Privy Council Appeal No. 24 of 1955

Mohamedaly Adamjee and others - - - - - - - *Appellants*

v.

Hadad Sadeen and others - - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1956

Present at the Hearing:

EARL JOWITT
LORD OAKSEY
LORD COHEN
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

The dispute between the parties relates to immovable property situate at Kollupitiya within the Municipality and District of Colombo Western Province. Their Lordships will refer to it hereafter as "the property". The property formerly belonged to one Idroos Lebbe Marikkar (hereinafter referred to as "Marikkar"). He died in 1876, probate of his will being granted on the 29th May, 1876. In accordance with directions contained in the will the estate was divided amongst those who would have been Marikkar's intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division the property was conveyed by the surviving Executor by a Deed No. 2575 of the 14th September, 1888, to Savia Umma, a daughter of the testator. The conveyance was made subject to the conditions imposed by the will, including a provision that the said Savia Umma or her issues or heirs should not sell, mortgage or alienate the property but should hold the same in trust for "the grand-children of my children and the grand-children of my heirs and heiresses" as therein mentioned.

On the 15th July, 1949, a Partition Action was started in the District Court of Colombo by seven of the present respondents against the other thirty-six respondents, the forty-three respondents, grandchildren of Savia Umma, between them claiming to be all the persons interested in the property. To these proceedings the appellants were not made parties. In the plaint in the Partition Action the plaintiffs allege in paragraph 19 that the parties to the Partition Action and their predecessors in title had been in undisturbed and uninterrupted possession of the property. The plaintiffs asked for sale under the Partition Ordinance (No. 10 of 1863) and for division of the proceeds.

At this point it is convenient to refer to the relevant provisions of the Partition Ordinance. Section 2 provides that "when any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property, or, should such partition be impossible or inexpedient, . . . to apply for a sale thereof, and in either case to file in any court of competent jurisdiction a libel . . ." as therein mentioned.

Section 4 gives direction as to investigation of the title of the plaintiffs (*a*) in the event of default of appearance by any defendant (*b*) after appearance if there is a dispute as to title or if any defendant shall claim a larger share than the plaintiffs have stated to have belonged to him. The Section goes on to provide that the court shall try and determine any material question in dispute between the parties and shall decree a partition or sale according to the application of the parties or as to the court shall seem fit. Sections 5, 6 and 7 deal with what is to be done in the event of a decree of partition being made. With these Sections their Lordships are not concerned in the present case. Section 8 gives directions as to the carrying out of a decree for sale. Once the decree has been made no further decree is necessary, and it is provided that a certificate under the hand of the Judge of the court that the property has been sold under order of the court and setting forth the name of the purchaser thereof and that the purchase money has been paid into court by him shall be evidence in any court of the purchaser's title without any deed of transfer from the former owners.

Section 9, which is the most important Section requiring consideration on the present Appeal, provides as follows:—

> "The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever whatever right or title they have or claim to have in the said property although all persons concerned are not named in any of the said proceedings nor the title of the owners nor of any of them truly set forth and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty.
>
> 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 damages had accrued."

Returning now to the Partition Action, on the 29th March, 1950, the District Judge made a decree in the course of which he declared the shares of the various parties to the Action and ordered and decreed that the property should be sold as therein mentioned and the proceeds be brought into court to abide by the further order of the court.

It is to be noted that the present appellants had not been made parties to that Action. They claim to be entitled to the whole of the property as descendants of one Adamjee Lukmanjee who had acquired the property from one Leonora Fonseka. She had acquired it under a Fiscal's Conveyance executed as the result of mortgage proceedings in the District Court of Colombo against the said Savia Umma and her husband. The Fiscal Conveyance did not set out the restrictions on Savia Umma's power to deal with the property which were contained in the 1888 Conveyance under which she acquired title.

At this point their Lordships must observe that all the deeds and documents on which the appellants rely for their title were duly registered in accordance with the provisions of the Registration Ordinance but that neither the probate of Marikkar's will nor the Deed of 1888 were so registered. The appellants argued that the relevant sections of the Land Registration Ordinance gave them priority over the title of the respondents under the will and the conveyance of 1888.

The relevant Section of the Registration Ordinance at the time of the execution of the conveyance to Mr. Adamjee Lukmanjee was Section 17 of Ordinance No. 14 of 1891. This Ordinance was repealed by Ordinance No. 23 of 1927, and Section 7 of the repealing Ordinance provided that an instrument executed or made on or after the 1st January, 1864, whether before or after the commencement of the repealing Ordinance should unless it was duly registered under the Ordinance be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which might be duly registered under the Ordinance. For reasons which will appear hereafter their Lordships do not find it necessary to deal with the argument based upon the Registration Ordinance.

From the decree of the District Judge in the Partition Action certain respondents appealed to the Supreme Court on the question whether they had received their proper shares under the decree of the District Judge. Before that appeal could be heard in the Supreme Court the appellants, who had become aware for the first time of the Partition proceedings petitioned on the 20th May, 1950, for an injunction restraining sale of the property. In paragraph 16 of their Petition they pleaded that they should have been made parties to the action and should have had and should have been given notice thereof, and they asked by way of relief for an injunction restraining any sale of the property, for an order setting aside or vacating the decree in the Partition Action and for a declaration that the decree in the Partition Action was null and void and of no force or effect in law.

What happened on that Petition does not appear clearly from the Record. Their Lordships are left in doubt whether the attention of the Supreme Court at the hearing of the appeal from the Partition decree was ever called to this Petition for injunction and other relief. Had the attention of the Supreme Court been directed to this matter it is possible that they would have considered carefully whether there had been sufficient investigation of the respondents' title and if there had not been sufficient investigation they might have directed a new trial under the powers referred to later in this judgment.

On the 20th May, 1950, the appellants also lodged their plaint in the proceedings which have now reached their Lordships' Board. In clause 14 thereof they pleaded that by themselves and through their predecessors in title they had been in the sole and uninterrupted and undisturbed possession of the property to the exclusion of all others from at least the 29th day of March, 1916, and that they had prescribed to the property. That pleading was directed to the Prescription Ordinance No. 22 of 1871. Section 3 of that Ordinance so far as material provided as follows:—

> "Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the Defendant to a decree in his favour with costs. And in like manner when any Plaintiff shall bring his action . . . proof of such undisturbed and uninterrupted possession as hereinbefore explained by such Plaintiff . . . or by those under whom he claims, shall entitle such Plaintiff . . . to a decree in his favour with costs.
>
> "Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Returning now to the plaint the relief claimed by the appellants was, so far as relevant, as follows:—

> (*a*) An order that the court do set aside or vacate the decree in the Partition proceedings.
>
> (*b*) A declaration that the said decree was null and void and of no force or effect in law, and in the alternative
>
> (*c*) damages in the sum of Rs.100,000/–.

Answers were put in by some of the defendants and issues were settled. In due course the action came on for trial before District Judge L. B. de Silva. He answered the various issues, his findings so far as material to the present appeal were as follows:—

> (1) the respondents had acted wrongly, unlawfully, fraudulently and collusively in failing to make the appellants party to the Partition Action or in giving them any notice thereof;

(2) the value of the property at the date of the action was Rs.100,000/-;

(3) the appellants had not acquired a prescriptive title to the premises since they had not discharged the onus which the District Judge held rested on them of establishing when the respondents' right to possession as *fidei commissarii* accrued to them. Therefore

(4) the appellants could only claim such rights as accrued to them by virtue of the priority conferred on them by the Registration Ordinance.

He held further that the effect of that Ordinance was that the will being void, Savia Umma could only have vested in Leonora Fonseka and through her in the appellants' predecessors in title such interests as she had in the property on an intestacy and that such interest was only 1/16th of the value of the property, i.e. Rs.6,250. He added, however, the value of the improvements which he found the appellants and their predecessors in title to have effected on the property and accordingly awarded to the appellants by way of damages under the proviso to section 9 of the Partition Ordinance the sum of Rs.29,687/50. He rejected their claim to set aside the decree or to have it declared null and void on the ground that the effect of section 9 of the Partition Ordinance was that the decree was final and binding and that the only remedy of any person including a person who had been defrauded by the action of the parties who obtained the decree was limited to a claim in damages.

The plaintiffs appealed to the Supreme Court who affirmed the decision of the District Judge, and it is from that decision that the appellants, with the leave of the Supreme Court, now appeal to their Lordships.

Having regard to the finding of the trial Judge as to the fraud and collusion issue and the confirmation of that finding by the Supreme Court. it is plain that the appellants were entitled to some relief, and the questions for their Lordships' decision are:—

(1) Whether the plaintiffs can now insist on having the decree in the Partition Action set aside or are limited by section 9 of the Partition Ordinance to their claim for damages, and

(2) whether, if they are so limited, they must accept the figure of Rs.29,687/50 awarded to them by the trial Judge or are entitled to receive Rs.100,000/- which the parties agree would be the correct figure if the appellants were entitled absolutely to the property at the date of commencement of the proceedings.

The appellants support their claim to have the decree set aside on two grounds. First, they say that notwithstanding the wide language of section 9 fraud is something outside the ambit of that section, and that on general principles a decree obtained by fraud is both under English law and under the law of Ceylon always liable to be set aside in independent proceedings. Their Lordships heard an interesting argument on this point from Sir Lynn Ungoed-Thomas on behalf of the appellants, and despite the wide language of the Ordinance they might have been persuaded to accept it had there not been a long succession of authority in the Courts of Ceylon establishing the principle, for which justification can be found in the language of the section, that "a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages." The citation which their Lordships have made was from the decision of Sir Alexander Wood Renton in *Jayawardene* v. *Weerasekera* reported in (1917) 4 C.W.R. 406 at p. 407. That decision followed on a continuous series of decisions dating back as far as 1891, see *Nono Hami* v. *De Silva,* 9 S.C.C. 198. Prior to that year there had been some conflict of decision, but in the case last cited Burnside, C.J., said at p. 199 that section 9 "makes a partition decree obtained under the Partition Act final and conclusive in all respects, save as to the right contained in the proviso of any party prejudiced by it

to his action for damages." He went on: "It was urged that it was a principle of law that fraud vitiated everything obtained by it. That is too general a proposition. It is true that the law abhors fraud, and equity had an undoubted jurisdiction to relieve against every species of fraud; yet when adequate relief can be had at law, where in fact there is a full, perfect, and complete remedy otherwise, it is not the course to interfere. (*Deere* v. *Guest*, 1. M. & C. 516, and per Lord Hardwicke, "Smith's Manual of Equity," p. 51.) Now, looking at the very distinct declaration contained in the 9th section, and to what must have been the object which the Legislature had in view, I can come to no other conclusion than that the proviso was meant to conserve the only remedy, except by way of appeal, which could be sought against a decree already pronounced, namely, one which sounded in damages; if it were not so, the operation of the Ordinance must be disastrous. No single decree could escape a litigious spirit to reopen it on the ground of fraud, and no date would exclude such contests. The object of the partition act was to quiet the title to land, and leave persons prejudicially affected by any such decree, by reason of any cause whatever, to their remedy in damages at law, and this to my mind is a full and perfect remedy, and it is unfortunate if any mere dicta should have led to any uncertainty on the point."

Since that date there has been no decision conflicting with the principle laid down as stated by Sir Alexander Wood Renton in the passage already cited, and their Lordships, whatever their view might otherwise have been as to the correctness of the decision, would not be prepared to disturb a principle so long recognised and on the basis of which many titles may have been established.

Since Sir Alexander Wood Renton gave his judgment in 1917 there has been no decision to the contrary. Sir Lynn referred to a dictum of Ennis, J., in the case of *Fernando* v. *Marsal Appu*, 23 N.L.R. 370, in which the learned Judge said that he did not consider it necessary to go into the question of whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the court could not on proof of fraud take away the property from them. Sir Lynn said that the present was such a case and that it was still open to their Lordships to say that as the decree for sale had not actually been carried out and as the fraud had been proved they could take away the property from the respondents. Their Lordships' attention was not called to any case where the possible exception suggested in the passage stated had been recognised. Bearing in mind that section 9 expressly provides for the binding nature, not of the sale but of the decree for sale, and that section 8 does not contemplate any decree subsequent to that decreeing that sale should take place, their Lordships do not think it right to recognise the alleged exception to the general rule.

Alternatively the appellants submitted that there had been no proper investigation of title in the present case and that consequently the decree was not a decree within the terms of section 9 of the Partition Ordinance. The Supreme Court have laid it down that it is the duty of the court before entering a decree to satisfy itself that the parties to the case have title to the land. The District Judge in the present case referred to a decision of the full bench reported in 6 N.L.R. 246 where it was held that a paramount duty is cast upon the court by the Partition Ordinance to ascertain who are the actual owners of the land sought to be partitioned before entering up a decree which is good and conclusive against the world. Layard, C.J., went on to say at p. 250 "As collusion between parties to a partition action is always possible, and as in such a suit the parties get their title from the decree of the court awarding them a definite piece of land, and as a decree for partition under section 9 of the Ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the Ordinance." Their Lordships find themselves in complete agreement with what was said by Layard, C.J., in that case. The facts of each case will indicate the manner in which the Judge can best carry out his duty and their

Lordships would not attempt to lay down a complete course of procedure for the Trial Judges to follow in every case. Their Lordships think however that the following matters should be attended to in the generality of cases.

The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Chapter 101). They may reveal registered instruments suggesting the possible existence of title in persons other than the parties before the court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in court or not, the effect of such instruments upon the title set up by the parties before the court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given. The fraud which has been established in the Partition Action under consideration could not have taken place if the steps indicated by their Lordships had been taken.

It is to be observed, however, that Chief Justice Layard did not go on to say what would be the effect if a decree was made and was either not appealed from or was confirmed on appeal. Their Lordships do not think it permissible for a court in a subsequent action to disregard the decree merely because they come to a different conclusion from that of the trial Judge as to what were the appropriate steps to take in the particular case in the investigation of the title. The decree which is "good and conclusive against all persons whomsoever" under section 9 is a "decree for partition or sale given as hereinbefore provided." Their Lordships are of opinion that the words "as hereinbefore provided" has reference to section 4 which requires the court to investigate title. Once it appears that the court has done so then any defect in the method of investigation would not vitiate the decree any more than an error of law or of fact by a judge would in the generality of cases vitiate a decree duly entered and not appealed from or confirmed on appeal. It has been held by the Supreme Court of Ceylon that a decree entered without any investigation of title, has not the conclusive effect provided by section 9. Thus *Gooneratne* v. *The Bishop of Colombo* (32 N.L.R. 337) was decided on the basis that there was nothing to show "that the judge made any enquiries into title" and that "the decree was passed on the defendants admission." It was held that the decree for sale had not a conclusive effect under section 9 of the Ordinance. The basis of the decision in *Umma Sheefa* v. *Colombo Municipal Council,* 36 N.L.R. 38, which was strongly relied upon by the appellant, was that "in the result apart from the consent of parties there was no evidence that the parties to the action or any of them were co-owners of the premises" so that it could not have been said that there had been any investigation of title. It was held that the decree for sale did not have a conclusive effect. With these decisions their Lordships agree, but they have no application to the present case. In the Partition case under consideration the District Judge did hold an investigation into title although his investigation has not been sufficiently exhaustive to prevent the perpetration of the fraud which has taken place.

What their Lordships have said in the preceding paragraph is applicable when it is sought by separate action to set aside a decree in a partition action or in a separate action to challenge the conclusive effect of a partition decree. On an appeal in a partition action if it appears to the court of appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation. Nothing in the partition action can be final or conclusive until the appeal is concluded. But the fact that lack of proper investigation may be sufficient

for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 when the decree is being considered in a separate case. Their Lordships would add that if it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision.

For the reasons their Lordships have given they are unable to accept the submission on behalf of the appellants that the partition decree should be set aside. They turn therefore to the question of damages. The appellant based his claim to the Rs.100,000/- on two grounds. First he said that he had acquired title by prescription and for that reason alone must be entitled to recover the Rs.100,000/- as being the value of the property as a whole at the material date. Alternatively he pleaded that he had a valid title by reason of the provisions of the Registration Ordinance to which their Lordships have already referred. Their Lordships do not find it necessary to go into the question raised under the Registration Ordinance, since they are satisfied that under the Prescription Ordinance the appellants have acquired a good title to the property for the value of which they now ask to be compensated. It was common ground between the parties that the onus of proving the ten years undisturbed and uninterrupted possession adverse or independent to the title of the respondents rested in the first instance on the appellants. But it was said on behalf of the respondents that once they had established that they had an interest as *fidei commissarii* under the last will of Marikkar the onus of proving the date on which their right to possession accrued to the respondents rested on the appellants. As the trial Judge put it " Once the " defendants established that they are *fidei commissarii* it is for the plain- " tiffs to establish that as against them qua fidei commissarii plaintiffs " have acquired a title by prescription. To do so. the plaintiffs must " prove the burden under Section 3 of the Prescription Ordinance that " they have acquired a title by prescription subsequent to the accrual of the " rights of the defendants as *fidei commissarii*."

Their Lordships are unable to agree with the Courts in Ceylon on this point. Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years. The view which their Lordships have reached as a matter of construction seems strongly supported by the provision of section 106 of the Ceylon Evidence Act No. 14 which reads " when any fact is especially " within the knowledge of any person the burden of proving that fact is " upon him." In the case under consideration knowledge of the date of the death of Savia Umma and her children would be especially within the knowledge of the respondents and the dates might well be unascertainable by the appellants.

It was suggested that the opinion which their Lordships have reached on the construction of the section with the assistance of the Evidence Act is in conflict with the decision of the Supreme Court under section 13 of the Prescription Ordinance in the case of *S. K. Chelliah* v. *Wijenethan* reported in 54 N.L.R. p. 337. This section modifies the operation of section 3 of the Prescription Ordinance in the case of disabilities referred to in the section, namely infancy, idiocy, unsoundness of mind, lunacy, or absence beyond the seas. In that case Gratiaen J. said at p. 342:

> " Where a party invokes the provisions of Section 3 of the prescription ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by Section 13, prescription did not in fact

> run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years."

The language of section 13 is so different from that of the proviso to section 3 that their Lordships would not be prepared to hold that even if the decision in the case cited were correct it was applicable to the very different language to the proviso used in section 9. They are not prepared in giving their decision in the present case to overrule the decision in Chelliah's case, but they desire to point out that so far as can be gathered from the judgments in that case, the attention of the Supreme Court was not directed to section 106 of the Evidence Act. Should a similar case ever come before this Board they would like the assistance of observations of the Supreme Court as to the application of that section. They stress this point because the knowledge e.g. of duration of absence beyond the seas must as a rule be within the cognisance of the party relying on such absence, and it might well be impossible for the opposite party to ascertain when the absence ceased.

For the reasons their Lordships have given they will humbly advise Her Majesty to allow the appeal and increase the damages awarded to Rs.100,000/-. The respondents must pay the plaintiffs' costs of this appeal as well as their costs of the appeal to the Supreme Court. The order of the District Court as to costs will stand.

(39887) Wt. 8069—3 100 12/56 D.L.

In the Privy Council

MOHAMEDALY ADAMJEE AND OTHERS

v.

HADAD SADEEN AND OTHERS

DELIVERED BY LORD COHEN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1956