1967 *Present :* Alles, J., and Siva Supramaniam, J.

K. A. THOMAS SINGHO *et al.*, Appellants, *and*
U. A. CORNELIS *et al.*, Respondents

S. C. 118/65 (Inty.)—D. C. Gampaha, 3348/P

Partition action—Interlocutory decree—Duty of stating the shares therein—Court must not delegate it to a Proctor who appears for one of the parties.

Where, in a partition action, the shares allotted to the parties in the interlocutory decree were not in accordance with the findings in the judgment and the Court had signed a decree which had been tendered to it by the Proctor for the plaintiff without notice to the Proctors for the other parties—

Held, that, however irksome the task may be, it is the duty of a trial Judge in a partition action to determine precisely the share to which each party is entitled. This is not a duty which a Judge is entitled to delegate to a Proctor appearing for one of the parties. If, on the basis of the findings, a statement of shares is submitted by one of the parties for the assistance of the Judge, such a statement should be assented to by all the parties or their Proctors before it is accepted.

APPEAL from an order of the District Court, Gampaha.

E. B. Wikramanayake, Q.C., with *Roland de Zoysa*, for the appellants.

C. de S. Wijeratne, for the plaintiff-respondent.

Cur. adv. vult.

November 11, 1967. SIVA SUPRAMANIAM, J.—

This was an action for partition of a piece of land called Kekunagaha Kumbura, depicted as lots A–J on survey plan No. 266 dated 10th February 1954, marked X. The case for the plaintiff was that one Abaran Kankanama was the original owner of the land called Kekunagaha Kumbura in extent 9 bushels paddy sowing extent and on his death his four children Bacholamy, Punchappu, Andiris and Amaris became entitled to the said extent. Amaris died intestate and unmarried and Andiris separated off his share leaving behind the balance extent depicted by lots A–J on plan X which was owned and possessed in equal shares by Bacholamy and Punchappu. By deed No. 2765 of 22.3.1872 (P2) Bacholamy transferred an undivided 1/4 share of the whole land of 9 bushels paddy sowing extent to Baronchi, Samel, Sinnochi and Juwan who were sons of Punchappu.

The case of the contesting defendants was that the said Baronchi, Samel, Sinnochi and Juwan became entitled to 1/2 share of lots A–J on deed P2 and inherited the balance 1/2 share from Punchappu and were thus the owners of the land depicted on Plan X. In or about the year 1930 the land was amicably partitioned among the co-owners and was thereafter possessed dividedly as follows :—Lot A by Sinnochi and his successors in title, lots B, C, D, E and F by Baronchi and his successors in title, lots G, H and I by Juwan and his successors in title and lot J by Samel and his successors in title. They denied that the plaintiff was entitled to any share in the land and prayed for a dismissal of the action.

The trial Judge has held that in addition to the aforesaid four sons Punchappu had two daughters, Nonohamy and Babahamy who also inherited a share from Punchappu and dealt with that share by deed No. 5782 of 30.1.1892 (P17). He has further held that the parties were in possession of divided lots for the sake of convenience and not in consequence of an amicable partition of the land and that an action by one of the co-owners of the land for a partition of the said land is maintainable. They are both questions of fact and I do not see sufficient reason to interfere with those findings.

The only other matter canvassed in appeal was whether the plaintiff acquired any interests in the land on deed No. 5287 dated 2nd July 1952 (P1) which was executed in his favour by one Arnolis who claimed to be a successor in title of Bacholamy. The plaintiff did not give evidence but called as his witness his brother U. A. Pieris Singho, the 13th defendant. According to Pieris Singho, after Bacholamy had transferred 1/4 share of the whole land by deed P2, Amaris died intestate and unmarried leaving as his heirs Bacholamy, Punchappu and Andiris. He stated that he had obtained the information in regard to the date of the death of Amaris from one Melis but Melis was not called as a witness though he was said to be in the village. If that evidence was accepted, Bacholamy's interests would have been 1/12 share of the whole land.

The position set out in the plaint, however, was that deed P2 conveyed to the transferees an undivided 3/8 share of lots A–J though it purported to convey 1/4 share of the entirety and that Bachohamy was still entitled to an undivided 1/8 share. The learned trial Judge, on the other hand, has assumed in his judgment that Bachohamy was entitled to 1/4 share after the execution of deed P2, and has, in his answer to the issues, held that the plaintiff is entitled to 1/4 share on P1.

According to the plaintiff's case, Bachohamy's balance share devolved on her son Samel, and on his death it devolved on Peter, an only child of Samel. On Peter's death that share devolved on his only son Arnolis who transferred that share to the plaintiff on deed P1. The trial Judge has rejected the evidence that Peter was the only child of Samel and that Arnolis was the only child of Peter. According to Ruithan, the 18th defendant, who is another brother of the plaintiff and who was also called as a witness by the plaintiff, both Peter and Arnolis have several brothers and sisters. If so, Arnolis would have been entitled to a very much smaller share than 1/8 or even 1/12. None of the brothers and sisters either of Peter or of Arnolis appear to have claimed any share of the land in question through Bachohamy. They have not even been made parties to this action.

It is the plaintiff's case that Andiris separated off 4 bushels paddy sowing extent as his share and it is the remaining extent (represented by lots A–J on Plan X) that was possessed by Bachohamy and Punchappu. There is no admissible evidence as to when the separation took place. If it took place before the death of Amaris, Andiris would have been entitled only to 2 1/4 bushels paddy sowing extent, and if after the death of Amaris, to 3 bushels paddy sowing extent. In either case, it seems unlikely that 4 bushels paddy sowing extent, which was nearly one half of the whole land, would have been permitted to be separated off as the share of Andiris by the other co-owners. It is more probable that what was separated off represented the shares of Andiris and Amaris and not that of Andiris only and that the separation took place before the death of Amaris and the balance extent (represented by lots A–J in Plan X) was possessed by Bachohamy and Punchappu. If so, when Bachohamy transferred 1/4 share of the whole land of 9 bushels paddy sowing extent by P2 she dealt with 1/2 share of lots A–J and thus exhausted her interests in the land sought to be partitioned.

The evidence led does not show that Bachohamy thereafter claimed any interests in the said land. That would explain why none of the brothers and sisters of Peter or Arnolis have claimed any interests. The deed of transfer P1 which the plaintiff obtained from Arnolis appears to have been a speculative one.

The trial Judge himself characterised the evidence on which the plaintiff based his claim for 1/8 share on P1 through Bachohamy as "meagre and not quite satisfactory.", but he proceeded to hold that the plaintiff would have got "some rights" on deed P1 without determining

precisely what those rights were. In the answer to the issues, however, he held that the plaintiff was entitled to 1/4 share on P1, although that was not the plaintiff's case. In a partition action, before any party can invite the Court to hold that he is entitled to any share, he should satisfy the Court by cogent, acceptable evidence that he is entitled to such share. If, on the evidence led, the Court is unable to determine the precise share to which a party is entitled, it should reject that party's claim. A finding that a party is entitled to "some rights" is not a proper finding in a partition action. On the evidence led, the learned Judge should have rejected the plaintiff's claim to any share based on deed P1.

Learned Counsel for the appellants also complained that the shares allotted to the parties in the Interlocutory decree are not in accordance with the findings in the judgment and that the learned Judge had signed a decree which had been tendered to Court by the Proctor for the plaintiff without notice to the Proctors for the other parties. However irksome the task may be, it is the duty of a trial Judge in a partition action to determine precisely the share to which each party is entitled. This is not a duty which a Judge is entitled to delegate to a Proctor for one of the parties. If, on the basis of the findings, a statement of shares is submitted by one of the parties for the assistance of the Judge, such a statement should be assented to by all the parties or their Proctors before it is accepted. As was observed by T. S. Fernando S.P.J., in *Wijesundera v. Herath Appuhamy and others*[1], "the submission of such a statement cannot.....make any difference to the duty of the Judge to satisfy himself that the statement of shares is in conformity with the judgment already pronounced".

I set aside the interlocutory decree as well as the findings in the judgment relating to the share which the plaintiff claimed on deed P1. The remaining findings in the judgment are affirmed. There should be a computation by the Court of the shares to which each party is entitled on the basis of the said findings, and on the footing that Bachohamy exhausted her interests in the corpus when she executed deed P2. Let a fresh interlocutory decree for partition be entered allotting to each party the share in accordance with such computation. The costs in the trial Court will be as already determined by the learned Judge.

The appellants will be entitled to half their costs in appeal.

ALLES, J.— I agree.

Case sent back for further proceedings.

[1] *(1964) 67 C. L. W. 63 at p. 64.*