

1961 Present : L. B. de Silva, J., and Tambiah, J.

C. N. HEVAVITHARANA, Appellant, and S. THEMIS DE SILVA
and others, Respondents

S. C. 75—D. C. Balapitiya, 367/N.P.

Partition action—Exclusion of part of the land to which the action relates—Permissibility—Partition Act No. 16 of 1951, ss. 2, 23, 25, 26—Civil Procedure Code, s. 839.

In an action instituted under section 2 of the Partition Act to partition a land the Court has inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a separate or divided lot or land which has been wrongly included by the plaintiff as being part of the corpus. The Court has no power to deal with the separate lot also and to declare in the interlocutory decree the person, who proves title to it, as the owner.

Lwinna v. Gunasekera (1958) 60 N. L. R. 346, not followed.

APPEAL from an order of the District Court, Balapitiya.

E. B. Wikramanayake, Q.C., with *S. W. Jayasuriya*, for the plaintiff-appellant.

No appearance for the defendants-respondents.

Cur. adv. vult.

March 28, 1961. TAMBIAH, J.—

The plaintiff instituted this action to partition a land called Koradolawela depicted as lots A-G in plan 3590, dated 31.3.55 made by Mr. E. de Z. Gunawardena, Licensed Surveyor, marked "X" in the course of the proceedings.

The 7th defendant filed answer claiming lot F in the said plan as a separate and distinct portion forming part of a land called Koradellendeniya. The fifth and sixth defendants claimed lot E as a separate land. The 30th defendant claimed a divided portion as the property of the Crown. Those defendants claimed therefore the exclusion of these lots.

At the trial, the plaintiff sought to restrict the partition action to lots A, B, C & D in the plan and asked for the exclusion of lots E, F & G. It was contended by Counsel for the seventh defendant that the plaintiff having filed a partition action for a land, of an extent of 1 acre and 38 perches, and having registered the *lis pendens* in respect of this land, cannot now ask for a partition of a portion of it, and therefore he submitted that plaintiff's action must be dismissed. The learned Judge,

purporting to follow the ruling in *Luinona v. Gunasekera*,¹ held that the plaintiff's action must necessarily fail and dismissed it with costs. The plaintiff has appealed from this order.

It was contended on behalf of the plaintiff-appellant that the District Judge had no power to dismiss a partition case in view of the provisions of the Partition Act, No. 16 of 1951. Learned Counsel for the appellant also urged that the trial judge had misapprehended the ruling in *Luinona's case* (supra). In that case it was held that where the plaintiff in a partition case has sought to include land belonging to a person, other than the co-owners of the land sought to be partitioned, then the proper course for the District Judge to adopt is to deal with that land also and to declare the person who proves title to it as the owner in the interlocutory decree. In the course of his judgment Basnayake, C.J., said at p. 349 : "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 25 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."

It has hitherto been the practice of the Courts to exclude a separate land wrongly included by a plaintiff as being part of the *corpus* of the partition case. However, in view of the far-reaching consequences of the ruling in *Luinona's case* it is necessary to consider whether the Court should investigate the title of such separate allotments. An examination of some of the provisions of the Partition Act becomes relevant.

The Partition Act, section 2, is as follows :—

"Where any land belongs in common to two or more owners, any one or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Act." It would appear that by this section the courts are empowered to entertain partition actions only in respect of lands which are co-owned. Even prior to this Act the Courts regarded "with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which the shareholders and the interests are not the same." (*per* Bertram, C.J., in *Banda v. Weerasekera*²).

Section 3 sets out the manner in which a plaint should be presented in the appropriate Court, section 4 deals with the requisites of the plaint, section 5 sets out the persons who have to be made parties, section 6

¹(1958) 60 N. L. R. 346.

²(1921) 23 N. L. R. 157 at p. 159.

provides for the registration of a *lis pendens*, section 7 specifies the consequences of the failure to comply with section 4, 5 or 6, and section 8 and the succeeding sections set out the procedure to be followed in partition cases. The Court has to issue a commission to the surveyor to make a preliminary survey of the land set out in the plaint (see section 16). The surveyor has to make the survey and furnish a report in which he must set out the particulars specified in section 18 of the Act. Where there is a dispute regarding the *corpus* of the partition, special provisions are made by section 23 (1) which is in the following terms :

“ Where a defendant in a partition action avers that the land described in the plaint is only a portion of a larger land which should have been made the subject-matter of the action or *that only a portion of the land so described should have been made such subject-matter*, the Court may on such terms as to the deposit or payment of costs of survey as the Court may order, issue a commission to a surveyor directing him to survey the extent of land referred to by that defendant.”

Section 23 (3) is as follows :—

“ Where a survey made under a commission issued under sub-section (1) of this section discloses that the land described in the plaint is only a portion of a larger land which should have been made the subject-matter of the action, the Court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendens* affecting that larger land shall be filed in Court, and the provisions of sections 6, 8 (a) and 11 shall apply to that application.”

The Act imposes certain duties on the parties to the action specified by the Court under section 23 (3) of the Act (see section 23 (4)). The Act also lays down procedure to be followed where on the application of the defendant, the Court finds that a larger land has to be the subject-matter of the partition. Although section 23 (1) deals with a case where a plaintiff has included in his plaint a larger corpus than the one which is the subject-matter of the partition action, the Act has not expressly stated that the Court has the power not to exclude such a lot. Section 26 sets out the powers of the Court in entering an interlocutory decree as follows :—

“ 26 (1). At the conclusion of the trial of a partition action, or on such later date as the Court may fix, the Court shall pronounce judgment in open Court, and the judgment shall be dated and signed by the judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the Court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the judge.”

“ 26 (2). The interlocutory decree *may include* one or more of the following orders, so however that the orders are not inconsistent with one another :—

- (a) order for a partition of the land ;
- (b) order for a sale of the land in whole or in lots ;
- (c) order for a sale of a share or portion of the land and a partition of the remainder ;
- (d) order that any portion of the land representing the share of any particular part only shall be demarcated and separated from the remainder of the land ;
- (e) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties ;
- (f) order that any share shall remain unallotted.”

Section 26 (2) does not exhaust the powers of the Court, since the words of the sub-section show that the interlocutory decree contemplated by it “ *may include* ” one or more of the remedies set out there. The use of the words “ *may include* ” suggest that the orders specified in the sub-section are not exhaustive. Thus although there is no provision in section 26 to dismiss an action, the Court’s power to do so cannot be questioned.

There is no provision in the Partition Act that the Court is obliged to make any of the orders set out in section 26 (2), in respect of the land that is described in the plaint. Nor is there any provision in the Act providing for the declaration of title to a land solely owned by a person, which has been wrongly included in the corpus sought to be partitioned. In such cases the practice hitherto has been to exclude the land which is outside the subject-matter of the partition action and which is proved to have been the property of a person who is not a party to the proceedings. It is not uncommon for a plaintiff to include small portions of land in the corpus belonging to other persons. In all such cases if the Court has to adjudicate also on the title of the owners of those lands, then the Court will be obliged to investigate the title of lands which do not come within the purview and scope of section 2 of the Partition Act. Further, if the Court has to examine the title of persons whose lands have been wrongly included in the corpus, great inconvenience and hardship may be caused to persons who may be quite content to possess such lands in common or, if it happens to be the land of a single individual, to possess it by himself. In our view it is not the intention of the legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of section 2 of the Act.

As section 26 does not exhaust all the orders which a Court could make, in our view the Court has the inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a lot which has been wrongly included in the corpus. Therefore we respectfully differ from the ruling in *Luinona's* case (supra) which is not binding on us. In this connexion the following observations of Mahmood, J., in *Narsingh Das v. Mangal Dubey*¹ are apposite :—

“ Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed.”

Under the Partition Ordinance No. 10 of 1863, now repealed, this Court has recognised the procedure of reducing the corpus in the partition suit. (See *Sedohami v. Mahomadu Ali*².)

We would therefore set aside the order of the learned District Judge and direct him to proceed with the partition of the lots A–D in the plan filed of record, and to exclude the other lots. The plaintiff will not be entitled to the costs of this appeal.

L. B. DE SILVA, J.—I agree.

Order set aside.

¹ (1883) 5 *Allahabad* 163 at p. 172.

² (1896) 7 *N. L. R.* 247 at 250.

