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29, 1953

Appeal No. 40 of 1952.

33598

In the Privy Council.

ON APPEAL
FROM THE FIJI COURT OF APPEAL.

UNIVERSITY OF LONDON
W.C.1.
10 FEB 1954
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

GOBERDHANBHAI BHAILALBHAI PATEL - - - *Appellant,*

AND

GHELABHAI PREMABHAI - - - - - *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

10 1. This is an Appeal from a Judgment of the Fiji Court of Appeal dated the 22nd August, 1952, allowing an Appeal by the present Respondent from the Judgment of the Supreme Court of Fiji dated the 29th May, 1952, whereby the learned Trial Judge decided in favour of the Appellant's claim that he was entitled in lieu of an order for partition of certain lands situate in the township of Ba, of which the Appellant and Respondent were tenants in common, to an order for the sale of the said property and for the distribution of the proceeds.

20 2. The principal issue for determination in this Appeal is whether the Fiji Court of Appeal were right in holding that the Partition Act, 1868, in its application to Fiji, was modified by the Sub-division of Land Ordinance, Cap. 121. The material sections of the Partition Act, 1868, the Supreme Court Ordinance and the Sub-division of Land Ordinance are annexed hereto.

30 3. The parties hereto are the registered proprietors as tenants in common of two adjoining plots of land, of the total area of 13 perches, with buildings thereon, situate in the township of Ba. A business was carried on on the said property of which business the Appellant owned one half-share and the other half-share was owned by the Respondent and one Champaklal. In 1947 the Appellant paid a visit to India, and before leaving he entered into a written contract whereby he disposed of his share in the said business to his two partners subject to the condition that on his return from India he should have the option of rejoining them as a partner. At the same time the Appellant entered into a tenancy agreement with the Respondent and the said Champaklal whereby he leased his undivided half-share in the said property to them

pp. 18 & 19.

pp. 7, 8 & 9.

pp. 21 - 24.

RECORD. for a term of four years commencing on the 1st March, 1947. The Appellant returned to Fiji in March, 1951.

4. After the return of the Appellant to Fiji correspondence passed between the parties' legal advisers as to the question of the partition of the said land at Ba, which said land the Appellant wished to partition. By a letter dated the 31st October, 1951, the Respondent's legal advisers asked the Appellant's legal advisers for a rough sketch plan showing the manner in which it was proposed that the said land should be partitioned. No plan as requested was sent to the Respondent or his legal advisers.

pp. 1 & 2. 5. By a Writ of Summons dated 23rd November, 1951, the Appellant 10 instituted—

THE PRESENT SUIT

claiming an order for partition of the lands and buildings comprised in Certificate of Title Vol. 51, Folio 5042, and Certificate of Title 5915, of which lands and buildings he and the Respondent were proprietors as tenants in common.

p. 2. 6. By a Statement of Claim dated the 11th January, 1952, the Appellant pleaded (*inter alia*) that he and the Respondent were the proprietors as tenants in common of the said lands; that he desired to have the said lands buildings and fixtures partitioned between himself 20 and the Respondent or in the alternative the sale of the said lands buildings and fixtures by public auction. By his Defence the Respondent pleaded (*inter alia*) that the Appellant was not entitled to partition by reason of the Sub-Division of Land Ordinance of Fiji, Cap. 121, as amended, and that by reason thereof the Appellant was consequently not entitled to the alternative remedy of sale of the said lands and division of the proceeds.

p. 4. 7. In the course of the hearing the Appellant deposed that he and the Respondent were the tenants in common of freehold property, with buildings and fixtures thereon, and produced the registered Titles thereof, 30 being Certificates of Title No. 51/5042 and 5915; further that he had made no application under the Sub-Division of Land Ordinance, as amended. It was agreed between the parties that by virtue of Section 2 of the said Sub-Division of Land Ordinance that Ordinance applied to the land in question. No evidence was called on behalf of the Respondent.

p. 5. 8. It was the submission of Counsel for the Respondent that the Sub-Division of Land Ordinance, Cap. 121, as amended, should be read in conjunction with the Partition Act, 1868, which last Act was applicable to Fiji by reason of the Supreme Court Ordinance, Cap. 2, section 35.

9. On the 29th March, 1952, the learned Trial Judge delivered a 40 Judgment which included the following passages:—

pp. 7 & 8. "With regard to the first point, 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 the 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. 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 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."

* * * * *

" I find that the plaintiff is owner of one half undivided share of the two properties concerned, that he has an estate in possession, that no good reason has been shown against an order directing a sale in lieu of partition, and that by reason of the terms of section 4 of the Partition Act, 1868, he is entitled to such an order. Indeed it is difficult to imagine a case where the nature of the property and the interests of the parties make an order for sale rather than partition more desirable. There will be judgment for the plaintiff with costs and I direct an order for the sale of the property and distribution of the proceeds."

pp. 8 & 9.

10. On the 7th June, 1952, the Respondent filed a Notice of Appeal to the Fiji Court of Appeal. The Grounds of Appeal included the following:—

pp. 9 & 10.

" 1. The said judgment of the learned Chief Justice of Fiji in the said action incorrectly propounded the first submission of the Appellant's Counsel to be that owing to the provisions of ' The Subdivision of Land Ordinance ' (Cap. 121 of the Laws of Fiji) (hereinafter called ' the Ordinance ') ' The Partition Act 1868 ' (31 and 32 Vict. Cap. 40) (hereinafter called ' The Act ') has no application in Fiji.

" 2. The submission of the Appellant's said Counsel as made to the learned Chief Justice was that while the Act does apply in Fiji the provisions of the Ordinance must be read in conjunction with it and that so read the effect was that the said action was not

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one wherein a decree for partition might be made and this submission is again respectfully made to this Honourable Court.

“ 3. The said judgment of the learned Chief Justice was wrong in law in holding that there was nothing in the Ordinance which expressly or by implication took away the common law jurisdiction of the Supreme Court of Fiji exercised by virtue of sections 36 and 37 of ‘ The Supreme Court Ordinance ’ (Cap. 2 of the Laws of Fiji) to order a partition and it is respectfully submitted the correct view in law is that such jurisdiction may be exercised only as to accord and not to conflict with the provisions of the 10 Ordinance.

“ 4. The said judgment was wrong in law in holding that the said Supreme Court had power to make an order directing the sale of the land referred to in such judgment and distribution of the proceeds of such sale.”

pp. 18 & 19. 11. The Judgment of the Fiji Court of Appeal was delivered on the 22nd August, 1952, and included the following passage:—

“ Mr. Rice stated to us that the learned Chief Justice incorrectly propounded his submission at the trial. He said that the submission which he then made, and to which he still adhered, 20 was that while the Partition Act, 1868, applied to Fiji the provisions of the Subdivision of Land Ordinance, Cap. 121, must be read in conjunction with it, and that, so read, the effect was that the action was not one wherein a decree for partition could be made.

“ It is clear that the Partition Act 1868 applies to Fiji and it is equally clear that in the absence of the Subdivision of Land Ordinance, Cap. 121, an order decreeing partition, or, if the circumstances so required, an order for sale, could lawfully be made. 30

“ We are of the 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 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. No evidence was produced to the trial judge, and no 40 suggestion has been made to us, that that proviso is applicable to the present case. 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 to cases in which an order for partition could be made, that no order for sale should have been made in this case. RECORD.

“ The appeal is therefore allowed, and judgment must be entered for the defendant in the action. The respondent will pay the costs of this appeal together with the costs in the Court below.”

12. Thereafter the Appellant obtained leave from the Fiji Court of Appeal to Appeal to Her Majesty in Council. p. 20.

10 13. The Respondent humbly submits that this appeal should be dismissed with costs and the judgment of the Fiji Court of Appeal should be affirmed for the following amongst other,

REASONS:—

1. Because the Fiji Court of Appeal were right in holding that the learned Trial Judge had failed to have regard to the provisions of the Sub-division of Land Ordinance, Cap. 121.
- 20 2. Because the Fiji Court of Appeal were right in holding that the Sub-division of Land Board could not have granted partition in relation to the land the subject matter of this appeal.
3. Because the Fiji Court of Appeal were right in holding that no order for partition could properly be made by the learned Trial Judge.
4. Because the Fiji Court of Appeal were right in holding that because the Partition Act, 1868, limits the power of the Court to order a sale to cases in which an order for partition could be made, that no order for sale could be made in this case.
- 30 5. Because the judgment in the Fiji Court of Appeal was right and should be upheld.

DINGLE FOOT.
BIDEN ASHBROOKE.

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Respondent's Solicitors.

RECORD.

ANNEXURE.

PARTITION ACT, 1868.

Section 3. “ 3. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if it appears to the Court that, by reason of the Nature of the Property to which the Suit relates, or of the Number of the Parties interested or presumptively interested therein, or of the Absence or Disability of some of those Parties, or of any other Circumstances, a Sale of the Property and a Distribution of the Proceeds would be more beneficial 10 for the Parties interested than a Division of the Property between or among them, the Court may, if it thinks fit, on the Request of any of the Parties interested, and notwithstanding the Dissent or Disability of any others of them, direct a Sale of the Property accordingly, and may give all necessary or proper consequential Directions.”

Section 4. “ 4. In a Suit for Partition, where, if this Act had not been passed, a decree for Partition might have been made, then if the Party or Parties interested, individually or collectively, to the Extent of One Moiety or upwards in 20 the Property to which the Suit relates, request the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court shall, unless it sees good Reason to the contrary, direct a Sale of the Property accordingly, and give all necessary or proper consequential Directions.”

SUBDIVISION OF LAND ORDINANCE (CAP. 121) OF FIJI.

Section 3. “ 3. In this Ordinance, unless the context otherwise requires— 30

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“ subdivide ” means—

- (a) dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of a Certificate of Title under the Land (Transfer and Registration) 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 40 Registrar of Titles under the last-mentioned Ordinance; or ”

Section 5 (as amended by Sub-division of Land (Amendment) Ordinance No. 14 of 1946, sec. 2). RECORD.

“ 5. Notwithstanding the provisions of any other law for the time being in force no land to which this Ordinance applies shall be subdivided without the prior approval of the Board to be obtained in the manner hereinafter prescribed:

Provided that it shall be lawful to subdivide such land without such approval if—

- 10 (a) no part of the land is situated in any township designated by the Governor by proclamation or within three miles of the boundaries of a town or of a township designated as aforesaid; and
- (b) the land is subdivided in such a manner that no lot is less than five acres in area.”

Section 6 (1) (as amended by Sub-division of Land (Amendment) Ordinance No. 14 of 1946, sec. 3).

- 20 “ (1) A person who desires to subdivide land in a manner which requires the approval of the Board as provided in section 5 shall submit an application in writing to the local authority of the area in which the land is situated.”

Section 11 (as amended by Sub-division of Land (Amendment) Ordinance No. 27 of 1948, sec. 3).

“ 11. The minimum area and street frontage of any lot in any subdivision made under this Ordinance shall be twenty four perches and fifty feet respectively:

- 30 Provided that in special circumstances the Board shall have power to modify such minimum area or frontage but only in so far as may be necessary to enable the full utilization of land under subdivision ”.

SUPREME COURT ORDINANCE (CAP. 2) OF FIJI.

Section 35. “ 35. The Common Law, the Rules of Equity and the Statutes of general application which were in force in England at the date when the Colony obtained a local Legislature, that is to say, on the second day of January, 1875, shall be in force within the Colony subject to the provisions of section 37 of this Ordinance.”

40 *Section 36.* “ 36. Such portions of the practice of the English courts as existed on the said second day of January, 1875, shall be in force in the Colony subject to the provisions of section 37 of this Ordinance, and except so far as such

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practice may be inconsistent with any general rules of the Supreme Court relating to practice and procedure.”

Section 37.

“ 37. All Imperial laws extended to the Colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction permit and subject to any existing or future Ordinances of the Colonial Legislature, and for the purpose of facilitating the application of the said laws it shall be lawful for the Court to construe the same with such verbal alteration not affecting 10 the substance as may be necessary to render the same applicable to the matter before the Court, and every judge or officer of the Supreme Court having or exercising functions of the like kind or analogous to the functions of any judge or officer referred to in any such law shall be deemed to be within the meaning of the enactments thereof relating to such last-mentioned judge or officer, and whenever the Great Seal or any other seal is mentioned in any such Statute it shall be read as if the seal of the Supreme Court were substituted therefor, and in matters of practice 20 all documents may be written on ordinary paper notwithstanding any directions as to printing or engrossing on vellum, parchment or otherwise.”

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