1978 *Present :* **Pathirana J., Sharvananda J. and Wanasundera, J.**

G. B. SOLOMON RANAWEERA, Defendant-Petitioner

and

W. SOLOMON SINGHO, Plaintiff-Respondent

S. C. 33/76 (Inty.)—D. C. Kurunegala 2158/P

Partition action—Death of a party before decree entered—Failure to substitute or bring legal representative on record—Whether decree null and void—Administration of Justice Law, section 651 (1)—Effect.

Admission—Mistake of law—Whether admission of Counsel in such a case binding on party.

Where the provisions of section 651 (1) of the Administration of Justice Law apply to a decree entered in a partition action such decree is not rendered null and void by reason of a party to the action being dead at the time of the decree being entered without proper substitution or by the failure to appoint a person to represent the estate of the deceased party. The decree is valid and binding and is final and conclusive for all purposes against all persons whomsoever and it is not open to the parties in the case to attack the validity of the said decree.

An admission made by Counsel for one of the parties that such a decree was null and void for failure to make proper substitution is a mistaken admission in law and is not binding on such party.

APPEAL from an Order of the District Court of Kurunegala.

Nimal Senanayake, with *K. P. Guneratne* and *S. Mathew*, for the 1st defendant-petitioner.

C. Thiagalingam, Q. C., with *U. C. B. Ratnayake*, for the 2nd plaintiff-respondent.

April 21, 1978. SHARVANANDA, J.

In this action the plaintiffs sought to partition the land called Serugaskumbura, depicted as lot 2 in final partition plan No. 1768 dated 15.2.61 and in extent 2 roods and 39.84 perches. The corpus is depicted in plan No. 1853 dated 21.7.64, filed of record marked 'X'.

One Mathias Perera was admittedly the original owner of an undivided 281/284 share, less ½ perch, less 13 × 216 sq. ft. of the land called Serugaskumbura, in extent 3 roods 11.7 perches. Under and by virtue of interlocutory decree entered in partition case No. 6372, the said Mathias Perera was declared entitled to an undivided 281/284 share, less ½ perch, less 13 × 216 sq. ft. of the land. Mathias Perera's share is represented by the defined Lot 1 in plan No. 3189 dated 22.2.51 made by Wright, licensed Surveyor. It would appear that the said Lot 1 in plan No. 3189 came to represent the undivided interests of Mathias Perera out of the entire land Serugaskumbura, consisting of Lots 1 and 2 in plan No. 3189, and this Lot 1 thus acquired identity as a distinct, divided lot corresponding to the share of Mathias Perera in the bigger corpus. Pending partition case No. 6372, Mathias Perera, by deed No. 1868 dated 16.3.52, gifted "the premises described in the schedule thereto and all the estate, right, title, interest whatsoever of the donor in the said premises, which said premises have been held and possessed by the donor under and by virtue of the final decree that will be entered in case No. 6372 in the District Court of Kurunegala to four persons, viz; (*a*) Don Rapiel Perera, (*b*) Don Juwan, (*c*) Wijesuriya Aratchilage Anamma, and (*d*) Migelge Anthony". The schedule referred to in the said deed of gift reads as follows:—

> "All that right, title and interest that the donor herein will be declared entitled to and allotted in the final decree in partition case No. 6372 of the District Court of Kurunegala now pending in respect of the land described herein below."
>
> "*All that allotment of land marked Lot 1, in extent 3 roods*

and 7 perches of the land called Serugaskumbura ..... and bounded on the north by the garden of Thepanis Fernando, *east by the main road and Lot 2,* south by the garden of Mohamed Abdulla, and west by the garden of R. M. Mudalihamy.....*and which said land depicted in plan No. 3189* dated 22.2.51 made by Wright, Licensed Surveyor, of the land called Serugaskumbura and is bounded, according to the said plan No. 3189, on the north by the field of R. Thepanis Fernando.....east by the main road, south by the garden of Podi Singho and Mohamed Abdulla, and west by the field of Thepanis Fernando, containing *in extent 3 roods and 11.7 perches.*"

An examination of the deed of gift No. 1864 shows that what was gifted was not only the right, title and interest that the donor will be declared entitled to and allotted in the final decree in partition case No. 6372, but also all the allotment of defined land marked Lot 1, in extent 3 roods and 7 perches, in Plan No. 3189 out of the entire land depicted in Plan No. 3189 in extent 3 roods 11.7 perches.

Final decree was thereafter entered in case No. 6372/P and Mathias Perera, who had died by that time, was allotted Lot 2 in final partition Plan No. 1768 dated 15.2.61. The present plaintiffs state that by operation of law, the right, title and interest of the said Mathias Perera out of the corpus that was partitioned, viz., Lot 2 in final partition Plan No. 1768 dated 15.12.61, devolved and vested on the said four donees in equal shares. While the said partition action No. 6372/P was still pending but after the death of Mathias Perera, Rapiel Perera, the first-mentioned donee on deed of gift No. 1868, without disclosing the terms of the said deed No. 1868, purported to transfer the entire holding of Mathias Perera to the 1st defendant by deed No. 1242 dated 18.6.59. The plaintiffs in this case base their title to shares in the land, viz., Lot 2 in plan No. 1768 and which is the subject matter of the present action, on the aforesaid deed of gift No. 1868 and on the final decree in case No. 6372/P.

The 1st defendant contests the validity of the aforesaid final decree in case No. 6372/P and states that the said decree is null and void in view of the following reasons :—

(*a*) That there was no proper substitution according to law of any person in the room of Mathias Perera.

(*b*) That there was no proper substitution according to law of any person in the name of Mohamed Salik.

(*c*) That there was no proper substitution according to law of any person in the name of Johana Perera.

(*d*) That the final decree of the said case was amended improperly and not according to law.

At the trial, the two issues, Nos. 5 and 14, were tried as preliminary issues. These two preliminary issues were founded on the objections of the 1st defendant to the validity of the final decree in 6372/P on the ground of failure to substitute the proper legal representatives in place of the deceased parties. The District Judge answered the preliminary issues in favour of the 1st defendant and dismissed the plaintiff's action with costs. An appeal was preferred from this judgment to this Court, and this Court, by judgment dated 2.5.75, set aside the judgment and decree of the learned District Judge and sent the case back for a re-trial on all the issues and on any further issue that might be raised and accepted by the Court.

When the case went back for re-trial, it was agreed between the parties that the plaintiffs should file an amended plaint in conformity with section 33 of the A. J. Law No. 25 of 1975. The plaintiffs, thereafter, filed amended plaint. In the amended plaint, the plaintiffs, as a matter of law, admitted that the final decree in case No. 6372/P was null and void for want of proper substitution of deceased parties and hence bad for non-compliance with the provisions of the Partition Ordinance and stated that the donees on deed No. 1868 and their predecessors-in-title have been in prescriptive possession of the said Lot 2, the subject matter of this action. and allotted shares on that basis. The plaintiffs also stated that, in the event of the final decree in 6372/P being held to be null and void by the operation of law, the right, title and interest of Mathias Perera from and out of the said premises, viz., Lot 2, develved on and vested in the said four donees. The defendant-petitioner, by his amended answer, objected to the change in the amended plaint, and at the preliminary investigation Counsel for the defendant-petitioner objected to the issues raised on behalf of the plaintiffs and stated that the plaintiffs were now seeking to reverse their earlier position set up in their original plaint. The learned District Judge, by his order dated 28.6.76, accepted all the issues raised by Mr. Thiagalingam for the plaintiffs. Against the said order, the defendant-petitioner has filed this interlocutory appeal.

At the hearing of this application, Counsel submitted that the learned District Judge has erred in permitting issues 1 to 13 to be raised and that since Mr. Thiagalingam, who was Counsel

appearing for the plaintiffs, had agreed that issue 10 "Was the final decree in case No. 6372/P entered on 23.3.62 bad in law ?" should be answered in the affirmative, judgment should be entered dismissing the plaintiffs' action.

At the hearing of this application, attention of both Counsel was drawn by this Court to section 651 (1) of the Administration of Justice (Amendment) Law, No. 25 of 1975, which had been overlooked by both parties at the argument before the District Court. This section runs as follows :—

> "651 (1) Save as provided by sub-section (5), the interlocutory decree and final decree of partition shall, subject to the decision on any appeal which may be preferred therefrom and subject to the provisions of sub-section (3), be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court or the fact that all persons concerned are not parties to the particular action ; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.
>
> In this sub-section. "omission or defect of procedure" shall include an omission or failure—
>
> (*a*) to serve summons on any party,
>
> (*b*) to substitute the heirs or legal representative of a party who dies pending the action or to appoint a person to represent the estate of the deceased party,
>
> (c) to appoint a guardian-ad-litem over a party who is a minor or a person of unsound mind."
>
> "(6) The provisions of this section shall be deemed to have come into operation on the 1st day of June, 1951."

Mr. Thiagalingam frankly admitted that he had overlooked section 651 of the A. J. Law when he drafted the amended plaint and made the admissions referred to above in the course of proceedings before the District Court. He stated that had he addressed his mind to section 651, he would not have made those admissions and moved to withdraw them as having been made on a mistaken view of the law.

In our view, the provision of the aforesaid section 651 strikes at the foundation of the 1st defendant's contention that the final decree entered in 6372/P is null and void because there was no proper substitution in the room of the parties who died pending the action, or because of the failure to appoint a person to represent the estate of the deceased party. Since this provision 651(1) is deemed to have come into operation on the first day of June, 1951, the objection of the 1st defendant that the final decree entered in 6372/P is bad cannot be sustained. The decree, in view of section 651 is a valid and binding decree and is final and conclusive for all purposes against all persons whomsoever and it is not open to the parties in this case to attack the validity of the said decree.

The admission of Counsel for the plaintiffs that the final decree entered in case No. 6372/P was rendered null and void because of the failure to make proper substitution, as claimed by the 1st defendant, is a mistaken admission in law and is not binding on the plaintiffs. We, therefore, allow the retraction of the admission made by Mr. Thiagalingam, Counsel for the plaintiffs, that issue 10 be answered in the affirmative.

We hold that issue 10 should be answered in the negative and that the interlocutory and final decrees in case No. 6372/P are valid and conclusive decrees entered in terms of the Partition Ordinance/Act. We also hold that this present action to partition the land described as Lot 2 in final partition plan No. 1786 dated 15.2.61 made by J. L. Chandraratne, Licensed Surveyor, and filed of record in case No. 6372/P is an action properly filed and can be maintained by the plaintiffs for partition of the said corpus, namely Lot 2. We remit the case for further trial on the basis of the above findings. We accept also Mr. Thiagalingam's submission that the said Lot 2 in plan No. 1786 is identical with Lot 1 in plan No. 3189 in D. C. Kurunegala 14530/P and is a defined lot representing Mathias Perera's interest in the larger land. We note that in the amended answer dated 3.6.76 filed by the 1st defendant in this case, the 1st defendant himself as a fact has accepted that the corpus to be partitioned, namely Lot 2, is a divided lot represented as Lot 1 in plan No. 3189 and that it has been in existence as a divided lot from the date of the said plan, i.e., from February, 1951. Further, it has been recorded at the commencement of proceedings on 28.6.76 that the corpus is not disputed.

We remit the case to the District Judge to continue the trial on the basis of the findings recorded above. So much of the

proceedings dated 28.7.66 as are in conflict with the findings of this Court referred to above are set aside.

The interlocutory appeal is dismissed with costs payable by the 1st defendant-appellant to the 2nd plaintiff-respondent. Each party will bear his own costs of the proceedings held on 28.7.66.

PATHIRANA, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal dismissed.