Present : Middleton J. and Wood Renton J. *July 18, 1910*

GOONESEKERA *et al.* *v.* ADIRIAN *et al.*

81—*D. C. Galle*, 9,679.

Inherent power of Court—Partition action stayed till one defendant's dispute with another defendant be decided by a separate action.

The District Judge, suspecting that the object of this suit was to have the eighth defendant's dispute with the third defendant decided in an action where no stamp fees had to be paid, stayed proceedings and directed the eighth defendant to bring a separate action against the third defendant to set aside a deed alleged by her to be void, as having been granted for the sale of her share during minority.

The Supreme Court set aside the order and directed that the action be proceeded with, as the District Judge was not justified in acting on suspicion.

MIDDLETON J.—" I am not prepared to accede to the proposition that the Court has not any inherent authority to prevent abuse of its process in cases where the Legislature has not distinctly provided for such contingencies. If the eighth defendant had been seeking partition herself against the plaintiff, on the ground that her conveyance to the third defendant was void, the District Court would have been right in refusing to allow a partition action to proceed till she had put herself in the position of an owner in common by obtaining rescission of her alleged void conveyance by a separate action."

THE facts appear in the judgment of Middleton J.

A. St. V. Jayewardene, for the plaintiffs, appellants.—The fact that eighth defendant's title is denied by the third defendant is no reason why the partition proceeding should be stayed. The Full Bench has held that a partition action may be instituted by a person who was never in possession of the land sought to be partitioned, and whose title is totally denied by the defendants. (*Sanchi Appu v. Wijegunasekere.*[1]) If the eighth defendant was plaintiff, the Court could not have refused to proceed with the case on the ground that his title was denied ; how, then, could plaintiff's action be stayed when his title is not disputed ?

There is no provision in the Partition Ordinance which would justify the order of the District Judge. [Wood Renton J.—Has not the Court an inherent power to see that that its process is not abused ?] The powers of the Court are strictly defined by the Courts Ordinance and by other Statutes.

[1] *(1902) 6 N. L. R. 1 ; 3 Br. 176.*

July 18, 1910

Goonesekera v. Adirian

Counsel referred to *In the Matter of the Application of John Ferguson.*[1]

H. A. Jayewardene (with him *Rosairo*), for the respondents.—The inherent power of the Court is very wide ; it is "as wide as the desire of the Court to do justice." The Civil Procedure Code and the Courts Ordinance do not exhaust all the powers of the Court (32 *Cal.* 927, 930).

The District Judge was justified in ordering a stay of proceedings ; the validity of the deed in favour of the third defendant cannot be decided in the partition suit, as the setting aside of the deed might involve questions of damages and compensation which cannot be awarded in a partition suit (*Samarasinghe v. Balahamy*,[2] *Silva v. Silva.*[3])

In a partition suit each party is in the position of a plaintiff. The Judge is satisfied that the eighth defendant and plaintiffs intended to raise the question of the validity of the eighth-defendant's deed by these proceedings. This is not a *bona fide* partition action.

A. St. V. Jayewardene, in reply.—Section 11 of the Partition Ordinance enacts that no dilatory exception should be allowed in partition cases.

Counsel also referred to *Cornelis Appuhamy v. Appuwa* ;[4] *Van Leeuwen* 5, 17, 4.

Cur. adv. vult.

July 18, 1910. MIDDLETON J.—

This was a partition action in which, on the application of the respondents' advocate in the District Court, the learned Judge stayed proceedings, directing the eighth defendant to bring a separate action against the third defendant to set aside a deed alleged by her to be void, as having been granted for the sale of her share during minority.

The District Judge commented on the fact that the same counsel appeared for both first plaintiff and eighth defendant, and that they were sisters, and accepted the theory put forward by counsel for the respondents in the District Court that the object of the partition action was to have the eighth defendant's dispute with the third defendant decided in an action where no stamp fees had to be paid.

It was objected on appeal that the Court had neither statutory nor inherent right to make such an order, and the respondents were not able to show that any statutory right to do so existed, but contended that an inherent right might be inferred to make any order staying proceedings in any case where it was clear that an attempt was being made to abuse the process of the Court.

[1] *(1874) 1 N. L. R. 181.*
[2] *(1902) 5 N. L. R. 379.*
[3] *(1905) 9 N. L. R. 110 ; 3 Bal. 149.*
[4] *(1906) 10 N. L. R. 161.*

I am not prepared to accede to the proposition that the Court has not any inherent authority to prevent abuse of its process in cases where the Legislature has not distinctly provided for such contingencies. At the same time I think it must be established that an abuse has clearly occurred, which calls for such intervention. The present case, I think, is not much more than a matter of strong suspicion. If the eighth defendant had been seeking partition herself against the plaintiff, on the ground that her conveyance to the third defendant was void, I think the District Court would have been clearly right in refusing to allow a partition action to proceed till she had put herself in the position of an owner in common by obtaining a rescission of her alleged void conveyance by a separate action. In *Sanchi Appu v. Wijegunasekere*[1] I held, as a member of the Collective Court, that a person not having an admitted claim could bring a partition action, and that possession was not necessary to found a right to make a claim in partition. But this does not mean that a person who has apparently no legal right can do so. As the case stands at present, the eighth defendant would have apparently no claim to partition as an owner in common, having divested herself of ownership by deed of sale, which stands unrescinded. In my opinion there is not sufficient ground shown here for making the order appealed against, and the plaintiff is, *prima facie*, entitled to partition proceedings.

I would direct that the order be set aside, and that the partition action be allowed to proceed. If it turns out in the course of the trial that the learned Judge's suspicions are justified, he can deal with the case under section 4 of Ordinance No. 10 of 1897. The appeal must be allowed with costs.

WOOD RENTON J.—

I am certainly not prepared, as at present advised, to hold that the District Judge in this case would not have had inherent power to make such an order as that now brought before us on appeal, at least to the extent of postponing the trial of the action for a limited time, if it were clearly shown to be necessary, in order to prevent an abuse of the process of his Court. But I agree with my brother Middleton that at present, however strong one's suspicion may be as to the relationship, for the purpose of this suit, between the first plaintiff-appellant and the eighth defendant, there are not sufficient materials before us to justify the order that has been made. I agree to the order proposed by my brother Middleton.

Appeal allowed.

[1] *(1902) 6 N. L. R. 4.*