

Present: Bertram C.J. and De Sampayo J.

1921.

BANDA v. WERESEKERA *et al.*

100—D. C. (Inty.) Anuradhapura, 72A.

Partition—Land granted by Crown to two persons for themselves and other members of the family—Intervention—Right of added defendants to include in the corpus to be partitioned land not included in the plaint.

The added defendants, who alleged that a grant of land made by the Crown to two persons was not for them exclusively, but for them and the other members of their family, were permitted to intervene in a partition action merely with a view to secure the protection of their equitable rights.

The added defendants wished to include as part of the *corpus* in the partition action a piece of land which the plaintiff had not included.

Held, that as the added defendants were not co-owners, but persons admitted for the protection of their equitable interests, they were not entitled, in the circumstances of this case, to have the land included.

The Court has a discretion in the matter, and it requires a very strong case to induce the Court to permit such an inclusion.

The Court regards with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which the shareholders and the interests are not the same.

THE facts appear from the judgment.

Bawa, K.C. (with him *Batuwantudawe*), for the appellant.

Samarawickreme, for the respondents.

1921. October 25, 1921. BERTRAM C.J.—

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This appeal raises interesting questions relating to the procedure in partition suits. Briefly stated, the facts are these. In 1893 the Crown made a grant of some 65 acres to Nuwarawewa Loku Banda and Nuwarawewa Punchi Banda. It appears from subsequent proceedings that it is alleged that these two persons received the grant, not for themselves absolutely, but in trust for themselves and other members of their family. The grant, in fact, was made in substitution for certain land submerged by the reconstruction of a tank, and it is said that, although the grant was made out in the names of Nuwarawewa Loku Banda and Nuwarawewa Punchi Banda, the grant was intended to be for the benefit of all persons interested in the submerged land. Many years later a partition action was instituted by a person who acquired an interest in the land from Punchi Banda, and in this partition action the other members of the Nuwarawewa family above referred to came forward and claimed to be added as defendants. The case came before this Court, and it was decided that these intervenients were entitled to be added as parties. This was not because they were co-owners, for it had been decided in a previous decision of this Court, *Silva v. Silva*,¹ that the persons who, as owners, are entitled to invoke the assistance of the Court in a partition action are persons in whom a legal estate is vested. They were permitted to intervene with a view to secure the protection of their equitable interests, so that the Court should not make an order which should ignore those interests.

Having secured this position, however, they go further. They wish to include as part of the *corpus* in the partition action a piece of land which the plaintiff has not included, and had in fact expressly excluded. The basis of this claim is that this land formed part of the original grant which, as they say, was made to Loku Banda and Punchi Banda in trust for the members of the family interested in the submerged land. Now, in any case, it is a strong proceeding for an added defendant to invite the Court to enlarge the *corpus* in a partition suit by the inclusion of an excluded portion. It is a still stronger proceeding where the persons asking for such an enlargement are not co-owners, but simply persons admitted for the protection of their equitable interests. I do not say that, even under these circumstances, the Court might not give effect to the prayer of such persons in appropriate cases. Certainly the Court would have a discretion in the matter, but it would require a very strong case to induce a Court so to proceed.

Now, unfortunately, the facts have not been proved before the Court. But the following facts are stated in the pleadings: Firstly, that in the year 1908 Punchi Banda, one of the grantees, sold 2 roods and 32 perches of this land to L. D. Perera. On December 17,

¹ (1906) 9 N. L. R. 114.

1908, L. D. Perera sold this same portion to Krisratne and Jacolyne. On August 8, 1913, Krisratne and Jacolyne sold this same portion to Harmanis Appu, the tenth added defendant, who is the appellant now before the Court. On November 22, 1915, the Crown acquired 20 perches out of this portion from the tenth defendant. It appears, therefore, that if those statements in the pleadings are to be relied upon, this piece of land has been dealt with as a separate piece of land, in a series of transactions from 1908 down to the present time, and there seems no doubt that it is in the occupation of the tenth defendant, and is of considerable value owing to the improvements which have been accomplished upon it. These allegations are, I think, not seriously contested, and it would be a waste of time to refer the matter to the Court below for proof of these statements. I should prefer to say that, in the circumstances of the case as they appear on the pleadings, it would not be appropriate for the Court to allow these added defendants added for the purpose I have explained, to insist on the *corpus* of the suit being enlarged.

I would further point out that there is another difficulty which would arise in the case if such an enlargement were allowed. A separate piece of property would be bought in in which the tenth defendant, in any view of the circumstances, would have certain special rights. There are other difficult questions arising with respect to this separate portion. It appears, from the pleadings again, that Loku Banda, one of the grantees, within a year of the grant, is said to have given a donation of an undivided one-fourth of the land to his widow. Punchi Banda, however, appears to have conveyed the whole of his legal interest in the 2 roods and 32 perches on the assumption that he inherited all his brother's rights. There will, therefore, be not only the case of an exclusive interest claimed in a portion of the land sought to be partitioned, but there will also be contests of a special nature with regard to that portion. I need only refer to the case Mr. Bawa cited to us, *Cooke v. Bandulahamy*,¹ to show that the Court regards with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which the shareholders and the interests are not the same.

In view, therefore, of all the circumstances, I think the learned Judge ought not to have exercised his discretion in the matter by including this separate portion in the partition suit, and I would reverse his order and allow the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.

1921.

BERTRAM
C.J.

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¹ (1904) 4 Tam. 63.