Present : Wood Renton J. and Grenier J.

BABUNONA *et al. v.* CORNELIS APPU.[1]

97—*D. C. Matara*, 4,704.

Land held in trust for another—Partition decree entered in favour of trustee—No action lies to compel trustee to re-convey the land—Action for damages.

Defendant, who held a share of a land in trust for plaintiffs, was allotted the share by decree in a partition suit.

Held, that the plaintiffs were not entitled to compel the defendant to execute a transfer of the land, and that his only remedy was one for damages.

APPEAL from a judgment of the District Judge of Matara (B. J. Dutton, Esq.).

The plaintiffs sued the defendant for a declaration that deed No. 1,423 dated November 23, 1905, for a certain land represented by lot E in plan filed in partition suit No. 3,967 of the District Court of Matara was executed in the defendant's name in trust for the plaintiffs, and prayed that the defendant be ordered to execute a transfer in favour of plaintiffs, or in the alternative to pay damages in Rs. 840.

The defendant pleaded the partition decree in District Court No. 3,967, in which lot E was allotted to him as *res judicata ;* he denied that the purchase by him was for or on behalf of the plaintiffs; he also pleaded prescription.

The following issues, *inter alia*, were framed at the hearing :—

(1) With whose money was the land bought ?

(2) Who built the house on the land ?

[1] *Present :* Hutchinson C.J. and Wood Renton J.

FONSEKA *v.* FONSEKA *et al.*

199—D. C. Colombo, 25,884.

Decision in Babuna *v.* Cornelis Appu *followed.*

Bawa, for plaintiff, appellant.

Van Langenberg (with him *Schneider*), for defendant, appellant.

H. A. Jayewardene (with him *B. F. de Silva*), for added defendant, respondent.

October 18, 1910. HUTCHINSON C.J.—

I think that we must follow the decision of this Court in the case 97—D. C. Matara, No. 4,707 (*S. C. Minutes of July 4, 1910*), that there is not sufficient reason for bringing the question of the correctness of that decision before a Full Court.

WOOD RENTON J.—I agree.

July 4, 1910

Rabunona v. Cornelis Appu

(3) Did defendant hold the land in trust for the plaintiffs ?
(4) Is plaintiffs' case prescribed ?
(5) Are plaintiffs barred by the decision in D. C. No. 3,967 from maintaining this action ?

The learned District Judge decided the issues in favour of the plaintiffs, and entered judgment in their favour with damages and costs.

The defendant appealed.

H. A. Jayewardene, for the appellant.

A. St. V. Jayewardene, for the respondents.

Cur. adv. vult.

July 4, 1910. WOOD RENTON J.—

I entirely agree with the findings of the learned District Judge on the facts, which he has fully stated, and which I do not propose to repeat. The only question is whether, in view of the provisions of section 9 of Ordinance No. 10 of 1863, the plaintiffs-respondents are entitled to a decree ordering the defendant-appellant to execute a conveyance and transfer to them of the land in suit, of which he fraudulently obtained the allotment to himself under the partition decree in D.C., Matara, No. 3,967. Section 9 of Ordinance No. 10 of 1863 provides that a decree for partition shall be "good and conclusive against all persons whomsoever, whatever right or title they have or claim to have " in the property partitioned. And a proviso to the section safeguards the right of any party prejudiced by a partition to recover damages from the parties who have caused him the prejudice. It has been held by the Supreme Court in numerous cases, of which it will suffice to refer to *Nonohamy v. De Silva*,[1] that under section 9 of Ordinance No. 10 of 1863 the partition decree is conclusive against the whole world, and that the only remedy open to a party aggrieved by it is the action of damages preserved by the proviso. Although I have no sympathy whatever with the case of the present appellant, I am unable to distinguish the circumstances of the present case from those of similar cases in which the rule of law that I have just stated was laid down. I would set aside that portion of the decree under appeal in which the defendant-appellant is ordered to execute a conveyance and transfer of the land in question to the plaintiffs-respondents. In their plaint, however, the respondents did claim damages in the alternative, and the learned District Judge (see pages 39 and 40 of the Record) has also ordered that in the event of the failure of the defendant to execute the re-transfer directed he should pay to the plaintiffs (1) the value of the land, namely, Rs. 300 ; (2) Rs. 300 for the house on the land which has been removed ; (3) Rs. 50 damages ; and (4) costs of the action. I would direct judgment to be entered

[1] *(1891) 9 S. C. C. 198.*

in favour of the plaintiffs in terms of the above alternative direction, but without any reference to the alternative as to the execution of a deed of re-transfer, which, in my opinion, the learned District Judge had no right to order. The plaintiffs-respondents should have, as above stated, the costs of the action in the District Court, but as we have modified the decree of that Court in a material particular, I think that there ought to be no costs of this appeal.

GRENIER J.—

The merits are all on the side of the respondents, and if the law permitted my doing so, I should certainly affirm the order of the District Judge that the appellant do execute a transfer to the plaintiffs of the land in question. But section 9 of Ordinance No. 10 of 1863 is so unequivocal in its terms that it is a complete bar to my granting the respondents the first prayer of their plaint. They are however, entitled to damages, and I agree in the order proposed by my brother in that respect as well as in the order as to costs.

Varied.