

1955

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

WEERAKOON *et al.*, Appellants, and WAAS *et al.*,
Respondents

S. C. 377-378—D. C. (Final) Colombo, 3,077/P

Partition Act, No. 16 of 1951—Section 2—Dismissal of action—Jurisdiction of Court to allot shares among the defendants thereafter.

When an action for partition of a land is dismissed on the ground that the plaintiff has no title to the land, the Court has no jurisdiction to proceed to allot shares among the defendants if the defendants do not agree to ask for partition.

APPPEALS from a judgment of the District Court, Colombo.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke*, for the Plaintiff-Appellant in No. 377 and the Plaintiff-Respondent in No. 378.

D. S. Jayawickrema, Q.C., with *M. Rafeek* and *H. J. de Silva*, for the 1st and 2nd Defendant-Appellants in No. 378 and the 1st and 2nd Defendant-Respondents in No. 377.

N. E. Weerasooria, Q.C., with *T. B. Dissanayake*, for the 30th to 34th Defendant-Respondents in both appeals.

June 22, 1955. BASNAYAKE, A.C.J.—

This is an action for partition of a land called Pelengahawatta described in the schedule to the plaint as all that allotment of land called Pelengahawatta with the buildings and plantations thereon situated at Maharama in the Palle Pattu of Salpiti Koralo in the District of Colombo, Western Province, bounded on the North by Dewata Road, East by Weerakodigewatta and Embuldeniyawewatta, on the South by a part of this land, and on the West by Kalutantrigewatta, containing in extent land sufficient to plant about 300 coconut plants in extent four acres. After trial the learned District Judge found that the plaintiff had not established title to the land and dismissed the plaintiff's action. But he added:—

“The defendants 30 to 34 in their answer denied the title of the defendants 1 to 22 but admitted the title of the 20 to 22 defendants to an acre at the trial. I find that the owners of the land sought to be

partitioned are the defendants 30 to 34, 21, 22, 71, 72, as well as the other heirs of Jeelis and Babanis and the defendants 4 to 19, 61 to 64, and 69 and 70 who are the children and grandchildren of Githan Hamy.

The improvements are owned as follows :

The plantations on the eastern side of the land of the age of 50 years and above belong to the heirs of Jeelis and Babanis.

The other plantations belong to the 30 to 34 defendants.

The buildings and other structures are owned as follows :

.....”

Ho then proceeded to allot the buildings.

It would appear from section 2 of the Partition Act, No. 16 of 1951, that an action for partition can be instituted only by a person to whom a land belongs in common with two or more persons. The Act creates a special jurisdiction and provides for a special procedure. Where after trial it appears that the basis on which the action can be brought is non-existent, the Court cannot make any order other than the dismissal of the action and any other order which is ancillary to such order. This Court has decided that in an action under the repealed Partition Ordinance each party to a partition action had the double capacity of plaintiff and defendant and that he who first brought the action was taken to be the plaintiff. It has also been held by this Court that in an action under the same Ordinance where the plaintiff failed to prove his title there was no objection to a partition among the defendants who had established their title if they so desired it, because defendants in a partition action are for some purposes in the position of plaintiffs. The new Act is not different from the old Ordinance in respect of the provisions under which those decisions have been given and decisions under the repealed Ordinance can properly be regarded as applicable to the new Act. But in the instant case the defendants did not agree to ask for a partition.

There are two appeals, one by the plaintiff and the other by the 1st and 2nd defendants. The plaintiff-appellant has not satisfied us that the learned District Judge is wrong in his finding that he has no title to the land. We do not think that after having dismissed the action on the ground that the plaintiff had no title the learned District Judge had any jurisdiction to proceed to allot the plantations and the houses among the parties to it.

We accordingly set aside that part of the order which proceeds to allot plantations and buildings to various parties. Subject to that variation, the appeal of the plaintiff is dismissed with costs.

The parties who are dissatisfied with the learned trial Judge's order made without jurisdiction have had to come to this Court to have it set aside.

The 1st and 2nd defendants-appellants are declared entitled to recover the costs of this appeal from the 30th to 34th defendants who resisted their claims to the land.

PULLE, J.—I agree.

Appeal No. 377 dismissed.

Appeal No. 378 allowed.

