*Present:* Schneider J. and Maartensz A.J.

MUNESINGHE *v.* JERONIS *et al.*

*148—D. C. (Inty.) Kalutara, 12,847.*

*Partition action—Right of pre-emption—The correct procedure—Ordinance No. 10 of 1863, s. 14.*

Where a partition action involves the question of a right of pre-emption under section 14 of the Ordinance, that right should be exercised before the interlocutory decree for partition or sale is entered.

APPEAL from an order of the District Judge of Kalutara. The facts appear from the judgment.

*Weerasinghe,* for second and third defendants, appellants.

*H. V. Perera,* for plaintiff, respondent.

October 19, 1927. SCHNEIDER J.—

We affirm the judgment of the Court below and dismiss the appeal with costs. We are of opinion that the learned District Judge was right in holding that the plaintiff was the sole owner, and also right in his holding as regards the plantations and houses on the land. But we are not satisfied with the decree that has been entered. It seems to us defective in two respects. First as regards costs it directs that the second and third defendants should pay the plaintiff's costs. That would mean costs of the whole action, which was not what the District Judge ordered. His order was that the second and third defendants should pay to the plaintiff the costs of the contest. The District Judge has omitted to make any order in regard to the costs of the action, apart from the costs of the contest. He should have ordered that those costs should be borne *pro rata* by the parties according to the value of their interests. Next, the decree does not seem to us to be quite in conformity with the provisions of the Partition Ordinance. It declares that the land is sold. It appears to have been framed in terms of the prayer of the plaint, but that prayer does not seem to be quite correct. Section 14 places a person " having a permanent right of property in any of the trees growing upon any land and no interest in the ownership of the soil " in the same position as a person having an undivided interest in the land itself so as to entitle him to compel a partition or sale of the land and all thereon in the manner provided by the Ordinance. It also gives the owner of the soil a right of pre-emption upon

a just appraisement by the Commissioner " of the value of the planters' right and interest " and houses built thereon by him. It seems to us that if an action under the Ordinance involves the question of the right of pre-emption under section 14, that the right should be exercised before the interlocutory decree for partition or sale of the land is entered. In *Natchia v. Baba Singho*[1] it was held that an order for pre-emption is not a judgment *in rem* such as is contemplated in section 9 of the Ordinance, because that section speaks of a decree for partition or sale given as " hereinbefore provided ". The word " hereinbefore " precludes a decree or order under section 14 being vested with the character of a decree under section 9. Lascelles C.J. said in that case " It is clear to me that an order under this section is in no sense of the word a partition, and it is equally clear that it does not amount to a decree for the sale of the *corpus* of the property under the sections which precede section 9. " If the soil owner is unable to exercise his right of pre-emption, or does not exercise that right, the land with everything on it would then have to be sold or partitioned in terms of the provisions on that behalf in sections 5 and 8 of the Ordinance.

As there had been a full trial of the title to the land in this case it appears to us that the correct procedure is the following: The Court should enter an order declaring the rights of the parties in regard to the lands, plantations, and buildings, and direct a sale of the land, plantations, and buildings in the event of the plaintiff failing to exercise his right of pre-emption. Upon this order, first a Commission should issue for a just appraisement of the value of the planters' interests and of the buildings. Upon the Commissioner making a return in regard to this Commission, the parties should be notified of the return having been received and should be heard in support of any objection they may have to the appraisement. It is after such objection, if any, has been disposed of that the interlocutory decree should be entered for the purpose of a sale in conformity with the provisions of section 8. In that interlocutory decree should be embodied an order as to costs; that the costs of the contest should be paid to the plaintiff by the second and third defendants, and the other costs be borne by the parties *pro rata*. It was pointed out in *Obeyesekera v. Karonchihamy*[2] that the objection to a pre-emption under section 14 should be made before the sale. We therefore formally set aside the decree which has been entered, and remit the case for the procedure indicated in this order to be followed.

MAARTENSZ A. J.—I agree.

*Set aside.*

[1] *(1906) 1 Matara C. 40.*

[2] *(1896) 7 Tambyah 44.*