1968 *Present :* Sirimane, J., and de Kretser, J.

J. A. JANE NONA, Appellant, *and* N. L. DINGIRI-MAHATMAYA *et al.*, Respondents

S. C. 570/66 (F)—D. C. Avissawella, 9745/P

Partition action—Plaintiff's title—Requirement of a full and comprehensive pedigree.

In a partition action the plaintiff must set out his title fully. "It is the duty of a plaintiff in a partition action to set out to the best of his knowledge and ability a full and comprehensive pedigree showing the devolution of title with reference to all the deeds of sale on which title is alleged to have passed. In view of the very far reaching consequences of a decree under the Partition Act, a Court should not assist a plaintiff who either through carelessness or indifference does not place before the Court evidence which should be available to him."

APPEAL from a judgment of the District Court, Avissawella.

Frederick W. Obeyesekere, for the 1st defendant-appellant.

Ralph de Silva, for the plaintiff-respondent.

Cur. adv. vult.

July 10, 1968. SIRIMANE, J.—

This was a partition action for the land depicted in Plan (P1) which the plaintiff called "Berennewatta", "presently known as 'Pahala-watta'" according to the plaint.

I must state here in view of certain submissions made in the course of the appeal, that it is the duty of a plaintiff in a partition action to set out to the best of his knowledge and ability a full and comprehensive pedigree showing the devolution of title with reference to all the deeds of sale on which title is alleged to have passed. In view of the very far reaching consequences of a decree under the Partition Act, a Court should not assist a plaintiff who either through carelessness or indifference does not place before the Court evidence which should be available to him.

The plaint in this case averred that the original owners were Sima and Sethu. Sima left 4 children, and the plaintiff claimed certain undivided shares under two of the children, basing his claim on 2 deeds, P2 and P3, which referred to the land as "Berennewatta". The other two children—the plaint averred—"are alleged to have sold" to two other persons who "are alleged to have sold" to the 1st defendant. Sethu's 1/2 share is also "alleged to have sold" to Thenhamy, who in turn is "alleged to have sold" to the 1st defendant. One can hardly describe this as a satisfactory statement of the devolution of title.

The 1st defendant filed answer denying that the land was called "Berennewatta"—that the deeds pleaded by the plaintiff were not acted upon in relation to the land surveyed, and that the plaintiff did not have even a day's possession of the corpus. She claimed the entire land shown in P1 and another portion to the West shown as Lot 2 in her Plan 1D1 on an *entirely different title* and on prescriptive possession It is idle therefore for the plaintiff to pretend that he did not realise the importance of proving (if such was the case) that the 1st defendant or her predecessors had purchased from persons set out in his pedigree.

The 1st defendant pleaded that one Roslyn Koch and another were the original owners of the entirety depicted in Plan 1D1, that they possessed it as a separate entirety from 1926 to 1942 and that they sold that entirety on 1D2 of 1942 to C. M. G. Fernando and F. E. Fernando, who on 1D3 of 1951 sold to M. de Mel and Mrs. B. M. de Mel, who on 1D4 of 1952 sold to her. She said that she herself possessed the land since 1943 under her predecessors in title and continued to do so after she purchased from them.

The case had come up for trial on 7.3.66, and the point of contest was whether the 1st defendant was entitled to the entirety. The plaintiff gave evidence. He made no effort to show that the 1st defendant or any of her predecessors in title had purchased from any person or persons set out in his pedigree. In the course of the plaintiff's evidence it was found that two of the plaintiff's sisters to whom he had not allotted rights in the pedigree were entitled to rights if that pedigree was correct, and so the case was put off.

On the next trial date, some 7 months later, the plaintiff gave evidence again. Still he made no effort whatsoever to show that the 1st defendant's rights to this land (which he conceded) were in any way connected with the pedigree he put forward. Indeed his evidence was even more vague than before. He said nothing about two of the children of the alleged 1/2 share owner Sima, and in regard to the other alleged owner of 1/2 share Sethu, he said that those interests "devolved on the 1st defendant".

I must say that even in an uncontested case this evidence of devolution of title can hardly be considered sufficient on which to base a decree.

In the course of the 1st defendant's evidence, after setting out her title and stating that she possessed the entire corpus from 1943, she also said that there had been some "amicable division" between Roslyn Koch and the plaintiff as a result of which Koch and his successors in title possessed the entire land surveyed, and the plaintiff possessed outside it to the east. This statement cannot be made use of to supply deficiencies in the plaintiff's case and advance an argument that Roslyn Koch and the plaintiff are therefore co-owners of the corpus surveyed.

In regard to possession one need not look beyond the plaintiff's case. He called one witness who admitted that he knew nothing of the land after 1940. His evidence therefore does not help the plaintiff in the contest against the defendants.

In cross-examination the plaintiff said at one stage that the land was a part of Pindeniya Estate owned by Mr. and Mrs. Koch, that thereafter the land and the Estate devolved on the Fernandos, and that thereafter those two sold to Mr. and Mrs. de Mel. He also said that the 1st defendant's son built the house on the eastern side of the land in 1953, and went on to say that the 1st defendant came to reside on this land a long time before that—when the land was possessed by Mr. and Mrs. de Mels' predecessors. He then went on to say that after the 1st defendant came to reside on the land she enjoyed the *entirety* and gave him no produce.

The District Judge in dealing with the title said, "It is possible that the Kochs had purchased the 3/4th share from the heirs of Sethu and Sima"—a most dangerous assumption in a partition case without an iota of evidence to support it.

In regard to possession he said, "However, possession has been on the basis that they (i.e., the Kochs) were entitled to a 3/4th share at least as far back as 1938". This is a serious misdirection on the evidence led in the case.

The point in dispute should have been answered in favour of the 1st defendant.

The appeal is allowed, and the plaintiff's action is dismissed with costs both here and below.

DE KRETSER, J.—I agree.

Appeal allowed.