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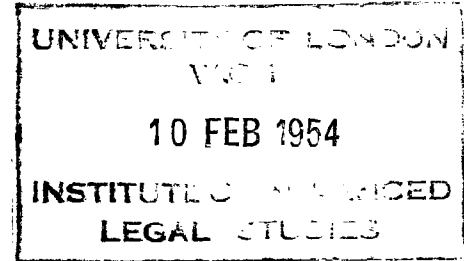
29, 1953

No. 40 of 1952.

33599

In the Privy Council.

ON APPEAL
FROM THE FIJI COURT OF APPEAL.



BETWEEN—

GOBERDHANBHAI BHAILALBHAI PATEL
(Plaintiff) *Appellant*

— AND —

GHELABHAI PREMABHAI
(Defendant) *Respondent.*

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CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from an Order of the Fiji Court of Appeal dated the 22nd August, 1952, reversing an Order of the Supreme Court of Fiji made by the Chief Justice dated the 29th May, 1952. p. 18.
p. 7.

20 2. The question in issue in this Appeal depends on the application of the Subdivision of Land Ordinance cap. 121 of the Laws of Fiji as applied to the Partition Act 1868: and is whether under Section 4 of the Partition Act 1868 (applicable to Fiji by reason of Sections 36 and 37 of the Supreme Court Ordinance cap. 2 of the Laws of Fiji), the Court has power to order a sale of certain land in Fiji, of which the Plaintiff and the Defendant are registered proprietors as tenants in common, or whether the Court cannot make such an Order by reason of the provisions of the Subdivision of Land Ordinance cap. 121 of the Laws of Fiji.

p. 1. 3. The litigation which led up to this appeal was commenced
p. 2. by an action instituted on the 23rd November, 1951, whereby the
Plaintiff-Appellant asked for partition, or in the alternative sale, of
certain land in Fiji, which the Appellant and the Respondent held
as tenants in common in equal shares.

4. The facts are not in dispute and are stated as follows by
the learned Chief Justice:—

p. 7. “The Plaintiff and Defendant are the registered proprietors
“as tenants in common of two adjoining plots of land upon
“which stand buildings used for commercial and residential 10
“purposes. Prior to a date in 1947 the parties were occupying
“the land and buildings and were engaged in running a
“commercial enterprise therein as partners together with one
“Champaklal. The Plaintiff owned a half-share in the busi-
“ness and the Defendant and Champaklal owned the other half.
“In 1947 the Plaintiff decided to pay a visit to India, and before
“leaving he entered into a written contract with his two
“partners in terms of which he disposed of his share in the
“business to his two partners, the Defendant and Champaklal,
“subject to a condition that on his return from India he should 20
“have the option to re-join them as a partner. At the same time
“he entered into a tenancy agreement with the Defendant and
p. 7. “Champaklal under which he leased his undivided half-share
“in the property to them for a term of four years commencing
“from the 1st March, 1947. On his return to Fiji in March, 1951,
“the Plaintiff desired to exercise his option to re-enter the
“business, but he failed to come to any agreement with the
“Defendant and his partner because they wished to impose
“conditions which he could not accept. He states that the
“Defendant and his partner are now in possession of the whole 30
“premises without his consent and against his will and that he
“had failed to come to any suitable or satisfactory arrangement
“with the Defendant and his partner. He applies for an order
“partitioning the property or, in the alternative, an order for
“sale. He admitted in evidence that owing to the form of the
“buildings and their position relative to the two properties and
“their accessibility, a fair partition would be extremely difficult
“either of each plot separately or of the two plots together. I
“accept his evidence on these points—indeed it is clear from
l. 30. “the plans and the evidence as to the buildings that partition 40
“is not a practical or economic proposition.”

5. By Section 35 of the Supreme Court Ordinance (No. 2 of the
Laws of Fiji) the Common Law, the Rules of Equity and the Statutes
of general application, which were in force in England on the 2nd

January, 1875, were to be in force in the colony but (by Section 37 of the ordinance) subject to any future ordinances of the colonial litigation.

6. By reason of the provision of Section 35, the law in force in England before the Partition Act 1868 became in force in the Colony. Under the law in force before the Partition Act 1868 a tenant in common was entitled to a decree for partition as of right. See *Parker v. Gerard* Amb. 238 and *Turner v. Morgan* 8 Ves. 143. Under Section 4 of the Partition Act 1868 in a suit for partition
 10 where, if the Act had not been passed, a decree for partition might have been made, then if the persons interested in a moiety or upwards so required the Court was to direct a sale, unless it saw good reason to the contrary. Accordingly (as both Courts found) the Plaintiff-Appellant was, apart from Ordinance No. 121, entitled to have a decree for sale.

7. Ordinance No. 121 is "an Ordinance to Provide for the Regulation and Control of Subdivision of Land". Under Section 3 subdivision is defined as meaning "dividing a parcel of land for
 20 sale, conveyance, transfer, lease, sub-lease, mortgage, agreement, partition or other dealing or by procuring the issue of a Certificate of Title under the Land (Transfer and Regulation) Ordinance in respect of any portion of land or by parting with the possession of any part thereof or by depositing a plan of subdivision with the Registrar of Titles under the last-mentioned Ordinance". There is no other reference in the ordinance to partition.

8. Ordinance No. 121 contains provisions relating to the subdivision of land, under which an "application" has to be made to the local authority and has also to be considered by a Board constituted under the Act. "Applicant" is defined as "owner lessee
 30 or sublessee of any land proposed to be subdivided," so that in the case of land held by tenants in common it would appear that all the co-owners would have to be parties to an application and that one co-owner could not obtain an order for subdivision, until, at all events, he had established his right to partition.

9. Under Section 11 of Ordinance No. 121 the minimum area and street frontage in any subdivision made under the Ordinance is to be 24 perches and 50 feet respectively, with a provision which enables the Board to modify such minimum area or frontage as therein mentioned.

40 10. The Learned Chief Justice deals with the effect of Ordinance No. 121 on the right of the Plaintiff-Appellant to have a decree for sale as follows:—

p. 7, l. 41.

“I can find nothing in the Sub-division of Lands Ordinance which expressly or by implication takes away the common law jurisdiction of this Court, exercised by virtue of Sections 36 and 37 of the Supreme Court Ordinance (Cap. 2) to order a partition when such order could lawfully be made. It may well be that the person obtaining such order would be bound to proceed in accordance with the provisions of Sub-division of Lands Ordinance, and in the event it might be that owing to the application of those provisions to the particular circumstances the order could not be carried out. 10
 “In that event I apprehend that the person obtaining the order would be entitled to apply for such alternative relief, if any, to which he might be entitled. Alternatively, I see no reason why the Court should not make an order directing partition and at the same time suspend the operation of the order until satisfied that the requirements of the Ordinance had been complied with. I find that this Court has not lost its common law jurisdiction to make an order directing the partition of property and therefore the case is one where, in the terms of the Partition Act, 1868, a decree for partition might have been 20
 “made. It follows that the Court has power, in pursuance of the terms of the Partition Act of 1868, to make an order directing the sale and distribution of the proceeds.”

11. The learned Judges of the Court of Appeal expressed their opinion on this question as follows:—

p. 19, l. 22.

“We are of opinion that whilst the learned Chief Justice correctly expounds the law relating to his jurisdiction at common law and under the Partition Act, 1868, he has in fact failed to have regard to the provisions of the Subdivision of Land Ordinance Cap. 121. It is clear, under Section 11 of that Ordinance, that subdivision, which we hold for the purposes 30
 “of this case to be the same as partition, cannot be granted by the Subdivision of Land Board in relation to the land the subject matter of this appeal, except in the circumstances specified in the proviso to that section.....Thus it appears to us that in the circumstances of this case no order for partition could properly be made by the learned Chief Justice or this Court. It follows, therefore, by virtue of the fact that the Partition Act 1868 limits the power of the Court to order a sale 40
 “to cases in which an order for partition could be made, that no order for sale should have been made in this case”.

p. 19, l. 38.

For these reasons they allowed the appeal with costs. The Appellant humbly prays that his appeal may be allowed with costs for (among others) the following

REASONS.

1. The Appellant's rights to a sale instead of a partition existed under the Partition Act 1868 immediately before the coming into force of Ordinance No. 121 and this right was not in terms or by necessary implication affected by Ordinance No. 121.
2. The Court of Appeal erred in so construing Ordinance No. 121 as affecting the Partition Act 1868, so far as that Act provided for the remedy of sale.
- 10 3. Further the learned Chief Justice was right in holding that Ordinance No. 121 did not deprive the Court of its jurisdiction to order a partition, and accordingly the Appellant was in the present case, entitled, if he desired it, to a decree for partition.
4. It was only after obtaining a decree for partition that the Appellant could have made an application under Ordinance No. 121.
- 20 5. The Order of the learned Chief Justice was right for the reasons stated in his Judgment and such Order ought to be affirmed.

LINDSAY M. JOPLING.

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PATEL (Plaintiff) *Appellant*

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CASE FOR THE APPELLANT.

HY. S. L. POLAK & Co.,
20-21, Took's Court,
Cursitor Street,
London, E.C.4,
Solicitors for the Appellant.