

1958

Present : Basnayake, C.J., and Pulle, J.

LUINONA, Appellant, and GUNASEKARA and others. Respondents

S. C. 182—D. C. Gampaha, 3.076/P

Partition action—Corpus—Can a portion of it be excluded from the action?—Provisions of the Partition Act must be carefully observed—Partition Act, No. 16 of 1951, ss. 12, 16, 23, 26 (2) (a), 51, 67, 83 (1)—Amendment of pleadings—Civil Procedure Code, s. 93.

The Partition Act makes no provision for excluding from a partition action, after *lis pendens* is duly registered, any part of the land to which the action relates. If allotments of land of which some of the parties to the action are sole owners are included by the plaintiff in his action, the only way of dealing with them under the scheme of the Act is by declaring in both the interlocutory and final decrees such parties entitled to those separate allotments.

The provisions of the Partition Act must be carefully observed by Judges as well as by parties and their lawyers.

When pleadings are amended due regard must be given to the provisions of section 93 of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Gampaha.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for 4th to 6th Defendants-Appellants.

F. W. Obeyesekere, with *G. L. L. de Silva*, for Plaintiff-Respondent.

S. A. Marikar, with *V. R. D. S. Gunasekera*, for 3rd Defendant-Respondent.

S. D. Jayasundera, for 7th Defendant-Respondent.

Cur. adv. vult.

December 18, 1958. BASNAYAKE, C.J.—

The plaintiff-respondent seeks to obtain a decree for partition of a land called Delgahakumbura Pillewa. It is described in the schedule to the plaint as a land thirty perches in extent and bounded on the North, South, and West by field of Dissanayake, formerly of the heirs of Charles Medonsa Wijeratne Gurunanse, and East by Main Road.

When the land was surveyed on a commission issued by the Court under section 16 of the Partition Act, the plaintiff and the first five defendants were present. The plaintiff pointed out the boundaries. The survey disclosed that the extent of the land was 1 rood and 4 perches and not 30 perches as described in the plaint. In the plan the surveyor depicted the land as consisting of three blocks A, B, and C of 22·5 perches, 14 perches, and 7·5 perches, respectively. Lots A and C contain buildings while B is a bare land.

The 7th defendant averred in his answer that Lot C was his exclusive property and the appellants (4th, 5th and 6th defendants) averred that Lots A and B alone should be partitioned. The learned District Judge after hearing evidence held that Lot A alone should be partitioned and entered interlocutory decree as follows:—

“It is ordered and decreed that the Lot A of the land called Delgahakumbure Pillewa situated at Kidagammulla in Meda Pattu of Siyane Korale in the District of Colombo, Western Province, and bounded on the North by field of S. A. Dissanayake formerly of the heirs of Charles Medonsa Wijeratne Gurunanse East by Main Road and South by Lot C of this land and by field of S. A. Dissanayake formerly of the heirs of Charles Medonsa Wijeratne Gurunanse and on the West by Lot B of this land and containing in extent twenty two and half perches (A.O-R.0-P.22½) as depicted in survey Plan No. 614 dated 21.10.52 and made by M. S. Perera, Licensed Surveyor and Commissioner, and marked X and filed of record be and the same is hereby declared the common property of the undermentioned parties

and that the same be divided and partitioned amongst in the following shares to wit :

Plaintiff to an undivided ..	..	28/168 shares
1st defendant to an undivided ..	..	14/168 ..
2nd defendant to an undivided ..	..	14/168 ..
3rd defendant to an undivided ..	..	22/168 ..
14, 15, 16, and 17 defendants jointly to an undivided ..	..	75/168 ..
Undivided ..	..	15/168 ..

are unallotted.”

The decree entered by the learned trial Judge is in respect of only a part of the land to which the action relates. Section 26 (2) (a) authorises the Court to enter an interlocutory decree ordering a partition of the land. The land in that context means the land or lands constituting the subject matter of the action (vide section 83 (1), definition of “land”).

A decree in a partition action must be in respect of the land to which the action relates. In the instant case the action relates to one land and the decree is in respect of another. If a plaintiff is unable to establish his title to the land which he seeks to partition his action must fail.

The defendant who claimed Lot C maintained that it was his exclusive property. It was the plaintiff’s counsel who said that Lot B was not a part of the land to which the action relates. The learned Judge held that as the plaintiff had pointed out the boundaries to the surveyor lots A, B, and C were lots of the land in respect of which she asked for a decree of partition. The plaintiff does not appear to have been clear as to what the land was, for the learned Judge himself observes :

“The question has been raised as to what the land sought to be partitioned is : the plaintiff herself was not quite sure as to what she wanted partitioned. She had pointed out the boundaries of the land depicted in the Plan X, which is divided into three Lots A, B, C.”

The course taken by the learned Judge is not authorised by the Act. The plaintiff’s proctor has certified under section 12 of the Act that *lis pendens* has been duly registered under the Registration of Documents Ordinance as an instrument affecting the land to which the action relates. That registration is on the register of documents in respect of all the lots including the excluded lots B and C which are not the subject-matter of the decree. The effect of section 67 is that after *lis pendens* is duly registered no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof or by entry of a decree of partition or by the entry of a certificate of sale. Now in the instant case if the interlocutory decree stands there can be no decree of partition in respect of lots B and C. When the Court transmits a copy of the decree for registration under section 51 to the Register of Lands, he will find himself unable to carry

out the duty imposed on him by that section on account of the discrepancy in the description of the land in the registration of the action as a *lis pendens* and that in the decree, for, it requires him to *duly* register such copy under the Registration of Documents Ordinance as an instrument affecting the land to which it relates. In the application for registration of *lis pendens* the land is described in precisely the same way as in the schedule to the plaint.

The scheme of the Partition Act is that once an action is instituted and *lis pendens* is duly registered the action must proceed in respect of the land described in the plaint except where a larger land is made the subject-matter of the action. In such a case the procedure prescribed by section 23 must be followed. The Act makes no provision for excluding from the action any part of the land to which the action relates. If allotments of land of which some of the parties to the action are sole owners are included by the plaintiff in his action the only way of dealing with them under the scheme of the Act is by declaring in both the interlocutory and final decrees such parties entitled to those separate allotments. In the instant case if the 7th defendant proved his exclusive right to lot C he should have been declared entitled to it in the interlocutory decree instead of excluding it. Similarly in regard to lot B the party who proved his claim to it should have been declared entitled to it. As the plaintiff has failed to establish the averments in the plaint and as the proceedings are not in accordance with the Partition Act the decree cannot be allowed to stand and is accordingly set aside and the plaintiff's action dismissed with costs.

I order that the plaintiff and the 3rd defendant do pay the 7th defendant the costs of trial.

The 4th, 5th, and 6th defendants are entitled to the costs of appeal payable by the plaintiff and the 3rd defendant. The 7th defendant will bear his own costs of appeal.

Before I part with this judgment I must repeat what I said in S. C. No. 1, D. C. Gampaha Case No. 2972/P¹. The provisions of the Partition Act must be carefully observed by Judges as well as by parties and their lawyers. In the instant case the pleadings have been amended without due regard to the provisions of section 93 of the Civil Procedure Code. Judges of first instance would do well to read carefully the provisions of that section before an application to amend pleadings is granted. In quite a number of appeals that have come up before us amendments to pleadings have been allowed without the provisions of section 93 being observed.

In the instant case the certificate of the proctor under section 12 of the Partition Act is undated and does not satisfy the requirements of that section. The proctor should certify *inter alia* that all entries in the register maintained under the Registration of Documents Ordinance as relate to the land constituting the subject-matter of the action have

¹ (1958) 60 N. L. R. 337.

been personally inspected by him after the registration of the action as a *lis pendens*. The certificate should also be dated, a prime requirement in regard to all documents prepared by a proctor to be filed in a Court of law. This has not been observed.

PULLE, J.—I agree.

Decree set aside.

