of Colombo

and a transfer No. 315 of September 4, 1920, by the said Rahimath Umma and two of her children in favour of the first plaintiff who also was a child of Rahimath Umma.

The first defendant Council had caused the premises to be seized and sold for non-payment of rates on June 21, 1916. At the sale the Council became the purchaser thereof and by virtue of four vesting orders marked 2D1 to 2D4 under the hand of the Chairman dated January 28, 1919, became the absolute owners thereof.

The effect given to such vesting orders by the Municipal Councils Ordinance, No. 6 of 1910, section 146, is that the Council must be deemed at the date to have been vested with absolute title to the premises free of all encumbrances.

The learned District Judge has, however, held that as the combined effect of the decree in D. C. Colombo, No. 46,980, dated March 18, 1919, and the certificate of sale issued in pursuance thereof the title vested in Rahimath Umma prevailed over the title of the Council which was of earlier date. It was contended that the decree above referred to was not a decree for which the conclusive effect of section 9 of the Ordinance could be claimed because it was entered of consent and without proof of title and, alternatively, that, in any event, the provisions of section 9 only bind persons who had title at the time of the institution of the action and were not made parties and those who acquired a title to an undivided interest in breach of section 17. As to this alternative contention it is sufficient to say that it is as well settled as anything can be by a long series of judgments of this Court that a judgment entered in accordance with the provisions of the Partition Ordinance is final and binding upon all persons and has the effect of a judgment *in rem*. It wipes out all previous title and vests the premises in the persons declared to be the owners to the exclusion of all other claims of title. It was sought however to place the Municipal Council in a special position in that its title proceeded from section 146 of the Ordinance and not from any previous owner who might as such have been made a party or who might have intervened in the proceedings. Everything which is susceptible of ownership, and in a special sense property such as this is, must be presumed to be in the ownership of some person. The effect of section 146 is to pass the title of the owner, whoever he may be, to the Council with the additional advantage that on being vested the title becomes absolute and free of all encumbrances. It is impossible to admit the contention that the Municipal Council is not bound except in a view of the Partition Ordinance and the effect of section 9 which would be irreconcilable with the law as declared in the long series of judgments to which I have referred.

There is more substance in the contention that the decree with which we are here concerned is one for which the conclusive effect of section 9 may not be claimed.

The plaint in D. C. No. 46,980 is dated November 24, 1916. An amended plaint was filed on February 2, 1917. The plaintiffs, who were Rabia Umma and her husband Samsadeen Sherifdeen, sought a partition of these premises alleging that Ibrahim Lebbe Ahamado Lebbe Marikar, being the owner thereof, had by deed No. 944 of July 22, 1871, gifted the

same to his daughter, Candoo Umma, subject to a *fidei commissum* in favour of her children, that Candoo Umma died in 1894 leaving her surviving her children, abdul Cader and Rahimath Umma; that Abdul Cader died leaving three children—the first plaintiff and the second and third defendants—and that the persons entitled to the premises were Rahimath Umma first defendant and the first plaintiff and second and third defendants. The second and third defendants through their guardian *ad litem* filed answer admitting the averments in the plant but alleging that in terms of the *fidei commissum* the premises devolved on the first defendant as to half and on the first plaintiff and second and third defendants in the proportion of one-sixth to each. The first defendant claimed that she was exclusively entitled to the entirety of the premises.

On March 27, 1918, one Abdul Cader Mohamed Nauf intervened and claimed that he was entitled to a one-eighth share.

On May 9, 1918, the journal shows that the trial was postponed to await the decision of case No. 46,977. The hearing was postponed for various reasons and was ultimately taken up on March 18, 1919. On that day all the parties were represented and what took place is recorded as follows:—

> The parties agree that the finding in case 46,617 should bind the parties in this case as regards the intervenient.
>
> Mr. Canekeratne reads in evidence deed No. 944 (P 1).
>
> *Judgment.*
>
> I find that the parties are entitled to the land as follows :—
>
> First plaintiff, second defendant, third defendant, intervenient—are entitled to one-eighth share each ;
>
> and the first defendant is entitled to half share subject to the conditions in deed No. 944.
>
> Let the premises be sold and the proceeds be brought into Court for distribution under the Entail and Settlement Ordinance. All costs to be borne *pro rata*.

The above is the record of what took place at the trial of case No. 46,980.

The finding in 46,617 which the parties agreed should be binding on them was that the intervennient was also a legitimate child of Abdul Cader.

Apart from the averments and admissions in the pleadings and the agreement of the parties as regards the position of the intervenient, can it fairly be said that there was evidence before the Court that the first plaintiff and the first, second, and third defendants and the intervenient were entitled these premises? By their admissions and agreements the parties consented to their rights *inter se* being determined in accordance therewith. The only evidence in this case is that which is afforded by the deed 944. This deed being over thirty years no prooof of execution is necessary. All that appears on the face of that document is that one Ibrahim Lebbe Ahamado Lebbe Marikar, claiming to be entitled to certain premises, purported to convey them by way of gift to his daughter, Candoo Umma, in the year 1871. There is no evidence in the record of Ahamado Lebbe Marikar's title. There is no evidence that he ever had any possession, there is no evidence of any possession of the premises

thereafter by Candoo Umma or any of her descendants and there is nothing to show that the parties or any of them were in possession at any time. No evidence has even been adduced in proof of the averment that the parties are the descendants or successors in estate of Candoo Umma.

In the result apart from the consent of parties there was no evidence that the parties to this action or any of them were co-owners of these premises.

It was sought to reinforce the record of the proceedings at the trial of D. C. No. 46,980 by the proceedings in D. C. No. 46,977 upon the ground that in that case the parties had agreed that the decision should, subject to appeal, bind the parties in 46,617, 46,977, and in 46,980. The learned District Judge rejected the objection raised and after perusing the proceedings in that case and in two others states that it is perfectly clear that there was a full investigation into the title of parties in D.C. No. 46,977, and in view of the agreement entered therein that the decision in that case should bind the parties in 46,980 he appears to have come to the conclusion that there was also an investigation as to title in 46,980. Assuming that there was a full investigation into title in 46,977, which be it noted related to premises No. 12, Chatham street, it is difficult to see how the conclusion is reached that there has been a full investigation as to the title to premises Nos. 45 to 57, 62, and 28 situated at 2nd Cross street, Maliban street, and Norris road which are the premises sought to be partitioned in 46,980, and to which there is not even a reference in 46,977.

Now in 46,977 the parties submitted for the decision of the Court nine questions at which the parties were at issue. These questions related to their rights *inter se*. The agreement recorded in that case was that the decision of the Court should bind them in 46,980 and the other two cases then pending. But even if the matter be approached upon the footing that this agreement was actually entered of record in 46,980 all it amounts to is that the parties consented that their rights *inter se* should be as ascertained in 46,977. Whatever the reason for the consent may have been it is manifest that the shares assigned to the parties in 46,980 were the shares they consented to take and were not based on evidence that they were entitled to the premises which were the subject matter of the action in those proportions.

In view of the Judge's observation as to the fullness of the investigation in 46,977 I would, in passing, observe that that action proceeded very largely on the assumption that a title existed and that very little, if any, attention appears to have been paid to proof of title.

The learned District Judge says with reference to decrees in partition proceedings " If there is no appeal or if the decree is affirmed in appeal, then the decree is conclusive, provided only that there has been *some* investigation of title". This passage and the words " some investigation of title " appear in a context which indicate that they were not used in the sense of an investigation upon evidence with the object of ascertaining whether the evidence proved that the parties or some at least of them had title to the premises or to shares thereof. The words " investigation into title " are traceable to the judgment of de Sampayo J.

in the case of *Jayawardene v. Weerasekera*[1] where that learned Judge when considering the effect of section 9 said "The expression 'given as herein before provided' appears to me to have reference to such essential steps as investigation into the title, the order to partition . . . ." Clearly what de Sampayo J. had in mind was the law as declared in a long series of judgments of this Court that, as the final decree in a suit for partition is final and conclusive of title against all persons whomsoever, the Court should see that the parties prove their titles strictly, that no share is allotted except upon proof of title thereto, and that no such decrees are entered on admissions or of consent.

In *Manchohamy v. Andris*[2] a case decided forty years ago Burnside C.J. emphasized the need for strict proof of title—"It must be remembered," he said, "that a judgment in a partition suit is *res judicata* against the whole world and not, like an ordinary judgment, only *res judicata* among parties and privies. In a partition suit I hold that it is the duty of the Judge to take care that no mere paper title prevails so as to make it good title against all the world, by reason of a partition decree, and even if the defendants had contended themselves with admitting the plaintiff's title, that would not have been enough to entitle her to a decree". While Lawrie J. added "I agree cordially that in partition suits there should be careful investigation and clear proof of the titles of the parties who are decreed entitled to shares of the land".

The "investigation into the title" which de Sampayo J. considers an essential requirement compliance with which is one of the conditions upon which a decree in a partition case is to be accorded the effect of a judgment *in rem* is an investigation made by a Court with the object of determining whether the title of the parties claiming to be the owners of land has been strictly proved.

An unbroken succession of judgments of this Court has followed the case of *Manchohamy v. Andris* (*supra*) and emphasized this requirement of strict proof of title. There is also a long succession of cases which have established the proposition that it is open to a party against whom a decree obtained in a proceeding under the Partition Ordinance is pleaded to show that it is not a decree "given as hereinbefore provided" and has not therefore the conclusive effect given to such decrees by section 9—see *Fernando v. Shewakram*[3], *Dias v. Carlinahamy*[4], *Ukku Banda v. Kiri Banda*[5] and lastly *Gooneratne v. Bishop of Colombo*[6] where most of the cases were reviewed and the decision of the Court was that a decree which proceeded upon consent was not a decree to which the conclusive effect of section 9 can be given.

In D. C. 46,980 there certainly was no investigation of the nature contemplated by the judgments to which reference has been made, save for the production of the document referred to which proves nothing beyond the circumstance that the donor claiming to be the owner of the premises purported in 1871 to convey them to the donee. There was no evidence at all. There were admissions and agreements in respect of the

[1] *4 C. W. R. 406.*
[2] *9 S. C. C. 64.*
[3] *(1917) 20 N. L. R. 27.*
[4] *(1919) 21 N. L. R. 112.*
[5] *4 C. W. R. 39.*
[6] *(1931) 32 N. L. R. 337.*

rights of the parties *inter se,* but there was no evidence that they or any of them were entitled to these premises or to any shares thereof at the dates material to the action.

This case illustrates the need for strict proof of title in the interests of persons who notwithstanding that they have title to the premises have not been made parties or given notice of the action. The parties to the action were related to each other. The premises are situated in one of the busiest parts of the city. They were sold for non-payment of rates and purchased by the Municipal Council on June 21, 1916. Some at least of these persons must have been aware of this sale. In November, 1916, about five months after the sale this action was instituted for the partition of the premises. Throughout the proceedings in that case no mention whatever was made of the purchase by the Municipal Council and a decree was obtained which it is claimed completely extinguished the Council's title. There can be no doubt that all knowledge of the title of the Municipal Council was withheld from the Court and a decree obtained which the Court would not otherwise have entered.

The decree in 46,980 is not in my judgment a decree within the meaning and contemplation of section 9 of the Partition Ordinance and does not therefore affect the title of persons who were not parties to that action. The title vested in the Municipal Council by virtue of the vesting orders of January 28, 1919, must therefore prevail unless the plaintiffs can by proof of ten years' adverse possession claim the benefit of section 3 of the Prescription Ordinance.

In the District Judge's view of the decree in 46,980 and its effect there was no need to consider whether the plaintiffs or either of them has acquired a prescriptive title, and he has not done so. It is argued to us in appeal that by reason of adverse possession by Muheeth the second plaintiff on behalf of his wife the first plaintiff since January 28, 1919, and until ouster on November 1, 1929, prescriptive title has accrued to the first plaintiff.

Muheeth married the first plaintiff in 1918. At that time the premises were in the occupation of tenants of Canapathy Iyer to whom Rahimath Umma had granted a lease for 3 years dated March 7, 1916. The premises continued thereafter to be similarly occupied under leases granted by Muheeth and not by his wife the first plaintiff. Muheeth says from the time of his marriage his mother-in-law Rahimath Umma permitted him to take the rents from the lessee and that thereafter he leased the premises and took the rent.

Muheeth claims the benefit of the occupation of these premises by the tenants of the lessees and there undoubtedly is evidence of possession by him for a few months over the prescriptive period of 10 years.

But was the possession adverse to the Municipal Council and was it uninterrupted.

Whenever property is put up for sale for non-payment of rates and in the absence of bidders the Municipal Council buys the property, the evidence shows that the main purpose of the Council is to compel payment of the rates. It is the practice of the Council in such cases to transfer

the premises to the person who was the previous owner thereof on payment of all arrears of rates and the costs and expenses of the sale and of the transfer. The Council permits the previous owner to remain in possession of the premises upon the understanding that it is not to prejudice the title of the Council—the property during such time is for purposes connected with the recovery of rates treated as if it were the property of the former owner. Possession upon such an understanding is permissive and not adverse. On August 11, 1919, shortly after the decree in 46,980 Rahimath Umma's proctor wrote to the Council requesting information as to the amount of the assessment tax due in respect of these and certain other premises up to that date. By the letter 1D17 of August 19, 1919, he was informed that the amount due was Rs. 4,848.38, the writer adding that he would be glad to know what arrangements it is proposed to make to have the matter settled. Mr. Abdul Cader then wrote 1D18, dated October 4, 1919, forwarding an order of payment issued by the District Court for Rs. 2,319.65 which he tendered in payment of the rates due in respect of the premises with which we are here concerned. The reply to this was the letter 1D19 by which he was informed as follows:—

"This money is accepted on the understanding that the arrears will be paid in full including all amounts that would have been due to the Council according to law, if the property had not been seized and sold by the Council, as well as any costs and expenses that may have been incurred during the period of the Council's ownership, and that, thereafter, the previous owner shall apply to the Council to take the necessary steps to have the property revested in him.

"This receipt is granted without prejudice to the title of the Colombo Municipal Council, and the property will remain absolutely vested in the Council, unless and until the property has been revested in the previous owner by cancellation of purchase".

Muheeth says in his evidence that he knew that Mr. Abdul Cader had sent an order of payment for Rs. 2,319.65 to the Council. "That" he says "was done in connection with the negotiations which Mr. Cader was carrying on in respect of these premises with the Municipality. I did not know that the property was vested in the Council at that time. I knew that it had been sold at the instance of the Council but I did not know that it had been vested in the Council. I came to know that very shortly afterwards". He admitted later that he knew the premises had been purchased by the Council.

Mr. Abdul Cader, the agent of Rahimath Umma, had full knowledge of the position of the Council and its title and that the payment he made was accepted on the understanding set out in the letter 1D19. And Muheeth, her son-in-law, was aware of the negotiations being carried on by Mr. Abdul Cader and was doubtless aware also that the premises had been sold and vested in the Council. With the knowledge they thus had of the sale and purchase by the Council the sale under the decree was carried through and the certificate of sale obtained on June 7, 1920. It appears from the letter of the Financial Assistant to the Chairman of

the Council 1D20 of January 8, 1921, that Mr. Abdul Cader had an interview with him in regard to these and other properties on behalf of his clients.

The letters 1D1 of February 7, 1922, and 1D2 of August 25, 1922, show that the second plaintiff Muheeth was then in direct correspondence with the Council, whose letter 1D3 of September 6, 1922, is an intimation to him of the fact that the premises were vested in the Council coupled with a threat that unless a remittance in settlement was received without further delay the Council will proceed to collect the rents. On November 20, 1922, a further letter was written to Muheeth informing him that the Council declined to waive warrant costs,. refusing further time for payment of rates long overdue and intimating that steps would be taken to collect rents on behalf of the Council. As a matter of fact the Council did proceed to collect rents. This is an act which the Council could only do by right of its ownership of the premises. Muheeth by his letter of December 7, 1922, (1D4) wrote forwarding a cheque and asking the Council for " a retransfer of the property ". He proceeded to " put " his case for a waiver of warrant costs referred to the Council's notice to the tenants to pay rent to the Council from January 1, and asked that the Council's officers be instructed to cancel the notice. Far from setting up a title adverse to the Council and objecting to this trespass upon his righ, Muheeth asks for a " retransfer of the above property ", thus acknowledging that the title was in the Council and asking that the Council's officers be directed to withdraw the notices served on the tenants.

The Council's reply 1D6 of December 14, 1922, informed him that the notices were withdrawn, that a sum of Rs. 135.15 in excess of the amount due as rates had been collected and that the excess would be retained as a deposit against Messrs. Julius & Creasy's fees for report on title. Muheeth was requested to forward title deeds and extracts of encumbrances to enable the sanction of the Council to be obtained for the retransfer. Muheeth replied by his letter 1D7 of December 19, 1922, again stating that the officers of Council had not informed the tenants that the notices had been withdrawn and asking that these be withdrawn. He again asked for a refund of the Rs. 246.31 collected by the Council and undertook that " the remaining taxes, fees, &c., will be paid by him ".

Muheeth was fully alive to the claim of title by the Council. He acknowledged it by asking for a retransfer. He was aware of the assertion of the Council's rights by the Council, but at no time set up a claim of title in himself. He appears thereafter to have paid the rates regularly for some time. On October 18, 1926, the Council by its letter of that date 1D8 informed him that it had decided that " if a retransfer of the above property in favour of the person who would have been the owner but for its being vested in the Council is not obtained within six months from date hereof, steps will be taken thereafter to sell the same outright ". He was accordingly requested to furnish title deeds and extracts of encumbrances so as to permit of the retransfer being executed within the time specified. On March 19, 1927, Muheeth wrote with reference

to these premises inquiring what the charges were for the reconveyance of the premises "in one block" in his favour and stating that the title deeds consist of (1) a certificate of sale granted by the District Court of Colombo in a partition case in favour of his mother-in-law and (2) a deed of transfer by her in favour of his wife.

He never even then gave any indication that he claimed to have a superior title or that he proposed to or was holding adversely. On the contrary the letter and the rest of the correspondence show that he fully acknowledged the title of the Council.

The Council by its letter 1D10 requested a remittance of Rs. 42 with his title deeds, &c., for report on title on the distinct understanding that he would pay any charges on account of retransfer in excess of the amount of the deposit.

Muheeth replied by his letter 1D11 of March 26, 1927, forwarding the sum of Rs. 42 and the title deeds; he added that the extracts of encumbrances had been applied for and would be forwarded and requesting that the boundaries stated in the title deeds be given in the deeds of retransfer.

On November 2, 1927, the Council by its letter 1D12 again intimated to Muheeth its decision to retransfer the properties and stated the condition with which he must comply if he desired a retransfer.

He did not however do what he was asked to do, and on November 23 removed the title deeds which he had sent to the Council.

He did not even then claim that he had a superior title. Thereafter he was seen on three occasions by Inspector Pieris and warned that if he did not obtain a retransfer the premises would be sold. He said on each occasion that he would take steps to obtain a reconveyance, but did nothing. On October 2, 1928, the Council wrote him the letter 1D14 informing him that as he had failed to obtain a retransfer steps would be taken to sell the premises outright. He vouchsafed no reply to this letter and the premises were sold. At the sale the second defendant purchased the premises. When Muheeth heard of the sale he sent a proctor, Mr. de Witt, to ask the Chairman to cancel the sale but it was evidently then too late. Even then he did not set up any superior title. The premises were in due course conveyed to the second defendant by a deed attested by Mr. Abdul Cader who at the time of the sale by the Council was acting for the second defendant, and he was on November 1, 1929, placed in possession of the premises.

Muheeth was fully aware of the sale of these premises by the Council for non-payment of rates. He admitted he knew that it had been purchased by the Council. He was aware also of what he himself refers to as the negotiations being carried on by Mr. Abdul Cader with the Council in connection with these premises on behalf of his mother-in-law Rahimath Umma, who later executed a deed of gift of the premises in favour of his wife, the first plaintiff. Mr. Abdul Cader, Rahimath Umma's proctor, was informed of the conditions on which the Council would accept payment of rates, and there is no reason to doubt that Muheeth was fully aware of all that had taken place. After a time

proctor Abdul Cader appears to have dropped out and Muheeth took up the correspondence with the Council. As far back as December 7, 1922, he asked for a retransfer of the premises thus showing that he acknowledged the superior title of the Council and fully realized his position. When the Council collected the rents from the persons in occupation, his conduct was not that of a person who was holding adversely. Indeed, right up to the sale to the second defendant and even immediately thereafter his conduct is only consistent with that of a person who realized that his possession was permissive, and that the owner of the premises was the Council. There is no evidence of adverse and uninterrupted possession such as is required by section 3 of Ordinance No. 22 of 1871. Throughout the Council had shown him the utmost consideration of which he took the fullest advantage. In the end he capriciously withdrew his title deeds and broke off negotiations with the Council. A payment of approximately Rs. 300 would have vested in him or rather his wife the absolute title which the Council gets by virtue of section 146 of Ordinance No. 6 of 1910. The Council in the end made every effort to pass this title on, but the second plaintiff, though he repeatedly promised to see to the matter, took no steps to obtain a reconveyance. When the Council was driven at last to sell he seems to have realized the gravity of the situation and made efforts to procure a cancellation of the sale. These efforts came too late and failed. The second plaintiff has only himself to thank for the position in which he finds himself.

The judgment of the Court below must be set aside and the plaintiff's action dismissed as against both defendants. The second defendant did not appeal. It was said by counsel on his behalf that certain communications took place between the second defendant and the Council and while these were going on the time for appeal ran out.

The interests of the two defendants are largely identical and the second defendant is in the circumstances entitled to relief which he has been granted by the direction that the action shall be dismissed as against both defendants.

The plaintiffs will pay the first defendant's costs both here and below.

POYSER J.—

There is very little that I can add to my brother Garvin's judgment with which I entirely agree. The principal point in this appeal is whether the decree in D. C. Colombo, No. 46,980, is one for which the conclusive effect of section 9 of the Partition Ordinance may be claimed. The necessity for a full investigation and for strict proof of title have been emphasized in a number of judgments of this Court. In the case of *Peris v. Perera*[1] the following passage occurs in the judgment of Bonser C.J. at page 367:—"Whether or not the judgment be binding on the true owner who is not a party to the suit, it is obvious that the Court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions

[1] *1 N. L. R. 362.*

as merely to be decided on issues raised by and between the parties. The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for unless he makes out his title, his action cannot be maintained : and he must prove his title strictly, as has been frequently pointed out by the Court. Collusion between plaintiffs and defendants is always possible in these cases, and therefore the District Judge should take care that the inquiry is not a perfunctory one. It is only after he is reasonably satisfied that all the owners who can be found are parties to the action, using, if necessary, the power given him by section 18 of the Civil Procedure Code, that he should make his decree declaring that the parties are entitled to certain aliquot shares, and directing a partition or sale, as the case may be . . . . ."

In the case of *Mather v. Thamotheram Pillai*[1] it was held " that 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 chose 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 ".

The principles laid down in these cases have been followed in all subsequently reported cases on this point, the latest of which is *Gooneratne v. Bishop of Colombo*[2].

In D. C. Colombo, No. 46,980, the inquiry was certainly a perfunctory one, and having regard to the fact that the parties to the action were related to one another, the possibility of collusion cannot be excluded, for it is certainly remarkable that apparently none of the parties to this action had any knowledge of the fact that the premises in question had been sold for non-payment of rates before the action was instituted.

In my opinion as there was no proper investigation into the title in this action, the decree does not affect the title of persons who were not parties to the action, and therefore the title vested in the Municipal Council must prevail.

The question whether a prescriptive title has been acquired against the Muncipal Council is exhaustively dealt with by my brother Garvin and I entirely agree with him and for the reasons he has stated that such a title has not been established.

I agree that the appeal should be allowed and the plaintiffs' action dismissed as against both defendants. I also agree with the proposed order as to costs.

Appeal allowed.

[1] *6 N. L. R. 246.*

[2] *32 N. L. R. 337.*