1937 *Present* : **Moseley J. and Fernando A.J.**

GOLAGODA *v.* MOHIDEEN.

294—D. C. Kandy, 40,183.

Partition action—Decision as to title before interlocutory decree—No right of appeal—Investigation of title by Court.

Where in a partition action an order is made in regard to title before interlocutory decree the party affected by the order may appeal when the interlocutory decree is in fact entered.

Ferdinandes v. Don Davit (*7 N. L. R. 216*) followed.

The Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property.

Peiris v. Perera (*1 N. L. R. 362*) followed.

APPEAL from a judgment of the District Judge of Kandy.

N. E. Weerasooria (with him *H. A. Wijemanne*), for added defendant, appellant.

C. E. S. Perera (with him *P. A. Seneratne*), for plaintiff, respondent.

October 25, 1937. FERNANDO A.J.—

The plaintiff filed this partition action in September, 1930, claiming for himself a half share of the land and of the houses standing thereon, and he allotted the remaining half share to the first, second and third defendants. On July 18, 1933, the added defendant, the Basnayake Nilame of the Maha Dewale, Kandy, filed his answer objecting to partition, and alleging that the land sought to be partitioned was a paravane pangua of the Natha Dewale. On February 13, 1936, when the case came on for trial, the learned District Judge decided to try the first issue which is in the following terms : Whether the land in dispute falls within the temple plan (2) if so, is the action maintainable ? Counsel for the plaintiff stated that he could not go behind the temple plan which had already been produced and marked X. Another issue was then raised (3) is the land sought to be partitioned subject to services to the Natha Dewale ?

No evidence was called by any party except the plaintiff, and the Proctor for the added defendant contended himself with producing the temple plan and the Service Tenure Register. In the course of his judgment, the learned District Judge came to the conclusion that the portion in dispute fell within the temple plan, and that the portion in dispute was known as Galahitiyawa kumbura. He then proceeded to say that there was an issue which would probably arise in the action as to whether the plaintiff and the defendants could acquire a title by prescription against the Dewale, and whether in fact they had so acquired a title.

With regard to the issues as to the services to which the land was said to be subject, he held that on the materials before him it was impossible for him to say that the portion in dispute was liable to Service Tenure. At the same time, he stated that it may well have belonged to the temple, and yet may not have been liable to services. In answering the issues he appears to have come to the conclusion that the action for partition as such was maintainable. The trial then came on again on October 2, and on the conclusion of the proceedings of that date, the learned District Judge held that the plaintiff and the defendants were entitled to the land in certain shares and dismissed the claim that had been made by the intervenients who are persons other than the added defendant.

The added defendant appeals from this decree and a preliminary objection was taken to the appeal. That objection was that the appeal was filed only on October 14, 1936, while the order that affects the claim of the added defendant was made on March 30, 1936. I might here state that in making the order on October 2, 1936, the learned District Judge himself remarks that if the added defendant files an application he will have to return the plan, so that he himself appears to have contemplated that it was open to the added defendant to appeal, although he did not appear to have taken any prominent part in the proceedings of that date.

It is clear quite apart from this observation that the appeal is in order. In *Ferdinandes v. Don Davith* [1], it was expressly held that an appeal should not be entertained against the determination on the titles of parties to a partition action made prior to the partition decree. Lawrie J. there considered section 19 of the Partition Ordinance and stated that although "a decision with regard to a contest between two particular parties is an appealable order, we are in the habit of refusing to exercise jurisdiction and to entertain appeals against judgments which are not conclusive between parties to the suit". It is clear from this decision that a party with regard to whose title an order has been made prior to the date when the Interlocutory decree is entered, may appeal against the Interlocutory decree when that decree is in fact entered by the District Court.

With regard to the merits of the appeal, it is clear to my mind that the order made by the learned District Judge cannot stand. The proceedings of October 2, 1936, start with a statement of what is in dispute between

[1] *7 N. L. R. 216.*

the plaintiff and the original defendants and with a settlement that appears to have been arrived at between these parties. The evidence recorded is the evidence of the plaintiff and the first defendant. The plaintiff had purchased a share in the land in 1930 and was not able to speak to any facts before that date. He produced certain documents one of which was a conveyance in his favour. He also produced copies of certain prior documents, the originals of which were not produced, and their non-production was not accounted for in any way. The evidence may be summarized shortly to say. "I bought in 1930. I also produce copies of certain prior deeds which appear to show the *previous* history of the land". The first defendant merely stated that the heirs of the third defendant were the substituted defendants. She then added that before she became entitled, there were four houses on the land, and that she had two houses built. The question whether the land was the property of the Dewale, on whose behalf the added defendant had claimed, whether the land was of such a nature that title by prescription could be acquired against the Dewale, whether in fact such a title had been acquired, and whether in fact the land was liable to services to the temple appear to have been lost sight of, and without reference to any of these questions which in his own opinion were relevant, the learned District Judge proceeds to hold that the plaintiff and the defendants are entitled to the land.

It is hardly necessary to consider the earlier authorities which have all been summarized in the case of *Goonaratne v. The Bishop of Colombo*[1]. As Lyall-Grant J. said in the course of his judgment, "it is the duty of the Court before entering a decree to satisfy itself that the parties appearing before it have a title to the land". He quoted from the judgment of Bonser C.J. in *Peris v. Perera*[2], where it was laid down that the Court should not enter a decree unless it was perfectly satisfied that the persons in whose favour it makes the decree, are entitled to the property. The Court should not regard these actions as merely to be decided on issues raised by and between the parties, and must satisfy itself that the plaintiff has proved his title, and he must prove his title strictly". In the Full Bench case of *Mather v. Thamotheram Pillai*,[3] it was laid down that a paramount duty is cast by the Ordinance upon the District Judge to ascertain who are the actual owners of the land before entering up a decree which is good and conclusive against the world.

For these reasons it is obvious that the Interlocutory decree entered by the learned District Judge must be set aside. The appellant was a party to the action and as I have already observed, he had the right to appeal from the Interlocutory decree, although the order which affected, his rights had been made at an earlier inquiry. I would accordingly set aside the Interlocutory decree entered, and send the case back for trial according to law. The plaintiff respondent will pay to the added defendant appellant his costs of this appeal.

MOSELEY J.—I agree.

Appeal allowed.

[1] *33 N. L. R. 337.* [2] *1 N. L. R. 362.* [3] *6 N. L. R. 246.*