

1945

Present: Wijewardene J.

BALA MENIKA, Appellant, and ABEYSENA, Respondent.

85—*C. R. Galle, 24, 278.**Civil Procedure—Action under section 247 of Civil Procedure Code—
Claimant's right at date of seizure—Condition precedent.*

In an action under section 247 of the Civil Procedure Code brought by an unsuccessful claimant the burden rests on him to prove that at the date of seizure he had the right which he claims.

A PPEAL from a judgment of the Commissioner of Requests, Galle.*H. W. Jayewardene* for the plaintiff, appellant.*S. W. Jayasuriya* for the defendant, respondent.*Cur. adv. vult.*

September 4, 1945. WIJEWARDENE J.—

This is an action under section 247 of the Civil Procedure Code brought by an unsuccessful claimant. The Commissioner of Requests dismissed the action.

The defendant obtained a money decree against one Bastian on December 19, 1939, and seized on January 20, 1942, an undivided one-twelfth share of Paragahawatte. The plaintiff preferred a claim relying on deed PI of July 22, 1941, by which Bastian conveyed to him the property described as follows:—

"All those advantages such as costs compensation and the like payable to the vendor or disadvantages such as costs compensation and the like payable by the vendor in case No. 34,891 D. C. Galle and also the interests to which I the said vendor may be declared entitled to by the final decree to be entered in the said case in lieu of and equivalent to the following:—An undivided

¹ (1924) 26 N. L. R. 79.² (1925) 26 N. L. R. 344.

one-twelfth (1/12) share of the soil and trees of the allotment of land called Paragahawatte . . . which share is given as lots No. 8 and 8A in partition plan No. 362 dated June 28 and 26, 1941."

That claim was dismissed after investigation on March 1, 1943, and the present action was instituted three days later.

The entire land of Paragahawatte was the subject matter of the partition action No. 34,891 in the District Court of Galle. The interlocutory decree in that action was entered on January 29, 1940, declaring Bastian entitled to an undivided one-twelfth share. The Commissioner appointed under section 5 of the Partition Ordinance made his return to Court in June, 1941, suggesting that lots 8 and 8A in Plan No. 362 be allotted to Bastian. The Court entered final decree on March 27, 1944, declaring Bastian entitled to those lots.

The order made in the claim inquiry will be conclusive against the plaintiff unless he is able "to establish the right which he claims" to the undivided one-twelfth share. The burden rests on him to prove that he had that right at the date of seizure (vide *Silva v. Nonā Hamine*¹ and *Abubaakar v. Tikiri Banda*²). In view of the pendency of the partition action, the deed PI was inoperative to give him title to an undivided share. Moreover, the deed could not have given him any title to lots 8 and 8A before the final decree was entered in the partition action in 1944, more than a year after the institution of this action.

I dismiss the appeal with costs.

Appeal dismissed.