

1978 Present : Wimalaratne, J., Rajaratnam, J. and
Ratwatte, J.

DAVID DANTANARAYANA, Petitioner-Appellant

and

L. A. NONAHAMY, Defendant-Respondent

S. C. 10/77 (Inty)—D. C. Matara 7583/P

Partition action—Interlocutory decree entered leaving share unallotted—Power of Court to amend such decree allotting share to intervenient—Practice—Administration of Justice Law, No. 25 of 1975, sections 463, 464, 643; 644—Partition Law, No. 21 of 1977, section 69—Partition Act (Cap. 69), sections 26, 70.

Where the question arose as to whether a Court which has entered interlocutory decree for partition leaving a share unallotted can subsequently allot that share to an intervenient and amend the interlocutory decree accordingly—

Held: (1) That in a partition action to which the provisions of the Administration of Justice (Amendment) Law, No. 25 of 1975, applied, the interlocutory decree entered can be amended only as provided for in sections 463 (4) and (6) which empowered a court to correct any clerical or arithmetical mistake or any error arising from any accidental slip or omission or to amend the decree to bring it in conformity with the judgment. There is no provision to add parties after interlocutory decree had been entered.

(2) That however a practice has evolved in our Courts for allotting unallotted shares on proof of title even after interlocutory decree has been entered. Before that is done there should be clear proof of title and the party claiming title to such unallotted share should generally be called to lead evidence in proof of his title.

Case referred to:

Ariyaratne v. Lapie, 76 N.L.R. 221.

APPEAL from an order of the District Court, Matara.

N. Devendra, for the petitioner-appellant.

A. C. Gooneratne, Q.C., with M. Zarook, for the 14th defendant-respondent.

Cur. adv. vult.

February 13, 1978. WIMALARATNE, J.

There arises for consideration in this appeal the question whether a court which has entered interlocutory decree for partition leaving a share unallotted can subsequently allot that share to an intervenient and amend the interlocutory decree accordingly; and if so, the quantum of proof necessary before such share is allotted.

The plaintiff instituted this action for the partition of a land called Thudawagewatta *alias* Kitihennedigewatta, and traced title from one Jeewathhamy. Jeewathhamy transferred 1/3 share to Dineshamy and another 1/3 share to Devenarayana. There was dispute regarding the devolution of title to those 2/3 shares. On Jeewathhamy's death, the balance 1/3 share devolved on his wife Ceciliana Wijenarayana, and five children, one of whom

was William, who became entitled to 1/30 share. On William's death his widow Nonahamy became entitled to 1/60 share, and his five children to 1/60 jointly.

The plaintiff averred that Nonahamy transferred her 1/60 share by deed No. 10615 dated 6.11.47 to W. D. David, the 2nd defendant, and that the five children of William also transferred their interests to W. D. David on deed No. 42570 dated 24.11.57. Nonahamy was therefore not made a party to the action.

At the trial the plaintiff, who had purchased 1/24 share from one of the children of Dineshamy, gave evidence and said that Nonahamy did not transfer her 1/60 share to the 2nd defendant as averred in the plaint, and suggested that that share be left unallotted. No steps were taken to add Nonahamy as a party defendant. The learned District Judge entered judgment and interlocutory decree on 28.10.75 leaving a 1/60 share unallotted.

On 6.4.76 Nonahamy intervened and filed a statement moving that she be added as a defendant and claiming the 1/60 share. The learned District Judge (who was not the same Judge who had recorded evidence at the trial) made Nonahamy the 14th defendant and amended the interlocutory decree allotting the unallotted 1/60 share to her.

On 1.9.76 the petitioner David Dantamarayana filed a motion stating that Nonahamy had transferred her 1/60 share to him upon deed No. 10615 dated 5.11.47 (which is the same deed referred to in the plaint). He moved that he be added as a defendant and that he be allotted that share. This matter was fixed for inquiry, after notice to the 14th defendant and the learned District Judge by his order dated 24.11.76 refused the petitioner's application. The present appeal is from that order.

It has been argued on behalf of the appellant that the District Judge had no jurisdiction to amend the interlocutory decree entered on 28.10.75 and that the amendment allotting the unallotted share to Nonahamy is of no validity in law. The contention of learned Counsel for the respondent is that there could be no objection to this amendment as the learned Judge who recorded the evidence at the trial had come to a finding that Nonahamy had title to that share, and the amendment of the interlocutory decree was only done with a view to bringing the decree in conformity with the judgment.

When interlocutory decree was entered, as well as when it was subsequently amended, the law in force was the Administration of Justice (Amendment) Law, No. 25 of 1975. Section 644(2) of that Law required the Court, at the conclusion of the trial, to pronounce judgment, and thereafter to enter an interlocutory

decree in accordance with the findings in the judgment. There was no special provision to amend an interlocutory decree so entered. Therefore only such general provisions regarding amendment of decrees would apply. The general provisions were contained in section 463 (6), which empowered a court to correct any clerical or arithmetical mistake in any judgment, or any error arising therein from any accidental slip or omission; and in section 464 (4) which empowered a court to amend the decree to bring it in conformity with the judgment.

Nor was there provision to add parties after interlocutory decree had been entered. Section 643 (1) empowered the court to add a person who, in the opinion of the court should be or should have been made a party, or who applied to be added as a party to the action only at any time *before* interlocutory decree was entered. Indeed, section 69 of the new Partition Law, No. 21 of 1977, is more stringent in that parties can be added only at any time before judgment is delivered. This provision has been introduced perhaps because of the judgment of a Divisional Bench in *Ariyaratne v. Lapie*, 76 NLR p. 221, which held that section 70 of the former Partition Act (Cap. 69) was not wide enough to permit the court to allow a party to intervene after judgment had been pronounced in terms of section 26 of that Act, but before interlocutory decree had in fact been signed.

The District Judge who recorded the evidence of the plaintiff had not added Nonahamy as a party defendant. He could have done so under section 643 (1), but he did not do so very probably because of the averment in plaint, and in at least one statement of claim, that Nonahamy had transferred her interests on deed No. 10615 dated 6.11.47. He had ordered that 1/60 share to remain unallotted, and there was no finding in his judgment, that Nonahamy was entitled to it. The learned Judge who inquired into Nonahamy's application had, therefore, no jurisdiction either to add Nonahamy as a defendant or to allot the unallotted share to her.

But a practice has evolved in our courts of allotting unallotted shares on proof of title even after interlocutory decree has been entered. The reason is to avoid unnecessary delay and expense in compelling a person entitled to such share to institute a separate action for declaration of title to that share. Before that is done there should be clear proof of title, and the mere consent of parties would not be sufficient, because in a partition action there is a duty imposed on the court to examine the title of each party and to hear and receive evidence in support thereof. The party claiming title to such unallotted share should generally be called upon to lead evidence in proof of his title.

The learned District Judge who made the order dated 12.5.76 had not called upon Nonahamy to lead evidence in support of her title. Nonahamy had filed only a statement of claim, and not even an affidavit supporting her claim. In the absence of a positive finding in the judgment entered after the trial that Nonahamy was entitled to a 1/60 share, the learned District Judge ought not to have allotted that share to her. I would, therefore set aside the order of the District Judge dated 12.5.76. and also the consequential amendment of the interlocutory decree. Accordingly, the original interlocutory decree dated 28.10.75, is restored. The Commissioner has filed a final plan No. 2015 dated 4.10.76 in accordance with that interlocutory decree and in terms of that plan lot 4 represents the unallotted 1/60 share. The appellant and the 14th defendant are at liberty to make their claims to that lot in a separate action.

This appeal is accordingly allowed, with costs payable by the 14th defendant-respondent.

RAJARATNAM, J.—I agree.

RATWATTE, J.—I agree.

Appeal allowed.
