

GOBERDHANBHAI BHAILALBHAI PATEL

v.

GHELABHAI PREMABHAI

[SUPREME COURT,* 1952 (Vaughan C.J.), 28th, 29th April, 29th May]

Civil Jurisdiction

Land—partition or sale—jurisdiction to order partition not affected by Subdivision of Land Ordinance—power to order sale in lieu of partition—plaintiff in partition action—necessity for estate in possession—Subdivision of Land Ordinance (Cap. 121—Laws of Fiji, 1945)—Partition Act 1868 (Imperial) (31 & 32 Vict., c.40) s4—Supreme Court Ordinance (Cap. 2—Laws of Fiji, 1945) ss.36, 37—Fair Rents Ordinance 1947.

Landlord and tenant—tenant holding over under Fair Rents Ordinance—nature of estate of landlord—Fair Rents Ordinance 1947.

The plaintiff and the defendant were registered proprietors as tenants in common of two adjoining plots of land upon which were certain buildings used for commercial purposes. The plaintiff leased his undivided half interest to the defendant and another for four years, upon the expiry of which term the tenants claimed to be entitled to hold over under the provisions of the Fair Rents Ordinance, 1947. Following disputes the plaintiff commenced these proceedings for partition or, alternatively, sale of the property; it was common ground that partition was not a practical or economic proposition. It was submitted for the defendant (1) that owing to the provisions of the Subdivision of Land Ordinance, the Partition Act, 1868, had no application in Fiji and the court had no jurisdiction to order partition (2) the court was therefore equally debarred from ordering a sale, which can only be ordered as an alternative to partition and (3) that the plaintiff's interest in the property was an estate in reversion and an order for partition can only be made at the instance of a person holding an estate in possession.

Held: 1. Nothing in the Subdivision of Lands Ordinance takes away the common law jurisdiction of the court to make an order directing partition, though it might be that because of the application of the provisions of that Ordinance to the particular circumstances the order could not be carried out.

2. As the case was one in which a decree for partition might have been made in terms of the Partition Act, 1868, the court had power to make an order directing sale.

* The appeal from this judgment to the Fiji Court of Appeal is reported in this volume immediately following this report, and the ensuing appeal to the Privy Council is reported in [1954] A.C. 35 — Ed.

3. At the time the writ in the action was issued, the plaintiff was entitled in law to immediate possession (not exclusive of the defendant) and the fact that the exercise of that right might be rendered difficult or impossible by the application of some provision of the Fair Rents Ordinance, 1947, does not affect the nature of his title, which is an estate in possession.

Case referred to: *Wilkinson v. Joberns* (1873) L.R. 16 Eq. 14.

A. D. Patel for the plaintiff.

P. Rice for the defendant.

VAUGHAN C.J.: [29th May, 1952]—

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.

The application for the order is opposed by Mr. Rice on three grounds: Firstly, that owing to the provisions of the Sub-division of Land Ordinance (Cap. 121) the Partition Act of 1868, 31 & 32 Vict. Cap. 40, has no application in Fiji and the Court has no jurisdiction to order a partition. Secondly, that since the Court has no jurisdic-

tion to order a partition the Court is equally debarred from ordering a sale which can only be ordered as an alternative to an order for partition. Thirdly, that the plaintiff's interest in the property is an estate in reversion and an order of partition or sale can only be made at the instance of a person holding an estate in possession of the property.

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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 Land 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.

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This disposes of the first two grounds. On the third ground I understand Mr. Rice's submission to be that although the defendant's tenancy in terms of his tenancy agreement with the plaintiff expired in March, 1951, the defendant, by virtue of the provisions of the Fair Rents Ordinance, No. 29 of 1947, is entitled to hold over, and until ejected in accordance with the provisions of that Ordinance he remains a tenant from year to year, and therefore the plaintiff has no estate in possession but is a reversioner and cannot, in that capacity, bring an action for partition. I have always understood the law to be that the owner of a fee simple who leases his property for a term of years is in law regarded not as a reversioner but as enjoying, through his lessee, an estate regarded by the law as an estate in possession. However this may be it is quite certain that at the time he sued out his writ the plaintiff was entitled in law to the immediate possession of the property (but of course not exclusive of the defendant). The fact that the exercise of that right might be made difficult or impossible by the application of some provision in the Fair Rents Ordinance does not affect the nature of his title which I find is an estate in possession. This view of the law is borne out by the comment in *Halsbury's 1st Edition of the Laws of England*, para. 1578, Vol. 21 and the cases there cited, particularly the case of *Wilkinson v. Joberns*, (1873) L.R. 16 Eq. p. 14, the head note of which case reads:

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"The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial

purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under sect. 4 of the Partition Act, 1868."

A

I find that the plaintiff is owner of the 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 makes 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.

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Judgment for the plaintiff and order for sale.