1968 *Present :* **H. N. G. Fernando, C.J., and Abeyesundere, J.**

M. GIRAN APPUHAMY, Appellant, *and* M. ARIYASINGHE and 26 others, Respondents

S. C. 195/66 (Inty.)—D. C. Gampaha, 8207/P

Partition action—Inclusion, in plaint, of a land possessed dividedly by prescriptive possession—Alienation of that land pending the partition action—Validity—Partition Act, s. 67.

Res judicata—*Opinion thereon of Judge who heard the earlier action—Irrelevancy.*

(i) Where, in a partition action, a particular portion of land is excluded from the partition on the ground that some person or persons have title to it as a separate land, whether by prescriptive possession or otherwise, section 67 of the Partition Act does not render void dealings with that portion during the pendency of that action.

(ii) If a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion to the contrary expressed by the trial Judge.

APPEAL from an order of the District Judge, Gampaha.

E. S. Amerasinghe, for the Plaintiff-Appellant.

No appearance for the Defendants-Respondents.

Cur. adv. vult.

March 3, 1968. H. N. G. FERNANDO, C.J.—

The corpus of this action for partition is described in the plaint as Lots 5 and 6 depicted in Plan No. 543 dated 15th May 1952. That plan was prepared for the purposes of an earlier partition action, No. 2612/P D. C. Gampaha. One of the two persons who were plaintiffs in that action is the 8th defendant in the present action. The present plaintiff and one Siman Appu intervened in that action and filed a statement of claim asking for the exclusion of Lots Nos. 5 and 6 of the land depicted in the Survey Plan No. 543. In so doing, they pleaded also that they had acquired prescriptive title to those two Lots. These claims

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were disputed in that action, and judgment was delivered in 1958, the District Judge upholding the claim of prescription and excluding these 2 Lots 5 and 6 from the partition.

Although the present plaintiff and Siman Appu jointly intervened in the earlier action, it would appear that the major interests in Lots 5 and 6 had belonged to Siman Appu, and that at the time when their statement of claim was filed the present plaintiff had a claim only to a small share in these Lots. But in January 1952 and April 1952, while the earlier action was pending, Siman Appu executed two deeds of Gift in favour of the present plaintiff, and the latter's claim of title in the present action is based largely on these two deeds.

One of the substantial points of contest in the present action is that these two deeds, having been executed during the pendency of action No. 2612/P, were void by reason of the provisions of section 67 of the Partition Act. On this point the learned Judge who tried the present action has held that the deeds were void, and that is the principal reason why this action has been dismissed.

A similar point was considered by this Court in the case of *Perera v. Attale* [1]. In that case an action for partition had been dismissed on the ground that the land had been possessed dividedly and not in common. During the pendency of the action, the owner of one of the Lots transferred her interests and the transferee also thereafter executed another transfer. In subsequent proceedings these transfers were challenged on the ground that they were void because they were executed during the pendency of a partition action, but this Court held in appeal that section 17 of the old Partition Ordinance did not render the transfers void. De Kretser J. made the following observations in the judgment of this Court :—

> " The present is a case of many separate lands being included in a partition action and the action was dismissed on the ground that the land was not held in common. Each owner of each lot was not therefore affected by the abortive partition action and was free to dispose of his land as he chose. As Wood-Renton J. remarked in *Abeysekera v. Silva* (1 C. A. C. 37) " undivided " in section 17 means undivided in the eyes of the law. Here the larger land had long ceased to be undivided in the eyes of the law."

The facts of the present case are not in all fours with those of the case just cited, because in the present case the partition action 2612/P was not dismissed, but it seems to me that the *ratio decidendi* of the cited case is applicable to the present facts. Although a partition decree was entered in action No. 2612/P, Lots 5 and 6 were excluded from that decree on the ground that the present plaintiff and Siman Appu had,

[1] *(1944) 45 N. L. R. 210.*

at the time when the action was filed, already acquired a title by prescription to these Lots. To use the language of Wood-Renton J. which was quoted in the cited case, Lots 5 and 6 were thus not " undivided in the eyes of the law ", because by reason of the acquisition of prescriptive title to these Lots, they had ceased to be an undivided part of the larger land.

De Kretser J. also referred to a situation in which the plaintiff in a partition action includes another's separate property in the corpus of the action, and pointed out the injustice of preventing the true owner from dealing with his property merely because of a false allegation concerning the property made in a partition action.

The learned District Judge in the present action thought that the decision in 45 N. L. R. is no longer applicable because the provision of law which now applies is Section 67 of the new Partition Act. Section 17 of the old Ordinance prohibited alienations of an undivided share or interest in any " property as aforesaid ", that is to say, in any property which " shall belong in common to two or more owners ", and the decision in 45 N. L. R. was in effect that the alienation of property pending a partition action is not void if in law it does not belong in common to the co-owners of the land which is the subject of the partition action.

Section 67 of the Partition Act prohibits the alienation pending a partition action of an undivided share or interest in the land to which the action relates ; and the expression " partition action " is defined as an action for the partition or sale " of any land or lands belonging in common to two or more owners ". Hence, if a land, which is included by a plaintiff in the corpus of a partition action, is in law a separate land, and is excluded from the partition on that ground, it is not a land belonging in common to the owners of the land ultimately partitioned. It seems to me therefore that the construction placed by de Kretser J. on the former s. 17, namely that it rendered void only the alienation of shares of a land which is *properly* the subject of a partition action, must be placed also on s. 67 of the new Act.

The partition action which was referred to in the case of *Perera v. Attale* had been instituted in 1928 and was ultimately dismissed in 1937 or 1938 ; and unfortunately it is not uncommon that partition actions may be pending for very long periods. If then it turns out at the final determination of a partition action that some portion of the corpus described in the plaint did not in law properly form part of the subject of the action, section 67 of the Partition Act, if construed according to the opinion of the trial Judge in this case, can have extremely harsh consequences. If that construction be correct, the true owner of that portion of land would be unreasonably deprived of the liberty of selling or donating his property. The ordinary principle, that s. 67 does not prevent dealings in the interest to be ultimately allotted in a partition

decree, would be of no avail to such an owner ; for his right is, not that any interest will be allotted to him in the decree, but that his property cannot be the subject of partition. Accordingly, even if there be any slight doubt on the question, I much prefer to lean towards the construction that the Legislature, in enacting s. 67, had no intention of rendering the decision in that case inapplicable in connection with actions under the new Partition Act.

I would hold for these reasons that where a particular portion of land is excluded from a partition on the ground that some person or persons have title to it as a separate land, s. 67 does not render void dealings with that portion during the pendency of that action. The learned District Judge therefore erred in holding to be void the deeds of 1952 under which the present plaintiff claimed title to Lots 5 and 6.

The case for the plaintiff was that he is entitled to the entirety of Lots 5 and 6, less an undivided half acre, and that the 1st defendant is entitled to that undivided half acre. Although a number of persons intervened and filed statements of claim, the only claims which were pressed were those of the 3rd, 4th and the 7th defendants. The 3rd defendant claimed a title by prescription to Lot A of the land depicted in Plan No. 1990 prepared in this action. That claim was rejected by the learned trial Judge. The 7th defendant claimed interests under a deed No. 33091 of 3rd January 1952 alleged to have been executed by Siman Appu. The learned trial Judge, however, held that the 7th defendant failed to prove the due execution of this deed. The 4th defendant, a man by the name of W. A. Jan Singho, claimed certain interests under a person referred to in plaintiff's pedigree. This 4th defendant was a party to action No. 2612/P, having been the 19th defendant in that action. Counsel for the plaintiff has argued in appeal that the 4th defendant, as well as all other persons who were parties to action No. 2612/P, can now have no claims because the finding that the present plaintiff and Siman Appu had title by prescription to Lots 5 and 6 binds those parties as *res judicata*. This argument was rejected by the trial Judge owing to a quite unusual circumstance.

When the points of contest were framed in action No. 2612/P the learned Judge who tried that action referred *inter alia* to the point raised as to the prescriptive rights of the present plaintiff and Siman Appu to Lots 5 and 6, and he observed that he was " averse in a partition action to adjudicate upon points of contest which may be used as *res judicata* in some other action ", and he proceeded to state that he was allowing this point of contest to remain " not for the purpose of any other parties obtaining an adjudication, but purely as a guide for me ". These observations have influenced the trial Judge in the present action to hold that the earlier finding on prescription is not *res judicata*.

It is clear, however, from the judgment in action No. 2612/P that the question of the prescriptive rights to Lots 5 and 6 was actively contested, and that the finding in favour of the present plaintiff and Siman Appu was based on convincing evidence of their exclusive possession. In fact, therefore, despite those earlier observations, the point of contest No. 5 was not merely used or regarded as a guide for the Judge. In any event, if a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion or inclination to the contrary which the trial Judge might entertain. On this ground, the claim of the 4th defendant in the present action should have been rejected.

The 26th defendant made no statement of claim prior to commencement of the trial. He was called on behalf of the 3rd defendant as a witness at the trial, presumably in an attempt to support the case of the 3rd defendant. In the course of his cross-examination he stated as follows :—

"I was not a party to that case No. 2612/P. I had rights in this land from my mother Punchihamy. I sold those rights to Siman.

Q. After that you had no rights in this land ?

A. Still I own another 1/64 share.

Q. But you have not intervened in this action and claimed that share ?

A. There is no proper case for this land.

Q. You haven't up to date claimed this 1/64 share ?

A. I have intervened as a party in this case. I have not filed any answer."

At this stage he was permitted to file a statement of claim, which at the most upon his own deeds is that he is entitled to a 1/64 share. It is clear, however, from the document P6, that the 26th defendant had in 1942 sold to Siman Appu (the predecessor of the present plaintiff) the interests which, as stated in P6, he had derived from his mother Punchihamy. There being no reservation whatsoever in this deed of any portion of the land thereby conveyed, his claim that he still owned a 1/64 share is very nearly absurd. There is nothing in the evidence to explain how he retained a right to this particular share. He admitted that he had been served with summons and that he had not intervened in this action prior to the very late stage at which he was permitted to file a statement of claim. That circumstance alone casts grave doubt on the validity of his claim. I hold that the learned trial Judge should have rejected this claim.

It is unfortunate that there was no appearance at this appeal for any of the defendants, but I am satisfied on an examination of the evidence that the claims of the contesting defendants would have been rejected by the trial Judge but for his erroneous decisions on the two questions of law which I have discussed.

I would accordingly allow this appeal and set aside the decree dismissing the plaintiff's action. The 3rd, 4th and 7th defendants must pay to the plaintiff the taxed costs of contest in the District Court and of this appeal. The case is remitted to the District Court for Interlocutory Decree for partition to be entered as prayed for in the plaint, and for further proceedings to be taken as provided in the Partition Act.

ABEYESUNDERE, J.—I agree.

Appeal allowed.