1973 *Present :* **Pathirana, J., and Rajaratnam, J.**

A. DIONIS, Appellant, *and* A. WILLIAM SINGHO and others, Respondents

S. C. 170/69 (Inty.)—D. C. Gampaha, 11876/P

Partition action—Exclusion of a land from the land sought to be partitioned—Incapacity of the Court thereafter to make any orders as to the rights of the parties in relation to the excluded land.

In a partition action, once a certain land has been excluded from the corpus sought to be partitioned, the Court has no authority under the Partition Act to determine the right, title or interest of any person who claims to be entitled to the land that has been excluded, or to the plantations, buildings or other improvements on it.

APPEAL from an order of the District Court, Gampaha.

D. R. P. Goonetilleke, for the 11th defendant-appellant.

J. W. Subasinghe, with *Sarath Dissanayake* and (*Miss*) *Nilmini Goonasekera,* for the 1st to 8th defendants-respondents.

Cur. adv. vult.

January 30, 1973. PATHIRANA, J.—

The 1st and 2nd plaintiffs instituted this action to partition the land called Delgahawatte, depicted as lots 1, 2 and 3 in Plan No. 575 dated 17.9.65, marked X, made by L. R. L. Perera, Licensed Surveyor, in extent 0A. 2R. 39.75P.

The heirs of the deceased 1st defendant were represented by 1B defendant who was appointd legal representative of the estate of the 1st defendant (deceased).

The 1B defendant, as representing the heirs of the 1st defendant (deceased), took up the position that the land sought to be partitioned was amicably divided among the co-owners in 1930, and that lot 2 of Delgahawatte in Plan No. 588B, marked 1D3, dated 16.2.30, made by J. C. Chapman, Licensed Surveyor, was allotted to the 1st defendant (deceased). Lot 2 of Delgahawatte, depicted in Plan 1D3, is also depicted in Plan 696 of 16.11.66, which is a Plan where this Plan No. 588B—1D3—has been superimposed on Plan No. 575—'X'.

In Plan No. 696 of 16.11.66, filed of record, the superimposed boundaries are depicted in blue and are edged in blue to indicate the superimposition. I shall hereafter refer to this land as the land in Plan 1D3. The 1B defendant sought the exclusion of this land along with the buildings including the house 'J' from this partition action on the ground that this land was possessed exclusively and separately by the 1st defendant (deceased) who had prescribed to it.

The 11th defendant-appellant also claimed the building marked J, one part of which fell within this allotment, as having been built by his uncle and by his mother and handed over to him, and the other part which fell outside this allotment as having been built by him and his mother. He claimed prescriptive title to this building.

Among the points of contest at the trial was the question whether the 1B defendant was entitled on behalf of the heirs of the 1st defendant to claim an exclusion of this allotment of land and the buildings including building J. which were situated on this allotment on the ground of prescriptive possession. The 11th defendant also raised a point of contest whether he was entitled to the house marked J.

The learned District Judge held that on the evidence led in the case and the documents produced the land depicted in Plan 1D3, which in turn is depicted in Plan No. 696, had been possessed as a separate land for over 30 years, and accordingly he excluded the said land from the corpus sought to be partitioned, as claimed by the 1B defendant who is the legal

representative of the estate of the 1st defendant (deceased). He also held that all the improvements on this lot were made by the 1st defendant (deceased), and he proceeded to answer the points of contest raised by the 11th defendant-appellant and stated that the 11th defendant-appellant was not entitled to the house marked J. The interlocutory decree was entered on 25.6.69 in which reference was made to the exclusion of this land depicted in Plan 1D3 from the corpus sought to be partitioned. But, no mention is made in the said decree as to whom the building J. has been allotted, and this correctly too.

Mr. D. R. P. Goonetilleke for the 11th defendant-appellant takes up the position that once a land has been excluded from the land sought to be partitioned no orders can be made by the court in relation to the rights of any one in respect of the said land which has been excluded. It is also his position that the learned District Judge, once he had excluded the land depicted in Plan 1D3, he had no right to make any order as to whom the building J. which is on the said excluded portion belonged to. It is true that the decree makes no reference to the building J, but, there is nothing to prevent at some subsequent stage a party moving to amend the decree in terms of section 189 of the Civil Procedure Code, in order to make the decree conform to the judgment and thereby make a reference in the amended decree to the fact that the 11th defendant was not entitled to the building J. or that the heirs of the 1st defendant were declared entitled to the said building.

Whether a Court is entitled to make any orders as to the rights of parties in respect of a corpus which has been excluded from the land sought to be partitioned has been the subject matter of decisions of this Court. In *Luinona v. Gunasekera*[1] (60 N.L.R. 346) Basnayake C.J. held that the Partition Act makes no provision for excluding from a partition action after *lis pendens* is duly registered 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. He therefore held that if the 7th defendant in that case proved his exclusive right to lot C, he should have been declared entitled to it in the interlocutory decree instead of excluding it. Similarly in regard to lot B the party who proved his claim to it should have been declared entitled to it.

[1] *(1958) 60 N. L. R. 346.*

In *Hevavitharana v. Themis de Silva*[1] (63 N.L.R. 68 at 71), Tambiah J. did not follow the judgment of *Luinona v. Gunasekera* (*supra*). Tambiah J. after analysing certain provisions in the Partition Act held,—

> "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."

I am in respectful agreement with the judgment and reasons of Tambiah J. and I hold that once a certain corpus has been excluded from the land sought to be partitioned, the Court has no right under the Partition Act to adjudicate on any right, title or interest of any person in respect of the corpus which had been excluded.

The judgment of Tambiah J. finds support in the case of *Kanthia v. Sinnatamby*[2] (2, Balasingham, Notes of Cases, 19) where Lascellers, C. J., in considering the question whether the learned Commissioner was right in refusing to make an order with regard to a certain right of way claimed by the appellants over certain land lying outside and to the north of the land which was the subject of the partition action observed,—

> "There can in my opinion, be no doubt but that the Commissioner was right in refusing to adjudicate with

[1] *(1961) 63 N. L. R. 68 at 71.*

[2] *(1913) 2 Bal. N. C. 19.*

regard to the existence of a servitude on land outside the land which was the subject matter of the partition action. If the land to the north had belonged to a stranger, a person who was not a party to the action, it is clear that no order with regard to a servitude over the land would have any binding effect ; and the accident that the land belonged to the plaintiff can in no way enlarge the powers of a court in a partition action."

The judgment of Lascelles C. J., has been followed more recently in the case of *Thambiah v. Sinnathamby*[1] (61 N L. R. 421), which decided that in a partition action a declaration cannot be obtained that a land outside the land to be partitioned is subject to a servitude. Weerasooriya J. observed,—

"It is not clear how in a partition action a declaration can be obtained that a land outside the land to be partitioned is subject to a servitude, for this in effect is what the plaintiff seeks. Our attention was drawn by Mr. Chelvanayakam who appeared for the 3rd defendant-respondent to the case of *Kanthia v. Sinnathamby* where it was held that such a declaration could not be granted. The position seems to be the same under the Partition Act, No. 16 of 1951, which governs the present action. On this ground alone, therefore, the declaration sought for by the plaintiff should have been refused."

I am, therefore, in agreement with the submission made by Mr. Goonetilleke for the 11th defendant-appellant that while the learned District Judge was right in ordering the exclusion of the land described as lot 2 of Delgahawatte, depicted in Plan 1D3 from the corpus sought to be partitioned, the Court had no power to determine the right, title or interest of the person or persons who claimed to be entitled to the corpus that has been excluded, or to the plantations, buildings or other improvements on it.

I, therefore, set aside all the findings of the learned District Judge which declare or have the effect of declaring the heirs of the 1st defendant (deceased) whose estate is represented by the 1B defendant entitled to the corpus that has been excluded or any right to the building marked J. or other buildings or improvements thereon. This order will however not prejudice the rights of the heirs of the 1st defendant (deceased), or the 11th defendant-appellant from vindicating whatever rights they have to or in the corpus sought to be excluded and the buildings or improvements thereon in a properly constituted action.

[1] *(1958) 61 N. L. R 421.*

Subject to the variations I have ordered in regard to the findings of the learned District Judge, I affirm the interlocutory decree. There will be no costs of appeal.

RAJARATNAM, J.—I agree.

Appeal of 11th defendant allowed.