

Present : Fisher C.J. and Drieberg J.

1929.

DE SILVA v. LOKUHAMY

102—D. C. (Inty.) Galle, 20,189

Partition—Decree for sale—Share unallotted—Amendment of decree allotting share—Conclusive effect.

Where a decree for sale was entered in a partition suit and a certain share was left unallotted, and the Court, thereafter, amended the decree by deciding how that share should be allotted,—

Held, that the amendment of the decree was not a variation of it and that the decree as amended was conclusive. -

THIS was a partition case. The final decree which was one for sale contained the following:—

“ Unallotted :—1/27th claimed by 39th defendant, 1/27th share of Tiriyalage Anacho. ” The land was sold under this decree and the money equivalent of the unallotted shares remained in Court. According to the finding of the trial judge the 1/27th share claimed by the 39th defendant really belonged to the heirs of Docho, the sister of Anacho. The appellants, the heirs of Docho, intervened claiming this 1/27th share, and on January 24, 1929, the District Judge after inquiry, made order amending the decree and allotting the said share to them.

On the same day, just after the above order was made, the respondents applied for permission to intervene and claim the same 1/27th share on another basis. The District Judge after hearing argument, held that his order of the January 24, 1929, was not final and ordered an inquiry into the claim of the respondents. The appellants appealed.

H. V. Perera, for appellants.—Once the gap in the decree is filled there is finality. Even if the appellants had no title the amendment of the final decree gives finality just as if they had got their rights in the final decree.

Amarasekera, for respondents.—There was no adjudication that the 1/27th share was Docho's. Decree says “ 1/27th claimed by 39th defendant. ” The 39th defendant's claim was rejected. The 1/27th share is at large and can be claimed by any party who establishes a claim to the satisfaction of the Court. When an application for allotment of unallotted shares is made the Court ought to take all the steps taken in the course of a partition action, e.g., notices, &c.,

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Another way of looking at the question is that once the share is unallotted it cannot be dealt with under the Partition Ordinance. Money deposited in Court should be dealt with in accordance with the Civil Procedure Code.

Section 350 requires notice to interested parties. There is no sanctity in the order declaring appellants entitled to the money.

H. V. Perera, in reply.—The Court has jurisdiction to completely partition a land—allot it to parties and also allot unallotted shares. We must seek a solution that would apply to decrees for partition as well as decrees for sale.

With regard to the question of fresh notices, &c., all the necessary steps were taken before the original trial. Those who failed to come forward cannot claim another notice.

The subsequent intervention is made on the ground that the District Judge has the right to amend his order of January 24. It is submitted that he has not.

August 2, 1929. DRIEBERG J.—

This appeal arises out of an order by the learned District Judge amending the decree for sale passed under the provisions of the Partition Ordinance.

In the decree for sale, which is the final decree, two shares of $1/27$ th each were expressly left unallotted. The Court held that a co-owner, Siman, who was entitled to a $1/9$ th share, left as his heirs three children, Odiris, Ancho, and Docho. The share of Docho was claimed by the 39th defendant, a grandson, but this could not be recognized and in the decree for sale appear these words: "Unallotted— $1/27$ th claimed by 39th defendant; $1/27$ th share of Tiriyalage Ancho."

The land was sold under this decree and the proceeds of the $1/27$ th share in question in this case is in deposit in Court.

On January 24, 1929, the Court considered an application by the appellants to be allotted the $1/27$ th share of Docho. They did not notice the 39th defendant, but this point is of no importance as it is clear that he has no title as against them and no claim is made by him. The 80th added defendant proved that she was the child of Lokuhamy, one of the two children of Docho, and that the 82nd to the 85th added defendants were the children of Siyadoris, deceased, the other child of Docho. The 39th defendant is a son of Lokuhamy and has therefore no present interest in the money.

On January 24, the trial judge after inquiry made the following order: "Amend preliminary decree by allotting $1/54$ th to 80th defendant, $1/108$ th to 81st defendant, $1/108$ th jointly to 83rd, 84th, 85th." By "preliminary decree" I take it the judge meant the decree for sale, as this is the only decree.

On the same day the respondents, who claims adversely to the appellants, petitioned the Court to be allowed to intervene. It must be noted that the respondents claim on a basis which is opposed to the finding in the judgment. The then District Judge Mr. Schrader, found that Docho was one of three children of Siman and therefore entitled to a 1/27th share. The respondents say that the three children of Siman were Odiris, Anochi, and Sango, and that Docho was one of several children of Sango and entitled to only a 1/195th share.

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I understand from the later order of the District Judge that this petition was presented after he had made the order referred to. He fixed the inquiry into the application of the respondents for March 22 and on that date he held that the order which he had made on January 24 was no bar to his inquiry into the claim of the respondents, it being his opinion that the amendment of the decree had not the same final and conclusive effect as the original decree.

It has been pointed out in decisions of this Court that to leave a share unallotted in a partition action is unsatisfactory, and in the case of a decree for partition this is undoubtedly so. In a decree for sale, however, the disadvantages are less marked and it may be said that there is no real objection to such a course. The purchaser at the sale gets a good title and there is no reason why the final settlement of the action should be unduly prolonged when there is difficulty in ascertaining to whom a particular interest has passed.

In this case the decree left open for future determination the question as to who succeeded to Docho's interest. The Court which passed the decree has after inquiry now determined that it passed to the appellants and has ordered the amendment of the decree by that share being allotted to them.

This is in no sense a variation of the decree, it is nothing more than a decree, passed on a later date, that the appellants are entitled to that share. I am not aware of any direct authority on this point, but it seems to me that there is good reason for giving to this amendment the same conclusive effect that the rest of the decree has; and if this is so the learned District Judge could not entertain the application of the respondents after the appellants had been finally and conclusively declared the owners of this share on January 24.

The order of the District Judge of March 22 is set aside, and the amendment of January 24 will stand. The respondents will pay to the appellants the costs of this appeal and the costs in the District Court consequent on their application.

FISHER C.J.—I agree.

Appeal allowed.