1959 *Present :* **Basnayake, C.J., and Pulle, J.**

W. UBERIS *et al.*, Appellants, and M. W. JAYAWARDENE, Respondent

S. C. 44—D. C. (Inty.) Galle, 3465/L

Partition action—Preliminary survey—Duty of surveyor to adhere strictly to terms of commission—Amendment of pleadings—Effect on* lis pendens—*Civil Procedure Code, s. 93.

In a partition action, when a commission is issued to a surveyor to carry out a preliminary survey it is the duty of the surveyor to adhere strictly to its terms and to locate and survey the land he is commissioned to survey. It is not open to him, even with the consent of the parties, to survey a portion only of the land and submit the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the Court and ask for further instructions.

***Per* BASNAYAKE, C.J.—An action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings.**

***Per* PULLE, J.—When a plaint in a partition action is amended so as to substitute a new corpus for the one described in the first plaint, a fresh *lis pendens* would be necessary.**

APPEAL from an order of the District Court, Galle.

H. W. Jayewardene, Q.C., with *F. A. Abeywardene* and *N. R. M. Daluwatte*, for the Defendants-Appellants.

C. Ranganathan, with *M. T. M. Sivardeen*, for the Plaintiff-Respondent.

Cur. adv. vult.

November 27, 1959. BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Pulle, with which I agree.

I wish to add that this is one of many cases that have come up in appeal in which the surveyor commissioned to carry out a preliminary survey in proceedings under the law relating to partition has failed to appreciate the functions entrusted to him. It is the duty of a surveyor to whom a commission is issued to adhere strictly to its terms and locate and survey the land he is commissioned to survey. It is not open to him to survey any land pointed out by one or more of the parties and prepare and submit to the court the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the court and ask for further instructions.

2——J. N. B 12913—1,995 (10/60)

Another matter I wish to stress is that Judges of first instance should give their personal attention to the formulation of the terms of the commission issued in proceedings for the partition of land and not leave it to be done mechanically by a member of the clerical staff attached to the court. A commission is an instrument issued by the court and should receive its careful consideration and specify in detail what the surveyor is required to do. The instant case is a good illustration of the neglect of that duty by the Judge.

The amendment of pleadings is a matter for the court and should be effected in the manner prescribed by section 93 of the Civil Procedure Code. An action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings. I can find no authority in the Code for the following order of the trial Judge :

> " Take case off trial roll. Plaintiff to file amended plaint and all papers in respect of the whole land depicted in plan 1204. "

I wish also to draw the attention of Judges of first instance to the need for a strict observance of the provisons of section 93 of the Civil Procedure Code.

PULLE, J.—

The action out of which this appeal arises was instituted as far back as 6th February, 1948, to partition a land called Kudawadugewatta. On 3rd August, 1953, a preliminary decree was entered declaring the plaintiff and a number of defendants entitled to various shares in a land of the extent 0A. 1R. 39P. depicted in Plan No. 2493 of 29th May, 1948. The decree further ordered that the land be partitioned. It is sufficient for the present to note that the 11th defendant, Manawaduge Babysingho, to whom the plaintiff had allotted a share in the plaint and in tne two amended plaints dated respectively 20th April, 1948, and 23rd November, 1949, was absent at the trial prior to the preliminary decree being entered. The decree, however, stated that out of the plantation he was entitled to 9 coconut trees and out of the buildings to a brick built copra shed.

A few days after the preliminary decree was entered, namely, on the 18th August, 1953, the 10 appellants before us who are described in the caption as 59th to 68th defendants filed a statement of claim as intervenients. They alleged that the land decreed to be partitioned was part of a larger land of the extent of 1A. 0R. 12 6/10P. and asked tnat they be declared entitled to certain shares in the larger land. This larger land is shown in Plan No. 1204 of 3rd May, 1954, and includes a portion marked as lot D. They also took up the position that the registration of *lis pendens* was bad inasmuch as it was in respect of a land called Kudawadugawatta of the extent of 1A. 0R. 12 6/10P and not of a divided portion of it as depicted in plan No. 2493 referred to in the preliminary decree. The intervention on the part of the appellants brought in numerous other

parties to the case who filed various statements. Of the latter mention may be made of a statement dated 29th March, 1955, of the 76th and 79th to 83rd defendants. According to them the portion, namely, lot D in the later plan No. 1204 which the appellants claimed ought to have been included as a part of the corpus to be partitioned was a distinct entity. The 76th and 79th to 83rd defendants also alleged that the 11th defendant who had by default failed to establish his claim had " put forward his mother, sisters and brothers, the 59th to 68th defendants to re-open and revise these proceedings in this case which went against the said 11th defendant ". It would appear from a further statement filed by the 76th and 79th to 83rd defendants that lot D is now the subject matter of another partition case No. P1352 in the District Court of Galle.

This appeal is concerned with the legality of two orders made by the learned District Judge in the course of an enquiry into the application of the appellants to intervene in the action. The first was made on 5th December, 1956, and the second on 25th February, 1957.

On 5th December, 1956, counsel for the plaintiff informed the court that his client was " willing to partition in this case the whole land depicted in Plan 1204 ". From the point of view of the appellants the new attitude of the plaintiff procured for them what they desired by the intervention, namely, to obtain a declaration of title of the parties to a larger land. Counsel representing other parties, particularly the 76th and 79th to 83rd defendants, are recorded to have said nothing more than that they moved for the costs of the day.

The order was—

" Take case off trial roll. Plaintiff to file amended plaint and all papers in respect of the whole land depicted in plan 1204. "

After dealing with costs the Judge said,

" Amended plaint and other papers on 18.2.57. "

The case took a new development before 18th February, 1957. On 9th January, 1957, the Proctor for the plaintiff filed a motion stating that his client was not willing to partition the whole land and desired " to proceed with the enquiry relating to the intervention filed by the 59th to 68th defendants. " This motion came up for enquiry on 25th February, 1957, and the order made thereon is the subject of the present appeal.

The submission on behalf of the plaintiff was that there was a preliminary decree of record and the consent which the plaintiff gave on 5th December, 1956, to partition the larger land as depicted in Plan No. 1204 was inoperative. The Proctor for the 76th and 79th to 83rd defendants submitted that they had filed a statement opposing the claim of the appellants to bring lot D in Plan 1204 into the corpus of the suit and that a separate action to partition lot D had already been filed. He supported

the plaintiff's application. On behalf of the appellants it was submitted that the plaintiff should not be allowed to resile from the position he had taken up on 5th December, 1956, and that the order of the court " Take case off the trial roll. Plaintiff to file amended plaint " operated as *res judicata*. The appellants also took up the position that the order amounted to a vacating of the preliminary decree of 3rd August, 1953. The order which is the subject of the present appeal reads :

" All parties who come before Court should be given full freedom to put forward their case in the way they choose to place it. They must not be penalised for changing their minds, but such a change should not entail hardship or added expenditure to those who are opposed to them.

" I fix the case for inquiry into the intervention. "

This was followed by an order condemning the plaintiff to pay certain costs.

In their prayer in the petition of appeal the appellants ask that the Judge's order of 25th February, 1957, be set aside and the order of 5th December, 1956, restored. The grounds urged are that the earlier order operated as " *res judicata* ", that the consent given by the plaintiff on 5th December

" amounted to (*a*) setting aside the interlocutory decree already entered and (*b*) judgment by consent to bring in the whole land depicted in Plan 1204 ", and that it was not open to the plaintiff to resile from the position he had taken up on 5th December.

It is sad to reflect that proceedings which commenced in 1948 to partition a land were in 1957 in a state of confusion. Had the court and the parties, especially the plaintiff, kept a watchful eye on the early stages of the case and realised the need for strict proof of the title to the corpus with reference to the boundaries set out in the plaint, the complications that have now arisen might have been avoided. In the orginal plaint of 6th February, 1948, the corpus is described as Kudawadugewatta

" bounded on the North by Patabendigewatta and Lindemulawatta, East by Patabendigewatta and Wadugewatta, South by High Road and West by Talgahawatta and containing in extent 1A. 0R. 12 6/10 perches."

An undated commission was issued in 1948 for the survey of the land of the description I have quoted to which a return was made on 29th May, 1948, with Plan No. 2493 and a report. A scrutiny of the plan and a perusal of the report would have revealed the following irregularities :—

(*a*) The surveyor showed on the plan a corpus not of the extent 1A. 0R. 12 6/10P. but one of 1R. 39P.

(*b*) The western boundary of the land he was required to survey was stated in the commission to be " Talgahawatta ". The plan gives the western boundary as the " other portion of *this* land " which in the context is not " Talgahawatta " but " Kudawadugewatta ".

(*c*) According to the report the 11th defendant had informed the surveyor that what he had surveyed was only a portion, " but the plaintiff stated and *requested* me to survey only this portion as he has filed action for this portion only as the owners of the other portion are not made parties because they come under a different pedigree. The parties were agreed and admitted that this portion is possessed separately ".

In regard to (*c*) above it is surprising that a surveyor who received a mandate from court without carrying out its terms allowed himself to be dictated to by a party to the litigation. Whether a portion of a larger corpus has become a separate entity is not to be determined in a partition action by consent of parties intimated to a surveyor. Surely it does not follow that a portion of land possessed separately becomes *ipso facto* a distinct corpus for the purpose of an action under the Partition Ordinance. This case itself reveals the danger of acting on such a presumption.

There being a duty cast on the court to insist on strict proof of title in a partition suit the failure on its part to understand the implications of Plan No. 2493 in the light of the plaint and the *lis pendens* is lamentable. Once the plan and report were received it should have been manifest that to proceed further without a fresh *lis pendens* and an amendment of the plaint setting out without ambiguity the metes and bounds and extent of the new corpus would involve the risk of making a decree valueless. Vide *S. C. Kanagasabai et al. v. M. Velupillai et al.* [1]

The plaint was undoubtedly amended a second time on the 23rd November, 1949, but the amendment does not tell us with precision that a new corpus has been substituted for the one described in the first plaint and in the first amended plaint.

Paragraph 12 of the amended plaint reads,

" The plaintiff seeks to partition the land called a defined half portion of Kudawadugewatta situated at Pitiwella within the jurisdiction of this Court and bounded on the North by Patabendigewatta and Lindamulawatta East by Patabendigewatta Wadugewatta *South* by High Road and West by Talgahawatta and containing in extent 1A. 0R. 12 6/10 perches. "

This description does not tally with the one in the *lis pendens*. That does not speak of a " defined half portion ".

It seems to me that no useful purpose would be served in allowing the action to continue. Mr. Ranganathan for the plaintiff argues that a decision, on its merits, has still not been given on the claim of the intervening appellants and that no harm will be done to either side if, in terms of the order of 25th February, 1957, appealed from, the court holds an inquiry into the intervention. It seems to me that if the court holds with the appellants that the proper corpus is the one depicted in Plan No. 1204, this would in effect mean starting all over again a case which the plaintiff

[1] (*1952*) *54 N. L. R. 241.*

had abandoned. This might as well be done in a new suit. If the appellants fail, then the plaintiff opens himself to the attack that the *lis pendens* is bad and that grave irregularities have occurred by reason of his altering the scope of the action by praying for a partition of one corpus and getting a preliminary decree to partition another. Besides, there is pending a separate suit for the partition of lot D in Plan No. 1204 the final decision in which may settle the major controversies arising in the present case.

In my opinion this court acting in revision should set aside the preliminary decree and all the orders made on 5th December, 1956, and 25th February, 1957, and dismiss the plaintiff's action, with liberty to file a fresh action, if so advised. In all the circumstances each party should bear his own costs of appeal. In entering up a decree dismissing the action, the learned District Judge should award such costs to the parties in his discretion as the justice of the case may require.

Order set aside.