

SEVERINO CORNISTA, PLAINTIFF AND APPELLEE, VS. SEVERA TICSON, DEFENDANT AND APPELLANT.*G.R. No. 8603. March 13, 1914*

Ponente: CARSON, J.

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Plaintiff and defendant executed an extrajudicial partition agreement whereby they undertook to divide certain real estate of which they claimed ownership as the heirs of one Alvarez, deceased. Under the terms of the agreement defendant was to receive a house and two-twelfths of the parcel of land on which the house stands, and the plaintiff ten twelfths of this parcel of land. In the course of certain proceedings had in the Court of First Instance of Laguna touching the administration of the estate of Alvarez, deceased, the extra Judicial partition agreement was submitted to the court, and approved by an order regularly entered in the record of those proceedings.

Thereafter counsel for the plaintiff secured an order from the court directing the sheriff to deliver possession of the real estate to which plaintiff was entitled by virtue of the extrajudicial partition agreement as approved by the court. The sheriff thereupon went to the land in question, measured off a portion which he estimated to be ten-twelfths of the entire parcel, and undertook to make delivery thereof to the plaintiff. Defendant nevertheless continued in possession of the house and the entire parcel of land, and this action was instituted by the plaintiff to recover the portion measured off by the sheriff, and said to be ten-twelfths of the whole.

The defendant, claiming that the alleged assignment and delivery of a part of the land by the sheriff was wholly without lawful authority, made some attempt to have the proceedings in that regard annulled and to have the court proceed to the partition of the real estate in conformity with the provisions of the Code of Civil Procedure. It is not quite clear from the record what was the final result of her efforts in this regard, but it would appear that the court declined to grant the relief prayed for, on the ground that her application was not made in due form or in the proper action.

Defendant now insists that all the proceedings of the sheriff in the premises were unauthorized, null and void, and that while she recognizes plaintiff's right to a ten-twelfths undivided share of the land in question he cannot maintain an action to recover exclusive possession of the whole or any part of the land held in common by the plaintiff and the defendant.

We are of opinion that defendant's contentions must be sustained and the judgment of the trial court in favor of the plaintiff should be reversed. Without stopping to examine the legality or the true force and effect of the order to the sheriff to deliver to the plaintiff the ten-twelfths undivided share of the land in question to which he was entitled under the terms of the order approving the extra-judicial agreement, it is very clear that until and unless a partition of the land had been made either by agreement of the parties or in a proper judicial proceeding the sheriff could not give physical possession of such an undivided interest without giving possession of the entire tract, which of course he had no authority to do under the terms of the order. So also it is manifest that the sheriff was

wholly without authority to select arbitrarily a portion of the land, which he estimated to be ten-twelfths of the whole, and thus deprive the owner of the two-twelfths share of his right to an undivided interest therein.

The remedy of a tenant in common of an estate in land, (the holder of an undivided interest therein) who desires to have sole and exclusive possession of his interest is the appropriate proceeding for partition; and ordinarily no action can be maintained between cotenants for the exclusive possession of the common property, or for the sole enjoyment of the profits thereof. (Civil Code, Book 1, Title III; 38 Cyc, 19, and cases there cited.)

The trial court seems to have rested its judgment in favor of the plaintiff, in part at least, on the alleged consent of the defendant; but we think it is very clear that defendant did not consent to the action taken by the sheriff, and her consent to the order approving the extrajudicial agreement wherein she recognized the right of plaintiff to a ten-twelfths undivided interest in the land could under no circumstances be construed as consent to the arbitrary partition of the land by the sheriff, even though the order to the sheriff had expressly authorized such action on his part.

Let judgment be entered reversing the judgment entered in the court below, without costs to either party.

Arellano, C. J., Moreland, Trent, and Araullo, JJ., concur.

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