Present : Fisher C.J. and Drieberg J.

1929.

ARATCHILLAGEY APPUHAMY *v.* TIKIRI NAIDE *et al.*

187—D. C. (Inty.) Kegalla, 1,312.

Partition—Order for partition—Scheme of partition approved—No judgment—Sale of undivided share—Validity—Ordinance No. 10 of 1863, ss. 6 and 17.

In a partition action the Court confirmed the scheme of partition proposed by the Commissioner but did not enter judgment as required by section 6 of the Ordinance.

Twenty years after, one of the parties sold an undivided share to the plaintiff.

Held, the sale to the plaintiff was obnoxious to section 17 of the Partition Ordinance and that the plaintiff did not obtain a valid title.

Ibrahim v. Rahim Beebee[1] distinguished.

THIS was an action for declaration of title to two lots of a land called Kosgahaliyaddekumbura. The land was the subject of a partition action in D. C. Kegalla, 1,312, and on March 6, 1903, the Court confirmed a scheme of partition proposed by the Commissioner which allotted the lots in question to two persons, Ukku Etana and Appu Nachira, who were entitled each to $\frac{1}{8}$ of the land. The Court did not enter judgment as provided by section 6 of the Partition Ordinance. Ukku Etana died and her share devolved on Appu Nachira, who thus became entitled to $\frac{1}{8}$ share. Appu Nachira sold this share to Dingiri Naide, who by deed of October 19, 1925, registered on November 2, 1925, sold it to the plaintiff. Plaintiff claimed to be entitled to the divided lots, which represented the undivided interests of Ukku Etana and Appu Nachira. On December 21, 1925, Appu Nachira sold the divided lots to the first and second defendants.

The learned District Judge held that the entering up of the decree was a ministerial act, and that the sale to plaintiff was good.

R. L. Pereira, for second and third defendants, appellant.

Hayley, K.C., and *Koch*, for plaintiffs, respondent.

January 17, 1929. DRIEBERG J.—

The plaintiff-respondent brought this action for a declaration of title to the lots 2 and 3 in plan 4,285 filed in D. C. Kegalla, 1,312. Ukku Etana and Appu Nachira were each entitled to an undivided $\frac{1}{8}$ of the lands, of which lots 2 and 3 are a part. This land was the

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subject of a partition action (D. C. Kegalla, 1,312), and on March 6, 1903, the Court confirmed a partition proposed by the Commissioner, which it was alleged allotted lot 2 to Ukku Etana and lot 3 to Appu Nachira. The Court, however, did not enter judgment as required by section 6 of the Ordinance. The statement of the title of the parties as it appears in the pleadings—for the deeds relied on were not put in evidence—is as follows :—The respondent says that Ukku Etana died and that her $\frac{1}{8}$ share devolved on Appu Nachira, who thus became entitled to an undivided $\frac{1}{3}$ share. Appu Nachira sold this share by a deed of October 6, 1925, registered on October 16, 1925, to Dingiri Naide, who by the deed of October 19, 1925, registered on November 2, 1925, sold it to the respondent, who pleads that at the time of his purchase he was not aware of Ukku Etana's rights to lots 2 and 3 resulting from the partition action. He claims to be entitled on these deeds to the divided lots which represent the undivided interest of Ukku Etana and Punchi Kira. The respondent alleged that the first defendant, who is not a party to this appeal, fraudulenty induced Appu Nachira to convey the lots 2 and 3 to the second and third defendants, who are the present appellants, by deed 39,702 of December 19, 1925. The appellants rely on this deed, which was registered on December 21, 1925.

The appellants say that their deed is for lots 1 and 2 of the portion marked B in the plan 4,285; respondent's claim referred to the shares of Ukku Ettana and Appu Nachchira in Kosgahaliaddecumbure, which is lot B, of which lot 1 was allotted to Appu Nachira and lot 2 to Ukku Etana. Mr. Koch, for the respondent, accepts this as correct, and the action must be regarded as having been brought for lots 1 and 2 of the portion B. As we have decided that the respondent's action should be dismissed, it is not necessary to correct this error in the pleadings, but the decree of this Court will state that the dismissal of the action is with reference to these blocks.

At the trial the issues agreed on were : (1) Is the case No. 1,312, D. C. Kegalla, still pending ? (2) If so, are the deeds pleaded by plaintiff void by reason of thier having been executed during the pendency of the said partition case ? The Judge recorded that he was asked to note that all the parties rested their cases on these two issues alone.

After argument the learned District Judge held that section 17 of the Partition Ordinance referred to cases where the Court refused to allow a partition, but that in this case the Court granted a partition and that the mere entering up of the decree was a ministerial act which might be done at any time. He came to this conclusion on the ruling on *Ibrahim v. Rahim Beebee* [1]; he therefore entered judgment for the respondent for the land with costs and

[1] *(1916) 19 N. L. R. 293 ; 3 C. W. R. 350.*

damages against the appellants and the first defendant, it having been agreed the judgment should be so entered if plaintiff succeeded on issues. The second and third defendants have appealed. In my opinion the issues framed are not decisive, but we are not concerned with this, for Counsel at the appeal were agreed that the decision should be limited to the issue, whether the conveyance relied on by Appu Nachira were executed during the pendency of D. C. 1,312, and this, it was agreed, depended on the question whether the respondent could claim for the order of March 6, 1903, the same effect as a judgment entered in pursuance of it.

It appears to me that there are good reasons for holding that it cannot have this effect. The title acquired under the judgment alloting divided shares to parties is an indefeasible one; it terminates the old title of common ownership and creats a new title which has to be registered as such under section 27 of the Land Registration Ordinance, No. 14 of 1891, and which the Court by its judgement confers on the parties. It is in the nature of a conveyance. In this case the Court did no more than approve of the scheme of partition submitted by the Commissioner. To extend to this ordsr the effect of a judgment *in rem* assigning divided lots to the parties, with all the important results which follow on such a judgment, will be to relax, to a degree, dangerous and confusing, the provisions of the Ordinance.

In *Menika v. Mudianse*[1] the Commissioner's scheme of partition was submitted and the Judge notes that no cause was shown against it, though he did not formally confirm it. Wood Renton C.J. regarded the District Judge as having adopted the scheme, but as no judgment had been entered he regarded the order as not having the effect of the judgment and allowed parties to intervene.

In *Ibrahim v. Rahim Beebee* (*supra*), which was relied on by the learned District Judge, the Court found that the property should be sold, and a formal decree of sale under section 4 was drawn up, and in pursuance of it a commission for sale under section 8 issued and a day was fixed for the sale. A few days before this date parties sought to intervene on the ground that there was no decree for sale. Wood Renton C.J. held that the decree for sale could not be deprived of its effect because the Judge, probably through inadvertence, had omitted to sign it. He directed that the Judge should sign the decree *nunc pro tunc*, and he refused the application for intervention. In this case, not only is there no judgment of partition but it is open to doubt whether the matter ever got beyond the stage of approval of the Commissioner's scheme, for we find parties after the lapse of twenty years dealing with undivided shares as if no partition had been made. I would therefore allow the appeal and set aside the decree of the District Court against the first defendant

[1] *(1917) 4 C. W. R. 429.*

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as well, though he has not appealed. It is not possible to dismiss the plaintiff's action against respondent and let it stand against the first defendant.

It was agreed at the trial that if the respondent failed on the issues framed his action should be dismissed with costs payable to the first, second, and third defendants. Let a decree be entered accordingly dismissing plaintiff's claim to lots 1 and 2 of the portion B appearing in the plan 4,285 filed in D. C. Kegalla, 1,312. The respondent will pay the appellants the costs of the appeal.

FISHER C.J.—I agree.

Appeal allowed.