Privy Council Appeal No. 40 *of* 1952

Goberdhanbhai Bhailalbhai Patel - - - - - - *Appellant*

v.

Ghelabhai Premabhai - - - - - - - - - *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1953

Present at the Hearing :

LORD PORTER
LORD OAKSEY
THE CHIEF JUSTICE OF CANADA
(MR. T. RINFRET)
MR. L. M. D. DE SILVA

[*Delivered by* LORD PORTER]

The problem which their Lordships have to consider in the present case arises as a result of an Ordinance of the Protectorate of Fiji numbered 121 and enacted in the year 1937.

The Ordinance deals with the sub-division of land and is headed an Ordinance to provide for the regulation and control of sub-divisions of land. It applies not to the whole of Fiji but only to portions specified or to be specified and in the specified portions prevents subdivision without the prior approval of a body created for the purposes of the Ordinance, known as a Subdivision of Land Board and referred to as " the Board ".

The exact terms of the relevant portion of the Ordinance must be set out later but it may be stated at once that the fundamental question in issue is whether its provisions prevent the making of a decree of partition of certain categories of land or merely prevent the carrying out of the decree by prohibiting the material division of the land as a result of the decree.

The facts are not in controversy and have been set out in the judgment of the learned Chief Justice whose words may be adopted *seriatim*.

They are as follows :—

> " 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 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 business 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 have the option to re-join them as a partner. At the same time he entered into a

tenancy agreement with the Defendant and 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 premises without his consent and against his will and that he has 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 the plans and the evidence as to the buildings that partition is not a practical or economic proposition."

A true appreciation of the meaning and effect of the Ordinance in their Lordships' view requires a short summary of the doctrine of partition as it existed and developed in England.

Partition was of necessity a remedy required only in cases where there was concurrent ownership i.e. in cases of (1) Coparceny (2) Tenancy in Common (3) Joint tenancy and (4) Tenancy by entireties.

The last named has no bearing upon the matter in dispute and may be neglected but before the reign of Henry VIII though all concurrent owners could agree to a partition by private arrangement between themselves coparceners alone had a legal right to demand partition.

By Acts of 1539 and 1540 respectively the right to demand partition was conferred on joint tenants and tenants in common.

In the case of coparceners the remedy of partition was obtained by the issue of a writ *de partitione facienda* and the statutes referred to extended the like remedy to joint tenants and tenants in common.

In the two Acts mentioned above the writ is referred to as "*de participatione facienda*" by what is apparently a clerical error, but it is obviously the same writ. It was however so cumbersome and difficult a process that the Court of Chancery assumed jurisdiction and the writ itself was abolished in 1833.

Except for the right of partition the concurrent owners had no further remedy and there were many cases in which a fair division of the property enjoined in a decree was a matter of supreme difficulty amounting in certain instances almost to an impossibility.

It is not necessary to multiply illustrations: it is, as their Lordships think, sufficient to refer to the case of *Turner* v. *Morgan* 8 Ves, 143 decided in the year 1803. The result of this case may be succinctly stated as declaring that in a bill praying partition the Court must decree partition however inconvenient and undesirable partition may be. Indeed the Lord Chancellor in that case adjourned the hearing in order that the parties might come to terms whereby the one might sell and the other purchase but in default of agreement found himself compelled to decree partition.

The legislature was somewhat tardy in devising a remedy for this state of affairs but eventually in 1868 the Partition Act was passed. Its material provisions are as follows :—

"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 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."

"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 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."

Both these sections have some bearing on the point at issue but section 4 is that which is strictly relevant inasmuch as the appellant owns one moiety or upwards in the property to which the suit relates.

What the law of Fiji was with relation to partition at the time of the passing of the English Act need not be considered since in 1875 the Supreme Court Ordinance (Cap. 2) of Fiji was passed. It runs in the following terms:—

"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."

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

"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."

In these circumstances in England and in Fiji from the year 1875 to 1937 a concurrent owner in the position which the appellant holds could have demanded a sale of the property in which he was interested instead of being contented with a decree for partition. The question which their Lordships have to determine is whether that right has been taken from him in Fiji by Ordinance 121 of that year. Its material terms are as follows:—

Section 3.

"3. In this Ordinance, unless the context otherwise requires—

. . . . . .

"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 Registrar of Titles under the last-mentioned Ordinance;"

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

"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—

(*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).

"(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:

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."

The respondents point out as is the fact that under the Act of 1868 no order for sale is possible unless a decree for partition might have been made if the Act had not been passed and contend that, as the Court of Appeal have held, partition and division are the same thing. Partition, they say, merely means division and as the Ordinance by section 5 prohibits division it prevents a decree for partition being made in as much as no partition is permissible in Fiji unless and until an application has been made to the local authority and that authority has granted permission for the division to be made.

If indeed the Fijian Ordinance on its true construction prohibits the making of a decree of partition the respondents are clearly right subject to one argument presented to their Lordships on behalf of the appellant. On his behalf it is maintained that section 4 of the Act of 1868 when it uses the words "where if this Act had not been passed a decree for partition might have been made" is dealing only with the situation as it existed before that date. If, they say, such a decree might have been made before 1868 then a sale may or in certain circumstances must be granted. It matters not that division or indeed partition may be prohibited at a later time. The only question is could partition have been decreed before the Act of 1868 was passed. The wording is not "might be made" but "might have been made" and such an expression, they contend, points to the position as it existed in 1868 and not to the state of the law at a later period. If it had been desired to prohibit the remedy of sale in lieu of partition it would, they maintain, have been easy to do so in plain terms, but a mere prohibition of partition in the future would not have this result.

In the present instance their Lordships are not disposed to make a pronouncement upon the argument so presented since they are of opinion that a decision of the matter can be arrived at on another ground.

In their view "a decree for partition" and "division" or "subdivision" are two different matters.

It will be observed that throughout the relevant sections of the Ordinance save in one place the word partition (much less decree for partition) is never used. The Ordinance throughout speaks of subdivision and its object appears to be to prevent the subdivision of land into such small portions as are uneconomical or undesirable.

It was urged however that a decree for partition necessarily included an order for division and if an order for division could not be made then a decree for partition was likewise impossible.

In support of this proposition reference was made to Seton's Judgments and Orders (7th Edn. 1912) Vol. II p. 1812 where a form of order for partition in chambers is set out. It is, in the example given, first ordered that a partition be made and then as part of the same order that the land be divided into a number of parts and it is contended that both parts of the Order are essential elements in a decree for partition. Their Lordships are not persuaded that a decree for partition cannot be made, unless an order for subdivision forms part of the decree.

In their opinion this view is supported both by the text book writers and the cases to which they were referred in argument.

In Challis on Real Property (3rd Edn. 1911) it is said on page 375 dealing with partition "After judgment upon a writ of partition at Common Law, a writ was directed to the sheriff, ordering him to make the partition by the oath of twelve lawful men of the County."

This procedure seems to enjoin first the making of the decree and then as a subsequent act the division of the property.

The authority relied upon for Challis's statement is to be found in Coke upon Littleton Vol. I 1st part sect. 248 and is in the following terms:—

> "And when judgment shall be given upon this writ, the judgment shall be thus; that partition shall be made between the parties, and that the sheriff in his proper person shall go to the lands and tenements, etc. and that he by the oath of 12 lawful men of his bailiwick, etc. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintiff or to one of the plaintiffs, and another part to another parcener, etc. not making mention in the judgment of the eldest sister more than of the youngest."

For the sake of clarity it is perhaps desirable to quote the note by Coke which immediately follows the words of Littleton. It uses the following expressions:—

> "The first judgment in a writ of partition, whereof Littleton here speaketh, is quod partitio fiat inter partes praedictas de tenementis praedictis, cum pertinentiis (*sic*), after which judgment. By this etc. viz. tenements, etc. is implied, that a writ shall be awarded to the sheriff, quod assumptis tecum 12 liberis et legalibus hominibus de vicineto tuo, per quos rei veritas melius sciri poterit, in propria persona tua accedas ad tenementa praedicta cum pertinentibus, et ibidem per eorum sacramentum, in praesentia partium (3) praedictarum per te praemuniendarum si interesse voluerint, praedicta tenementa cum pertinentibus per sacramentum bonorum et legalium hominum praedictorum, habito respectu ad verum valorem earundem, in duas partes aequales partiri et dividi, et unam partem partium illarum etc."

But its contents are summed up later when it is said:—

> "And it is to be observed, that there be two judgments in a writ of partition. Of the former Littleton speaketh in this place. And when partition is made by the oath of twelve men, and assignment and allotment thereof, and so returned by the sheriff, then the latter judgment is *ideo consideratum est, quod partitio praedicta firma et stabilis imperpetuum teneatur*, and this is the principal judgment. And of the other, before this be given, no writ of error doth lie."

In their Lordships' opinion the natural inference from these authorities is that a decree of partition might be made although a right to a division of the land did not follow its pronouncement without the further step leading to the later and principal judgment. But indeed the same result would be reached even if the second judgment followed the first in due course. In such circumstances an order for partition and division could be made but the latter part of the order could not be carried out in Fiji owing to the terms of the Ordinance.

It is in their Lordships' view not the making of the decree which is prohibited but the subdivision of the land which would otherwise result from the making of the decree.

The argument on behalf of the appellant is, as their Lordships think, strengthened by a consideration of the grounds for the decision in *Pryor* v. *Pryor* (1875) 19 Eq. 595. The relevant features in that case are set out in the opening page from which it appears that in May 1864 the suit was instituted to obtain the partition of an estate at Lambeth. The usual partition decree was made with the following addition " and any of the parties to be at liberty before the commission shall be issued to carry in proposals for a sale or a partition before the Judge in Chambers." It is true that in that case it was held that the decree having been made before 1868 a sale could not be ordered without the consent of the whole of the parties, but it is plain that a sharp division is drawn between the decree and the carrying out of the division of the land under it. Indeed the decree might have been carried out in one of two ways, either by dividing the property or by a sale by consent of all the parties and if the latter course had been followed it could not be said nor was it contended that a partition decree had not been made.

Their Lordships' view is in no way altered by the fact that under s. 11 of the Ordinance the land in question in the present instance could not owing to its diminutive size be divided save in exceptional circumstances, the question being not could it be divided but could a decree for partition be made.

Nor is the definition of " subdivide " in s. 3 (*a*) inimical to this opinion. All that definition means is that a division or subdivision takes place within the meaning of the Ordinance, if the land is in fact divided, whether it is divided for the purpose of sale or conveyance or transfer or lease or sublease or mortgage, making an agreement, partition or otherwise dealing with the property. But it is not divided merely because an order for partition is made: there is nothing to prohibit the making of such an order. What is forbidden is the carrying out of the order by actual partition unless and until the approval of the Board, set up by the Ordinance, has been obtained.

It will be observed that in coming to their conclusion their Lordships have not considered it necessary to express any opinion on the contention presented to them that a statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words pointing unmistakably to that conclusion. In their opinion it is unnecessary to reach a conclusion on such a contention in as much as on the true construction of the Ordinance all that is forbidden is the actual division of the land or the carrying out of a decree for partition without the consent of the Board. The making of a decree is not prohibited and as such a decree might have been made (though it could not be implemented by actual division of the property) a direction for sale of the property is permissible under the terms of the Act of 1868.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed and the judgment of the learned Chief Justice restored. The respondent must pay the costs of the hearing before the Court of Appeal in Fiji and before their Lordships' Board.

(21044) Wt. 8096—1 100 11/53 D.L.

In the Privy Council

GOBERDHANBHAI BHAILALBHAI PATEL

v.

GHELABHAI PREMABHAI

DELIVERED BY LORD PORTER

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

1953