

1962 Present: T. S. Fernando, J., and Abeyesundere, J.

W. A. VICTOR PERERA, Appellant, and K. DON JINADASA  
and 9 others, Respondents

S. C. 538—D. C. Colombo, 8576/L

*Partition action—Interlocutory decree—Extent of its finality—Effect of failure to register lis pendens—Partition Act (Cap. 69), s. 48 (3).*

In partition suit No. 7059 R, who was added as a party, did not take any action herself in respect of the suit and did not participate at the trial. After interlocutory decree was entered she attempted to intervene in the suit in order to obtain either a dismissal of the suit or an exclusion of Lots 1 and 2 in the corpus. Her attempt proved unsuccessful. Thereafter she transferred her rights in Lots 1 and 2 to V. P. Relying upon this deed of transfer, V. P. instituted the present action No. 8576 claiming a declaration of title to Lots 1 and 2, citing as defendants all the persons who had been allotted shares in the interlocutory decree which dealt with Lots 1, 2 and 3 as one corpus. He claimed that, inasmuch as the partition action had not been duly registered as a *lis pendens*, his right to a declaration of his title was unaffected by the interlocutory decree.

*Held*, that under section 48 (3) of the Partition Act the trial Judge was obliged to address his mind to the question of the due registration of the partition action as a *lis pendens*.

**A**PPPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *Neville Wijeratne*, for the plaintiff-appellant.

No appearance for any of the defendants-respondents.

*Cur. adv. vult.*

June 1, 1962. T. S. FERNANDO, J.—

This appeal raises the question of the lack of finality of an interlocutory decree entered in a partition action instituted after the passing of the Partition Act of 1951, section 48 (1) of that Act notwithstanding, where such action has not been duly registered as a *lis pendens* affecting the land to which the action relates. The question arises in the circumstances set out below.

The plaintiffs in partition action No. 7059/PN of the District Court of Colombo sought a partition of a land referred to as Gorakagahawatte and depicted in plan No. 626 (of 1st August 1954 prepared by V. A. L. Ranasinghe, licensed surveyor) as three allotments marked thereon as Lots 1, 2 and 3. At the survey, one Mrs. E. Ranasinghe claimed title

to Lots 1 and 2. She was thereafter added as the 17th defendant in the case, but would appear not to have taken any action herself in respect of the partition suit nor even to have participated at the trial. Interlocutory decree was entered on 21st December 1955 declaring, inter alia, the 8th and 9th defendants in that case entitled to an undivided 1/24 share each of the entire land comprising Lots 1, 2 and 3. The 8th defendant was further declared entitled to certain buildings and a well standing on Lot 1. The 8th and 9th defendants in this partition action, it is not disputed, had long prior to the institution of the action itself parted with their interests to one de Silva, the predecessor-in-title of Mrs. Ranasinghe. No appeal was preferred against the interlocutory decree, but Mrs. Ranasinghe attempted on 21st April 1956 to intervene in the partition action in order to obtain either a dismissal of the action or an exclusion of Lots 1 and 2 from the corpus dealt with therein. This attempt proved unsuccessful, as did an appeal to the Supreme Court from the order of the District Court refusing intervention. The order of the Supreme Court dismissing Mrs. Ranasinghe's appeal was made on 19th May 1958, and Mrs. Ranasinghe thereafter, on the 1st June 1958, by deed of transfer No. 360, parted with her rights in Lots 1 and 2 to the appellant before us. Relying upon this deed of transfer, the appellant instituted the present suit No. 8576/L claiming a declaration of title to Lots 1 and 2 in plan No. 626 referred to above, citing as defendants to his suit the 2nd plaintiff and the 1st to 9th defendants in partition action No. 7059/PN who were the only persons who had been allotted shares in the interlocutory decree which dealt with Lots 1, 2 and 3 as one corpus. The appellant contended in the District Court that his right to a declaration of his title was unaffected by the interlocutory decree entered on 21st December 1955 in case No. 7059/PN as, so he claimed, the partition action had not been duly registered as a *lis pendens* affecting the land dealt with therein. The only parties who appeared before the District Court to resist the appellant's claim to a declaration of title were the 10th and the 8th defendants who were respectively the 2nd plaintiff and the 8th defendant in the partition action, the latter being a person who has been proved to have parted with his rights in the land in question to a predecessor-in-title of Mrs. Ranasinghe.

Section 48 (3) of the Partition Act enacts that the interlocutory decree or the final decree of partition shall not have the final and conclusive effect given to it by sub-section (1) of section 48 as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a *lis pendens* affecting such land. The question of the due registration of the *lis pendens* was raised as a specific issue on behalf of the appellant and evidence was led thereon; this issue was treated by counsel for

all parties who participated at the trial as being the crucial issue, but the learned District Judge nevertheless declined to answer it, observing that the question of the due registration of the *lis pendens* "cannot be canvassed afresh in these proceedings". In taking that course the learned judge appears to have assumed what had indeed to be established, viz., that the appellant himself was bound by the decree in the partition action.

The appellant, it must be emphasized, does not claim any right, title or interest as being derived directly or even remotely from the decree in the partition action. On the other hand, not having been a party to that action, he claims adversely to that decree. In these circumstances it seems to me that the trial judge was obliged to address his mind at the trial to the question of the due registration of the partition action as a *lis pendens*. It is neither satisfactory nor possible for us to essay an answer to that question (issue 7 at the trial) in this Court. The question is essentially one for a trial court.

I would set aside the decree dismissing the plaintiff's action and remit the proceedings to the District Court so that issue 7 may now be answered and a decree entered in accordance with that answer. It is permissible to add that, if that issue is answered in favour of the plaintiff-appellant, it seems to follow that he is not bound by the interlocutory decree of 21st December 1955 and that he is entitled to the declaration he has prayed for.

The 8th and 10th defendants must pay to the plaintiff-appellant the costs of this appeal.

ABEYESUNDERE, J.—I agree.

*Decree set aside.*

