

1928.

Present: Garvin and Dalton J.J.

VANGADASALEM *v.* CHETTIYAR.

28—*D. C. (Inty.) Chilaw, 7,176.*

*Writ of possession—Declaration of title to land—No prayer for ejectment—
Civil Procedure Code, s. 217.*

Where a person obtained a declaration of title to land without an order for ejectment,—

Held, that he was not entitled to a writ of delivery of possession.

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

Croos Da Brera, for 5th defendant, appellant.

May 8, 1928. GARVIN J.—

The point for decision upon this appeal is whether the District Judge was right in ordering a writ of possession on the application of the plaintiff, who had obtained a decree declaring his title to certain

¹ (1897) 6 *Tam.* 91.

³ (1896) 23 *Cal.* 896.

² (1885) 6 *Tam.* 60.

⁴ (1914) 42 *Cal.* 708.

⁵ (1918) 42 *D. L. R.* 120 (*Can.*), 15 *Empire Dig.* 709.

allotments of land. The plaintiff, in whose absence and without whose knowledge a final decree for partition affecting the land of which he claimed to be the owner was entered, brought this action praying—

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- (1) That the decree in the partition action and certain deeds executed thereafter and on the footing of that decree be set aside.
- (2) That the defendants be condemned to pay him a sum of Rs. 1,000 as damages.
- (3) For costs.
- (4) Alternatively, if the decree could not be set aside, that the 1st, 2nd, 3rd, and 4th defendants be condemned to pay him a sum of Rs. 16,000 as damages, with legal interest thereon, and costs.

The plaintiff failed to get the relief he claimed in the Court below, but on appeal to this Court it was held that the decree of which he complained had not the conclusive effect of a decree for partition duly entered under the provisions of Ordinance No. 10 of 1863, and in accordance with that decision decree was entered declaring him entitled to the land he claimed; no damages were proved, and none were awarded.

There was no prayer for ejectment, and there is no express direction as to ejectment in the decree. It was successfully contended in the Court below that a right to possession is implied in a decree declaring a right to property. The decree entered in this case was accordingly treated as a decree granting the plaintiff a declaration of title and ejectment, and a writ of possession was allowed.

From this order the 5th defendant has appealed.

Since the decree does not in terms direct that the defendants be ejected it only remains to examine the proposition that a decree declaring a right to property is impliedly a decree to yield up possession as well.

The learned District Judge refers to the cases of *Hadjar v. Mohamadu*¹ and *Fernando v. Cathiravelu*² as establishing the proposition that a final decree for partition impliedly gives to each of the parties to whom a share in severalty has been allotted a right to be placed in possession thereof, and thinks "that in a similar manner an ordinary vindicatory decree declaring a right to property implies a right to possession also."

The case of *Fernando v. Cathiravelu* (*supra*) is not an authority for the first of these propositions, nor does it approve or uphold the judgment in *Hadjar v. Mohamadu* (*supra*). The latter case is the only authority on the point. Without expressing any opinion as to

¹ 4 C. W. R. 371.

² 28 N. L. R. 492.

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whether or not *Hadjar v. Mohamadu (supra)* was rightly decided, it is a ruling which clearly cannot be extended to every decree declaring a right to property, and must be confined to final decrees for partition, since the ruling is founded upon a consideration of the provisions of the Ordinance and its objects and purposes.

In the classification contained in section 217 decrees which declare a right to property are treated as distinct from those which command the person against whom it operates to yield up possession of immovable property. It by no means follows that a declaration of a right to property involves a declaration of a right to the immediate possession of that property. For instance, an action may well be instituted for a declaration of right to property, the right to the possession and enjoyment of which for life or for a specified period is admittedly in the defendant. There are several other cases in which a declaration of a right to property may be sought and granted without any intention to affect the possession or enjoyment thereof.

In this case, whether it was intentional or accidental, the plaintiff did not ask that the defendants be ordered to yield up possession of the property, and no such decree has been entered.

The decree which he holds is not a decree for possession under section 217 (c), and cannot be executed as such.

The appeal must, I think, be allowed, with costs, both here and in the Court below.

DALTON J.—I agree.

Appeal allowed.
