

Present: Ennis J. and De Sampayo J.

1917.

APPUHAMY v. SAMARANAYAKE.

24—D. C. Negombo, 11,544.

Plaintiff's interest not disclosed by parties to a partition action—Action for damages against parties to partition action by plaintiff.

A person claiming to be the owner of a piece of land which had been partitioned by others in a proceeding under Ordinance No. 11 of 1863 cannot claim damages under section 9 of the Ordinance from the parties to the partition action if they acted *bona fide* and in ignorance of the rights of the plaintiff.

If any owner or co-owner is aware of the pendency of the partition action and abstains from coming forward he cannot afterwards claim damages.

THE plaintiffs in this case alleged that they were the owners of a land Moragahakumbura, and that the defendants had fraudulently represented to the District Court that they (defendants) were the absolute owners of the land, and had obtained a partition decree in D. C. Colombo, 9,434; the plaintiffs claimed from the defendants damages (Rs. 600). The District Judge dismissed plaintiffs' action. They appealed.

Samarawickreme (with him *W. H. Perera*), for plaintiff, appellant.

F. de Zoysa, for first defendant, respondent.

E. T. de Silva (with him *M. W. H. de Silva*), for the second to fifth defendants.

Cur. adv. vult.

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March 15, 1917. ENNIS J.—

This was a claim to recover damages under the proviso to section 9 of the Partition Ordinance.

The section, after providing that the partition decrees shall be conclusive evidence of title, runs: "Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damage had accrued."

The plaintiffs claimed that their predecessor in title granted a usufructuary mortgage to Ausadahamy in 1868 of a land which Metuhamy held (P 1) "by giving Government one-fourth share." The mortgage does not appear to have been registered, and on Ausadahamy's death over twenty years ago the land passed to his heirs, who obtained a partition decree for this and other land in 1914. The principal plaintiff, Carolis, said that he heard that a partition action had been brought after his letter of demand, but was not aware that the land now claimed was included in the action. From the fact that Carolis, who is a process server, did not intervene in the action, the learned Judge has inferred that he did not become aware of the mortgage bond till long after the partition decree had been entered. This inference is contrary to Carolis's own evidence. The parties to the partition action were unaware of the bond, and the omission to mention it was therefore not deliberate. The learned Judge has found that there is a strong probability that Ausadahamy possessed on some informal sale or acquired prescriptive title. He has presumed an ouster, and I am unable to say that he is wrong. Moreover, I think Carolis's statement that he did not know that the land was being partitioned is extremely doubtful; if he knew and stood by, he is bound by the partition decree. Whether an ouster be presumed, or whether the plaintiffs are estopped by their non-intervention in the partition action, the decree appealed from is right, and I would dismiss it, with costs.

DE SAMPAYO J.—

The defendants in this action are the plaintiffs and defendants in the partition action No. 9,434 of the District Court of Colombo, in which the land Morgahakumbura was partitioned among them. The plaintiffs, alleging that they were the true owners of the land, and that the defendants obtained the partition decree by fraudulently representing to the said District Court that the defendants were the absolute owners thereof, claim from the defendants Rs. 600 as damages. The proviso to section 9 of the Partition Ordinance enables any persons prejudiced by the partition or sale to recover damages from the parties "by whose act, whether of commission or omission, such damages had accrued." It seems to

me that the act of commission or omission here referred to is a conscious act, that is to say, an act done with knowledge of the right of the party prejudiced thereby. Section 2 of the Ordinance, which requires the plaintiff or plaintiffs to state certain particulars in the plaint, including the names and residences of all the co-owners and mortgagees, expressly provides that this shall be done "so far as the said matters or things or any of them shall be known to him or them." I do not think that the parties to a partition action will be liable in damages if they acted *bona fide* and in ignorance of the rights of any third party. The plaintiffs in this action appear, by alleging fraudulent misrepresentation, to have recognized this view of the Ordinance. Mr. Samarawickreme suggests that the damages provided for were really compensation for the value of the interest in the land of which the party suing for damages was deprived, and which by the decree were given to parties who were not really entitled to it, and that, therefore, it did not matter whether or not there was fraud or negligence. The first part of this proposition may be accepted, but the second part does not necessarily follow therefrom. Moreover, if any owner or co-owner himself is aware of the pendency of the partition action, and abstains from coming forward. I do not know on what principle he can afterwards claim damages. The case of the plaintiffs in this action is that their ancestors were entitled to the land, and had given an usufructuary mortgage to Ausadahamy, under whom the defendants claimed title, and that they sent a letter of demand to the defendants for the purpose of redeeming the land. The first plaintiff, who is practically the only witness called for the plaintiffs, said that they heard of the partition action after the letter of demand was sent. He is a process server, and was himself the Fiscal's officer who served the notices in the partition action. The circumstances satisfy me that the plaintiffs knew that the partition action affected this land, but for some reason or other did not intervene. I agree with the finding of the District Judge that Ausadahamy and the defendants had long since prescribed for the land against the mortgagors and their heirs. I may add that judicial decisions, so far as they go, appear to put the same construction on section 9 of the Ordinance as I above ventured to suggest. In C. R. Matara, 1,070¹ in which a defendant in a partition action was sued for damages, Lawrie J. in dismissing the action said: "It is not shown that any duty lay on the defendant to mention the present plaintiff, and, indeed, the present plaintiffs knew of the pending of the partition suit and voluntarily abstained from being parties." D. C. Jaffna, 1,907,² was a case in which certain parties to a partition action and a stranger to the action were sued for damages and the Court gave judgment on the ground of fraud. I am not aware of any case in which an action has been held to lie against a party to a partition action simply

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nayake¹ S. C. Min., Mar. 26, 1901.² S. C. Min., Feb. 24, 1902.

1917. because he was such party and got a portion of the land. This is
DE SAMPAYO what the plaintiffs seek to maintain in this action, since, although
J. in the plaint they alleged fraudulent misrepresentation, they
Appuhamy abandoned that position, and no issue was stated at the trial, and
v. Samara- no evidence given on that point.
nayake

I think the appeal should be dismissed, with costs.

Appeal dismissed.

