1956 *Present :* Pulle, J., and Weerasooriya, J.

FERNANDO, Appellant, *and* PERERA, Respondent

S. C. 316—D. C. Ratnapura, 1,053

Partition action—Interlocutory decree—Its binding effect on the parties—Title as to building erected by a co-owner—Res judicata.

By an interlocutory decree entered in an action for the partition of a land, A was declared entitled as against B to a garage which had been put up by a co-owner on the land and transferred by him to A. The decree was silent as to any rights of B in the land sought to be partitioned. Subsequently A sued B in the present action for the recovery of mesne profits in respect of the garage from the date of its purchase by A.

[1] (*1947*) *A. I. R. 15.*

Held, that the interlocutory decree entered in the partition action was binding on B and operated as *res judicata* in regard to the title of the parties to the garage in the present action.

APPEAL from a judgment of the District Court, Ratnapura.

T. B. Dissanayake, with *E. S. Amerasinghe*, for the plaintiff appellant.

H. Wanigatunga, for the defendant respondent.

Cur. adv. vult.

March 27, 1956. WEERASOORIYA, J.—

By an interlocutory decree for partition (P1) dated the 26th May, 1953, entered in D. C. Ratnapura Case No. 9,135 the plaintiff-appellant (who is the 3rd defendant in that case) was declared entitled to certain undivided shares of the land sought to be partitioned and also to the buildings C, D and E in Plan No. 1,155 (P2). It would appear that two alternative schemes of partition are under consideration in that case and no final decree has yet been entered. Of the buildings referred to, C is a garage and is the subject matter of the present action.

In the plaint in the present action, dated the 28th July, 1954, the plaintiff recited his title to the garage as by right of purchase upon a deed of transfer No. 10,672 dated the 14th June, 1947, and also the interlocutory decree in the partition case No. 9,135. The cause of action pleaded was that since the plaintiff's purchase the defendant-respondent disputed his title to the garage and appropriated the rent of the same and the relief claimed against the defendant was the recovery of mesne profits from the date of plaintiff's purchase up to the 31st May, 1953, which for the purposes of the action were restricted to a sum of Rs. 1,200 with legal interest and costs of suit.

The defendant-respondent is the 3rd plaintiff in the partition action. In that action a contest arose between him and the plaintiff-appellant over the garage in question which the latter claimed to be entitled to exclusively as an improvement effected by the transferor on Deed No. 10,672. The contest was resolved in favour of the plaintiff-appellant and no appeal was filed against the interlocutory decree declaring him entitled to the garage. That decree is silent as to any rights of the defendant in the land sought to be partitioned.

At the trial of the present action the following three issues were raised which the trial Judge was invited by the parties to try as preliminary issues :—

(1) Does the interlocutory decree in D. C. Partition Case No. 9,135, by which the plaintiff in this case, who was the 3rd defendant in the said partition case No. D. C. 9,135, was declared entitled to the garage referred to in the schedule to the plaint, operate as *res judicata* against the defendant in this case with regard to the title to the said garage ?

(2) Does the interlocutory decree referred to in paragraph 2 of the plaint, vest title in the plaintiff in respect of the said garage ?

(3) If not, can the plaintiff maintain this action ?

The learned trial Judge answered each of these issues in the negative and accordingly dismissed the plaintiff's action with costs. From this order the plaintiff has appealed.

In disposing of the action in this way the learned Judge regarded as decisive the *dictum* of Bonser C.J. in the case of *Pieris et al. v. Perera et al.* (F.B) [1] that an " interlocutory decree for partition, unless proceeded with, is useless for all purposes. It would not even support a plea of *res judicata* ". But the substantial ground on which the judgment of the trial Court was reversed and the case remitted for a fresh trial was the inadequate nature of the investigation into the rights of the parties before Court and of certain other persons whose interests in the land sought to be partitioned had been disclosed, and the *dictum* quoted above cannot, therefore, be regarded as forming part of the collective decision of the Appellate Court, nor have we been referred to any subsequent decision where that *dictum* was adopted as correct. The contrary seems to have been laid down in *Silva v. Silva et al.* [2] (also a Full Bench case, but a decision by the majority of the Court) where it was held, following certain earlier cases, that a preliminary decree for partition which is entered in accordance with the judgment is binding on the parties as long as it stands unreversed. In that case, under the interlocutory decree for partition, one of the parties had been declared entitled to an undivided share to the exclusion of another. Although the judgment in terms of which the decree was entered was, as subsequently transpired, based on an erroneous interpretation of a document, no appeal was filed against it but after the commissioner who was appointed to prepare a scheme of partition had made his return, the successor in office of the Judge who was responsible for the wrong order amended the interlocutory decree with a view to rectifying the error. It was held in appeal that the interlocutory decree was binding on the parties and that it was not open to the Judge to amend it. In the case of *Tillekeratne v. de Silva* [3] the preliminary decree for partition contained an express declaration that the land sought to be partitioned was subject to a *fidei commissum* but such a declaration was omitted in the final decree in regard to the shares in severalty allotted to the parties. It was contended in appeal that the omission had the effect of making the parties entitled to the shares free of the *fidei commissum*. In rejecting this contention Soertsz S.P.J. stated as his view that the Partition Ordinance (Cap. 56) contemplates only one decree, namely, that provided expressly as a decree in Section 4, and that while Section 6 provides for a " final judgment " confirming the partition proposed by the commissioner, it is the decree under Section 4 which under Section 9 is given good and conclusive effect as regards the partition or sale and the title of the parties. He held that the shares awarded in severalty were subject to the *fidei commissum* notwithstanding the

[1] *(1896) 1 N. L. R. 362.* [2] *(1910) 13 N. L. R. 87.*
[3] *(1917) 19 N. L. R. 25.*

omission to reserve it in the " final decree ". It must be noted, however, that the view of Soertsz S.P.J. is not in accordance with certain previous decisions of this Court of which I need refer only to the case of *Catherinahamy et al. v. Babahamy et al.* [1] where it was expressly held that the decree which is conclusive under Section 9 of the Ordinance is the final judgment under Section 6 allotting the shares in severalty in the case of a partition. But this decision did not touch on the question of the binding effect of an interlocutory decree on the parties to it as long as such a decree stands unreversed in appeal. On the authority of *Silva v. Silva et al.* (supra) I would hold that the interlocutory decree entered in Case No. 9,135 is binding on the defendant-respondent and operates as *res judicata* in regard to the title of the parties to the garage in the present action. I may say that for the purposes of the present case it is not necessary for me to consider the rights of parties under an interlocutory decree entered in a partition action in regard to which an order of abatement is made under Section 402 of the Civil Procedure Code prior to the entering of the final decree. That such an order could be made in a partition action was recognised in the case of *Muthucumaraswamy v. Sathasivam et al.* [2]

Mr. Wanigatunge who represented the defendant-respondent sought to reinforce the position of his client by the argument that all that the plaintiff-appellant is entitled to by virtue of interlocutory decree in Case No. 9,135 is the allocation of the soil on which the garage stands as part of the share in severalty that would eventually come to him under the partition decree or in lieu thereof to be paid compensation as for an improvement of the soil should that portion be awarded to another co-owner under the scheme of partition that will be adopted by Court. In support of this argument he cited the case of *Moldrich v. LaBrooy* [3], but it cannot be said that the decision in that case was intended to be exhaustive of the rights of a co-owner in the common property. In the case of *Girihagama v. Appuhamy* [4] it was held that a co-owner who has built a house on the common land is entitled to claim damages for the period during which he is deprived of his possession of the same by another who though not a co-owner had entered into occupation of it, but without the former's consent, on the strength of having paid off a mortgage to which it was subject. The decision in that case was based on the judgment of Ennis A.C.J. in *Kathonis v. Silva* [5] where he said that he could see no reason why a co-owner who exercises his rights as such and builds a house should not eject another co-owner who attempted to occupy it without his permission. In the case of *Peeris v. Appuhamy* [6] it was held by Keuneman A.C.J. that a co-owner who makes a plantation on common property is entitled to retain possession of the improved portion until the rights of the parties are finally decided in a partition action. In the case of *Cooray et al. v. Samaranayake* [7] it was held that a possessory action for a plantation can be maintained by one co-owner against another. In view of these decisions the argument advanced by Mr. Wanigatunge is not tenable and must be rejected.

[1] *(1908) 11 N. L. R. 20.*
[2] *(1951) 53 N. L. R. 97.*
[3] *(1911) 14 N. L. R. 331.*
[4] *(1939) 14 C. L. W. 11.*
[5] *(1919) 21 N. L. R. 452.*
[6] *(1917) 48 N. L. R. 341.*
[7] *(1946) 32 C. L. W. 13.*

In the present case, having regard to the terms of the interlocutory decree entered in the partition action (No. 9,135) the defendant-respondent is not even a co-owner of the land on which the garage stands. I see no reason to hold that the plaintiff 's action is not maintainable. It will be noted, as stated already by me, that the claim for mesne profits is up to the 31st May, 1953. The interlocutory decree was entered on the 26th May, 1953. The plaintiff 's title prior to that date would rest on his deed of transfer No. 10,672, and in regard to his claim for mesne profits up to the 31st May, 1953, he would be entitled to rely on that deed as well as on the interlocutory decree.

The order dismissing the plaintiff 's action with costs is set aside and the case is remitted for trial before another Judge on the basis that the interlocutory decree operates as *res judicata* in regard to the rights of the parties to the garage as from the date thereof. The plaintiff will be entitled to his costs here and in the Court below.

PULLE, J.—I agree.

Judgment set aside.