Present : Ennis and De Sampayo JJ. 1924.

CASSIM *v.* DE VOS *et al.*

363—D. C. Galle, 20,259.

Partition—Plaintiff aware of claim of another party—Omission to make him a party—Action for damages—Ordinance No. 10 of 1863, s. 9.

A knowing that B claimed to be the owner of lot X instituted an action for partition of a piece of land including lot X, and obtained a partition decree without making B a party.

Held, that B was entitled to claim damages from A under section 9 of the Partition Ordinance.

An action under section 9 need not be based on any wilful or fraudulent act, but may be based on any act which gives rise to damage.

THE facts are set out in the judgment.

Samarawickreme, for the first defendant, appellant.

Soertsz, for the second defendant, appellant.

B. F. de Silva, for plaintiff, respondent.

March 27, 1924. ENNIS J.

This was an action for damages under section 9 of the Partition Ordinance. The plaintiff asserted that his land had been incorporated in a land which was partitioned at the instance of the defendants in action No. 19,333. In that action the then plaintiffs moved to partition the land Horagaskela. The plaintiff says that what was included in that land was a small portion bearing the name Horagaskela-addara. He says that the plaintiffs in case No. 19,333 were well aware of his claim, because in the previous action No. 15,817, which was an action for partition at the instance of one Stephen Henry Dhanayake, a son of the second defendant, he made a claim and intervened. That previous action was dismissed as the then plaintiff had no title. The present plaintiff's claim in intervention in that action was, however, taken into account, and on the survey made for the purpose of that action his claim was marked lot D as shown on plan No. 852 marked P 1 in the present case. The learned Judge has found as a fact that the present defendants were aware that the plaintiff claimed to be entitled to lot D, which he said was a part of the land partitioned in case No. 19,333. On the question of title, the learned Judge found in favour of the present plaintiff and awarded him damages in respect of lot D. The present appeal is from that decree.

1924.

ENNIS J.

Cassim v. De Vos

It was next urged with regard to title that the plaintiff had had no effective possession. On this point we have the evidence of Abdul Cader, one of the predecessors in title of the plaintiff, that he planted for himself the coconuts on lot D. Abdul Cader has identified the land, and his evidence seems to show beyond question that there has been effective occupation by one of the plaintiff's predecessors in title. It was urged that the coconuts on lot D are in line with the coconuts on the adjoining property which belongs to the defendants. The mere fact that they run in the same line is not conclusive that the two lands are one, because we find that the trees on lot D are of different age from the trees on the adjoining land. The condition of the trees and the formation of the land seem to indicate that there is a strong probability that lot D was separately owned and separately planted as stated by Abdul Cader. In the circumstances there is no reason to think that the learned Judge is wrong in holding that the plaintiff has had effective occupation of lot D, and the learned Judge has gone further and held that the plaintiff has continued to occupy so as to prevent a prescriptive right arising.

We now come to the principal argument in this case which is based on the question of law. It was urged on appeal that the defendants were not liable to an action under section 9 of the Partition Ordinance. In this respect two cases were cited to us. The first case is *Fernando v. Fernando*.[1] In that case the Chief Justice said that it would seem to be clear that no action lies under section 9, except upon proof of the breach of a legal duty, and further that on the authority of the case of *Appuhamy v. Samaranayake* [2] that the position must be accepted that the plaintiff is not bound to state the names and residences of persons claiming to be co-owners whose title he in good faith disputes, or, in other words, that the parties to a partition action will not be liable in damages if they acted *bona fide* in ignorance of the rights of any third party. The Chief Justice went on to say that the principle of the earlier decisions seems to apply to claims which, though known to the petitioning party, are in good faith repudiated. Inasmush, however, as in that case it was found on the facts that the action of those seeking to partition was not *bona fide*, and that they were well aware of the fact that the plaintiffs had a mortgage and deliberately omitted to disclose it in their action, it would seem that the expression of opinion on the law was not necessary for the purpose of the case in the facts. My brother De Sampayo took part in the same case, but did not follow the lines of the Chief Justice. His decision was based upon the fact that the plaintiffs in the partition action were aware of the existence of the mortgage. The earlier case of *Appuhamy v. Samaranayake* (*supra*) is also not a complete authority for the proposition urged on behalf of the appellant on

[1] *(1918) 20 N. L. R. 410.* [2] *(1917) 19 N. L. R. 403.*

the appeal. In that case the parties seeking damages appear to have known all about the partition action at the time it was proceeding, but stood by and did nothing. In a sense, therefore, they would have contributed to the loss which fell upon them owing to the judgment in the partition action. In that case my brother De Sampayo went into a number of circumstances connected with actions under section 9 of the Partition Ordinance, and expressed the opinion that parties to a partition action would not be liable in damages if they acted *bona fide* and in ignorance of the rights of third parties. It is unnecessary to look into that point, because in the present case the facts, as found by the learned Judge, are that the plaintiffs in the partition action knew that the present plaintiff had a claim and had asserted that claim in the previous action. For the appellants it was sought to minimize the effect of this by saying that the plaintiffs in the partition action did not take the claim of the present plaintiff seriously. I cannot help feeling that an action under section 9 need not be based on any wilful or fraudulent act which might be concluded from certain observations in some earlier judgments which have been cited in the two cases already referred to—observations which appear to have been made in passing rather than an observation which have been based upon a consideration of the point—but may be based on any act which gives rise to damage. It is to be observed that section 9 does not introduce any new form of action. It merely reserves a right which the parties had prior to the passing of the Partition Ordinance. Prior to the passing of that Ordinance, a party claiming land had the right to bring an action to vindicate his title.

It was urged on appeal that he had no right to bring an action for the value of the land. I am doubtful if this is correct, because it would seem that actions for the recovery of a specific thing, for instance, actions for specific performance in contracts, actions for the recovery of land, or Roman-Dutch law actions *rei vindicatio*, always had behind them the alternative claim for the value of the thing lost. In the case of land it may not have been necessary always to mention the value, as the land itself could be recovered, but even if such a case where some portion of the land had been alienated beyond recovery, as, for instance, when gems and minerals had been removed, one finds coupled with an action for title or to recover land, a claim for the value of that portion of the land. It would seem then that the Partition Ordinance by making a specific provision reserving the rights of a party to claim damages reserved this alternative claim which a party had prior to the passing of the Partition Ordinance. The Partition Ordinance was enacted to remove from the land many of the shackles which tied it, and to provide that the decision of the Court that a particular portion of the land partitioned should belong to an individual should be good against the whole world so far as the land itself was concerned.

1924.

ENNIS J.

Cassim v. De Vos

That individual could deal with the land and pass a good title. But if it turns out subsequently that he, in fact, at the time of the partition had no title, the person having the title could not recover the land, but recover only the value of the property which had been lost by the terms of the Partition Ordinance.

In the circumstances I am of opinion that the plaintiff's right to bring this action arose on the act of the first defendant in instituting the partition action without making the present plaintiff a party to that action. It is unnecessary to consider whether the act of the first defendant was fraudulent or wilful. It is sufficient that he caused the damage, and that it was done knowing that the present plaintiff had preferred a claim to the land.

The only other point urged by the first defendant on appeal was that the present plaintiff could not claim more than a half share of the value of the portion of land which had been lost owing to the partition, inasmuch as deed P 5 shows that Mohideen is a co-purchaser with him. Mohideen gave evidence in this case and said that he owed the plaintiff money, that he did not wish to be made a party to the action as he was too poor to spend money, and that he wished that any sum that may be due to him should go to the present plaintiff. He appears to have made this assignment in the course of the case with some formality, but from what he says it would seem that he intended the same assignment to take effect prior to the institution of the action, for he says he allowed the plaintiff to possess the land in lieu of the money he had borrowed from him. In the circumstances of this case it is unnecessary to go into the legal rights of the parties on this point. If the defendants have been enriched at the instance of the plaintiff and Mohideen, it is not in their mouth to contest Mohideen's disposition of the money which is to be divided if the claim in respect of lot D is good.

The second defendant has appeared separately on the appeal, although she joined the first defendant in the appeal which has been filed. It was urged that her position was different to the first defendant's position. The learned Judge, however, has found, as a fact, that she or her proctor was aware of the plaintiff's claim in the previous partition action, and that being so the plaintiff's right to claim damages would lie against her as well as against the first defendant under section 9 of the Partition Ordinance. It transpires, moreover, that she is the mother of Stephen Henry Dhanayake, who was the plaintiff in the partition action in which the present plaintiff intervened and presented a claim. In the circumstances there is no reason to interfere with the judgment under appeal in favour of the second defendant. In the circumstances I would dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.