

1932

Present : Garvin S.P.J. and Drieberg J.

CADER v. FERNANDO.

75—76—D. C. Puttalam, 4,169.

Appeal—Power of Civil Court to send an offence for investigation to Police Court—Order not subject to appeal—Civil Procedure Code, s. 835.

Where a Civil Court, in exercise of the powers vested in it under section 835 of the Civil Procedure Code, sends for investigation by a Police Court a charge of an offence disclosed in the course of proceedings before such Court—

Held, that the order was not appealable to the Supreme Court.

A PPEAL from an order of the District Judge of Puttalam.

H. V. Perera, for defendant-appellant in No. 75.

Navaratnam, for intervenient-appellant in No. 76.

Croos Da Brera, for plaintiff-respondent.

November 14, 1932. GARVIN S.P.J.—

Two appeals have been taken from the judgment of the District Judge. The first, numbered 75, is an appeal by the defendant; the second, numbered 76, is by the first added defendant, Simon Fernando. The plaintiff sought in this action the partition of two contiguous lands depicted in plan No. 541 made by S. M. Assen Kudhoos, Licensed Surveyor. The parties are agreed that lots A and B in that plan form one of these lands, and the lot C the other. The title and interests of all the parties proceed from the same source, and the facts proved show that the title of those whom they are agreed were once the owners of these allotments has passed to the plaintiff and the defendant. The plaintiff by his purchases has acquired the interests of those who once owned 1/8 of the land consisting of lots A and B and 1/10 of the land C. The defendant is admitted by the plaintiff to be entitled to 7/8 of lots A and B and 9/10 of lot C.

The position of the first added defendant was that he, the other added defendant Manuel and one Ugo planted the land upon a certain notarial agreement, that Ugo received certain payments by way of compensation and died before the expiry of the term of the agreement, that he and Manuel continued to carry on the work under the contract and received in lieu of the part of the money payable to them under the agreement the lot B of which they claim to have had adverse possession for over ten years.

The defendant supported them in their claim to be the owners of lot B and claimed to have acquired a prescriptive title to lots A and C.

The defendant's claim to have prescribed for a defined portion of the land A and B and lot C fails, for his acquisition, in the year 1925, of the interests of certain of the heirs of Marcellinu, through others of whom the plaintiff claims, is fatal to his contention. He realized the impossibility of maintaining his contention, and, at the trial endeavoured to establish a claim to be assigned the whole of lot C and a part of the rest of the land as and for his share on the ground that he has been in exclusive possession of that lot for a number of years and has improved it by the methods of cultivation employed by him during that period.

The appeal of the defendant is from the direction of the District Judge to the Commissioner that the plaintiff's share should be "given adjacent to" the lands east and south of the corpus consisting of lots A, B, and C in which the plaintiff has interests.

The defendant has improved lot C by better cultivation, but the plaintiff is entitled to 1/10 of that lot and it is impossible to exclude him from a share thereof.

Similarly the plaintiff is entitled to 1/8 of lots A and B and must be allotted a share of the land consisting of those two lots.

I would therefore direct that the plaintiff be allotted a portion of the land C equivalent to 1/10 of that lot and a portion of the land consisting of lots A and B equivalent to 1/8 of the total area of those lots and that in the case of each of such lands the portion to be allotted to the plaintiff be so separated and demarcated as to adjoin the lands to the south and east in which he has interests. The defendant is entitled to ask that in carving out the two portions to be allotted to the plaintiff care should be taken to secure that no part of such portions shall intervene between the remainder of lot C and lots A and B of which he is the owner.

There is nothing in the judgment under appeal which prevents effect being given to those directions and there really was no need for any appeal.

The appeal of the first added defendant must fail. He had to abandon his claim to a share of lot A. The difficulty of establishing his claim to a share of that lot was enhanced by the defection of his fellow planter Manuel, who, at the trial, supported the plaintiff. His main contention is that he was entitled to retain possession of lot A till he was compensated for the plantations made by him.

The District Judge preferred to accept the evidence of the witnesses who say that the planters were fully compensated for the plantations made by them. He rejects the story of an adjustment by which lot A was assigned to the planters as and for and in lieu of the balance of the compensation due and payable to them under the agreement. There is evidence to support the Judge's findings and I cannot undertake to say that he was wrong in accepting that evidence. His judgment on the point must therefore be affirmed.

Both the defendant and the first added defendant complain that the Judge was wrong in causing them to be prosecuted—the latter on a charge of causing false evidence to be fabricated and the former for aiding and

abetting him. He purported to take action under section 835 of the Civil Procedure Code—a section which is seldom resorted to by Judges. We have been invited to say that the District Judge should not have taken the action he did.

The Criminal Procedure Code, section 147, prohibits a Police Court from taking cognizance of offences punishable under section 190 and certain other sections of the Penal Code except with the sanction of the Attorney-General or upon the complaint of a Court. Manifestly it is the policy of the Legislature that no person should be vexed and harassed by prosecution upon any such charges at the instance of any irresponsible person and the provision that such prosecutions should only be entertained when sanctioned by the Attorney-General or upon the complaint of a Court is intended to secure that no such prosecution is lightly embarked upon.

Section 835 of the Civil Procedure Code vests in a Civil Court the power to send for investigation by a Police Court a charge of any of the offences specified therein whenever in the case pending before it there appears to be sufficient ground for doing so.

The Court has in fact initiated proceedings which are now pending in the Police Court. It has done an act which the Legislature has said, it may do if it appears to it that there are sufficient grounds for so acting. But it has not in my judgment made an order which is appealable to this Court. There is therefore no order before us in respect of which we can exercise the powers vested in us as a Court of Appeal.

These appeals must therefore, subject to the directions given earlier as to the manner in which this partition is to be carried out, be dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.
