1942 *Present :* **Hearne, Keuneman and de Kretser JJ.**

KUMARIHAMY *v.* WEERAGAMA *et al.*

20—D. C. (Inty.) Kandy, 310.

Partition action—Compromise affecting rights of parties inter se—Binding on parties to agreement.

By Hearne and de Kretser JJ. (Keuneman J. dissenting).

An agreement, which is entered into in a partition action, affecting only the rights of parties *inter se*, and which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance.

CASE referred to a Bench of three Judges ; the facts appear from the judgment of de Kretser J.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for the first defendant, appellant.—The question for decision is whether in a partition action the parties can, before the stage of investigation into title by Court is reached, enter into a compromise which is to take effect after the Court has ascertained the co-owners and their respective shares. The solution to the problem may be obtained when one considers the nature of a partition action.

There is no positive rule of law imposing a duty on Court to make an investigation into title and to prevent collusion between parties. The duty is only *derived* from the rule that decrees for partition are conclusive against the world. The duty is to protect the interests of parties who are not before Court, *i.e.*, to see whether the parties appearing are entitled to the whole property as against the rest of the world. In the present case there is a very clear appreciation of the duty of Court. A partition action is firstly an action to partition a land owned in common, and, secondly, it decides certain disputes between the parties who are before Court. Parties are entitled to settle their own special differences. Such a settlement is contrary neither to the Partition Ordinance nor to any other provision of law. The cases of *Nagamuttu v. Ponnampalam et al.*[1], and *Sanchi Appu v. Marthelis et al.*[2] are helpful.

There is nothing in the Partition Ordinance to prevent the settlement of a dispute between the parties who are before Court. Section 4 speaks of "examination" of title, and not of determination of title. All that is necessary is that the rights of third parties are not prejudiced. Section 408 of the Civil Procedure Code is available in partition suits. The agreement in the present case is binding on the parties, and it is not open to any of them to resile from it.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse*), for the plaintiff, respondent.—The Court must in all cases of partition carefully investigate all titles, and must refuse to make title on admissions—*Fernando et al. v. Mohamadu Saibo et al.*[3] ; *Mather v. Thamotheram Pillai*[4] ; *Umma Sheefa v. Colombo Municipal Council*[5] ; *Golagoda v. Mohideen*[6].. The jurisdiction of the Court to investigate title cannot be ousted by compromise of parties.

[1] *(1903) 4 Tamb. 29.*
[2] *(1914) 17 N. L. R. 297.*
[3] *(1899) 3 N. L. R. 321.*
[4] *(1903) 6 N. L. R. 246.*
[5] *(1934) 36 N. L. R. 38.*
[6] *(1937) 40 N. L. R. 92 at 94.*

[DE KRETSER J. referred to *Assana Marikar v. Punchimahatmaya*[1]].

That case is referred to in *Jayawardene on Partition* at p. 310. The practical effect of an arrangement like the one in the present case would be to destroy the principles laid down by the Supreme Court in various cases.

A compromise entered into before any evidence is led is on a different footing from a compromise made after the evidence has been led. If the former is permitted, Court may settle questions of title too summarily. Further, parties may act in collusion, and rights of third parties may be prejudicially affected. See *Jayawardene on Partition*, pp. 75, 245-255; *Peris et al. v. Perera et al.*[2]; *Abdul Hamidu v. Perera*[3]; *Godage v. Dias*[4].

H. V. Perera, K.C., replied.

Cur. adv. vult.

May 8, 1942. DE KRETSER J.—

The facts leading up to this appeal are as follows:—Plaintiff brought this action to have a land called Welgalahena partitioned on the footing that two-thirds of it belonged to him and the remaining one-third to the two defendants, the first of whom is a minor. He filed a pedigree indicating how title to the land had devolved and according to it one Loku Kumarihamy was entitled to one-third and had transferred that share to plaintiff.

The second defendant alleged that Loku Kumarihamy had previously transferred that one-third to her and plaintiff's position thereupon was that the earlier deed had been revoked. Before evidence was taken the contesting parties, in order to avoid prolonged litigation, came to terms and intimated to the Court that in view of this consideration they were willing to make a compromise after the Court had been satisfied as to proof of the title.

A minor being interested, the Court considered the proposed compromise and decided that it was beneficial to the minor and sanctioned it.

On a subsequent date the plaintiff wished to resile from the compromise and defendants objected to his doing so. The Court held that the compromise would be binding in any other type of case but that in a partition case the Court had the duty of investigating the title of each of the parties and could not ignore that duty and that it would be obligatory on the Court to investigate and allot to each of the contestants what that party was entitled to.

What we have to decide now is a pure question of law, viz., whether an agreement, entered into in a partition case affecting only the rights of the parties *inter se* and expressly made subject to the Court being satisfied that all the parties entitled to interests in the land are before it and are solely entitled to it, is obnoxious to the Partition Ordinance.

A number of decisions of this Court have emphasized the duty of the Court to investigate title fully and not treat a partition action as an action *inter partes*. The emphasis is always on the necessity to investigate title.

[1] *(1920) 8 C. W. R. 152.*
[2] *(1896) 1 N. L. R. 362 at 367.*
[3] *(1925) 26 N. L. R. 433.*
[4] *(1928) 30 N. L. R. 100.*

To use the language of Layard C.J. in *Mather v. Thamotheram Pillai*[1], the judge "must satisfy himself by personal inquiry that the plaintiff has made out a title to the land sought to be partitioned and that the parties before the Court are solely entitled to the land". That position is clear beyond any doubt. A judge cannot be too careful in his investigation and nothing can relieve him of that duty. He has every right to call for evidence even after parties have closed their cases—*Thayalnayagam v. Kathiresapillai*[2], and it would be wise on his part to call for an encumbrance sheet and see what transactions have affected the subject-matter of the action. It is freely conceded that any agreement which sought to relieve him of his duty would be obnoxious to the Partition Ordinance and might, if allowed by him, convert the action into what de Sampayo J. called a "special" action—*Aseena Marikar v. Punchi Mahatmaya*[3].

But the question is not whether he should investigate title and be assured that the parties solely entitled to the land are before him, but whether once that stage is reached he should object to the parties so entitled adjusting any differences there may be among themselves.

No case has been cited to us which has disapproved of parties settling their rights *inter se*. No provision in the Partition Ordinance refers to such a contingency and therefore there is none prohibiting it. It has long been established that the Civil Procedure Code governs such actions in the absence of express provision, and the Code recognizes compromises.

While there is no case disapproving, there are *dicta* to the effect that parties may settle questions which arise *inter se*, e.g., *Nagamuttu v. Ponnampalam*[4] and *Sanchi Appu v. Marthelis et al*[5].

It is sought to distinguish these cases by the argument that they refer to agreements made after the Court had decided the rights of the parties. I see no difference in principle between agreements at such a stage and agreements which are to take effect only when such a stage is reached.

Assena Marikar v. Punchi Mahatmaya (*supra*) is a peculiar case. There too a contest had been settled by compromise and no objection was taken to it by this Court. In that case no further inquiry seems to have been held and the decree may not therefore have had the effect of a final decree under the Partition Ordinance though it did effect a partition. The Court's observation about it being converted into a "special" action was wedged in between other observations.

As I understood Counsel for respondent, the main reasons urged against a compromise were—

(1) It is possible after adjudication, but not at an earlier stage, because the former does not oust the jurisdiction of the Court and the latter does; the latter is against public policy because the result would be laxity on the part of a trial judge.
(2) Undisclosed parties may suffer, e.g., a person having a prescriptive title or a mortgagee.

With regard to the first objection, there is no question of ousting the jurisdiction of the Court, and one must assume that trial judges will

[1] *(1903) 6 N. L. R. 246.*
[2] *5 Bal. 10.*
[3] *8 C. W. R. 152.*
[4] *4 Tamb. 29.*
[5] *17 N. L. R. 297.*

perform their duty. It cannot be too strongly emphasized that they should fully investigate the title and make sure the land belongs solely to the parties before it. A compromise ought to make them even more watchful, if such a thing is possible.

With regard to the second point, when the judge finds that the rights of third parties are affected, then he cannot give effect to a compromise based on the assumption that only the parties before him were entitled to rights in the land or had interests therein. Possession is necessarily one of the points he must inquire into. For a person in possession not to have notice of the preliminary and subsequent surveys and of all other proceedings, and for all persons parties to the action and living in the neighbourhood of the land to engage in a conspiracy of silence would be so extraordinary as hardly to deserve a special rule of law to provide for such a contingency.

The position of a mortgagee is only slightly different. The plaintiff is required to disclose all mortgages, mortgagees being coupled with owners in section 2 of the Ordinance. In section 4 the Court is enjoined not only to examine the titles of all the parties and to ascertain their shares but also their "interests". In *Girigoris Appu v. Meedin*[1], it was indicated that persons claiming *any* interests should be joined, and that Courts should follow the practice in equity and direct inquiries to be made. There is no provision of the law and no decision that a mortgagee cannot be a party, and a vigilant mortgagee will always intervene to protect his rights. Unlike other persons who *must* intervene or be bound by the decree, whatever claims they may have had, mortgagees and lessees are given a special position by sections 12 and 13, and special provision is made as to what rights they will have in case they are interested in undivided shares and a partition is ordered. If, therefore, a mortgagee is vigilant and if a judge does his duty, as we must presume he would, the existence of any mortgage ought to be discovered. In spite of such vigilance parties may be adversely affected, but that is not peculiar to mortgagees and the Partition Ordinance contemplates the possibility of such a thing happening and provides for a claim for damages.

Too much emphasis has been laid during the argument on the possibility of judges being careless and of parties being knaves. When considering a question of law we cannot assume that the law contemplates such situations.

It seems to me that we have travelled far enough in making partition actions elaborate and costly, and while that could not be helped when emphasis was laid on the need for full investigation of the title of the parties to the land, it is unnecessary to make partition proceedings needlessly burdensome and to force contention unless we have some clear provision which takes away the right of parties to settle their disputes *inter se*.

In this case the parties informed the Court of the reasons for the compromise and expressly drew the Judge's attention to his own obligations in the matter. A minor was affected and the Judge considered

[1] *4 Tamb. 105.*

the compromise from the point of view of the minor and found it advantageous to the minor and then, after some time had elapsed, it was not the minor's guardian who changed his mind but the plaintiff!

Section 500 of the Code says that an agreement entered without the approval of the Court shall be voidable against all parties other than the minor. Here it is sought to make the agreement void as against the minor.

We are not concerned at this stage with what may happen next. The parties may treat this as a special action; the judge may not do his duty; third parties may come in. The effect of such developments cannot be foreseen and provided for. What we now decide is that, when the Court is invited to investigate title and, having done so and having been satisfied that the parties before it alone have interests in the land to be partitioned, thereafter to allow the parties to compromise their dispute, there is nothing to prevent the Court allowing this to be done, and once it is allowed the parties are bound by their agreement.

The appeal is allowed with costs in both Courts.

HEARNE J.—I agree.

KEUNEMAN J.—I regret I do not share the opinion expressed by my brother de Kretser. In this case the compromise is not based on one party abandoning opposition, but is an agreement to divide among the parties concerned a share of the land, the whole of which should go on the title to one party or the other. I think the District Judge was entitled in the partition proceeding to refuse to give effect to this conditional compromise. But as my two brothers are agreed, the appeal will have to be allowed.

Appeal allowed.