1965 *Present:* **H. N. G. Fernando, S.P.J., and Sri Skanda Rajah, J.**

M. R. D. PIERIS, Appellant, *and* K. R. ABEYSINGHE and another, Respondents

S. C. 71/62 (Inty.)—D. C. Kurunegala, 532/P

Partition decree—Assignment of certain lots to a particular group of persons—Subsequent partition action in respect of such lots—Quantum of shares to which the members of the group are entitled.

Where a partition decree assigns certain lots to a number of persons as a group who derive their title from the same source, without defining the interests of the members of that group *inter se*, a subsequent partition action may be instituted for the purpose of partitioning the land comprising the lots which were assigned to that group. In such a case, it cannot be contended that the earlier partition decree conveyed equal shares to the persons who formed the group. The finality of a partition decree does not touch matters which the decree does not in terms purport to define with finality.

APPEAL from an order of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *N. E. Weerasooria* (Jnr.) and *R. D. C. de Silva*, for the Plaintiff-Appellant.

C. Thiagalingam, Q.C., with *C. Ranganathan* and *K. Thevarajah*, for the 1st and 2nd Defendants-Respondents.

Cur. adv. vult.

August 3, 1965. H. N. G. FERNANDO, S.P.J.—

This was an action for the partition of a land comprising four lots E, F, G, and H. There had been an earlier partition action affecting a larger land (D. C. Kurunegala No. 11350 P). That action was instituted in 1926 by one Charles de Zylva as plaintiff against one Kumarappa

Chettiar as defendant. Thereafter one Dionysius de Abrew Abeysinghe intervened as guardian *ad litem* of his two minor children Princey and Kingsley, and claimed on their behalf that the children were entitled to a one-eighth share of Charles de Zylva's interests in the land by virtue of a deed of gift which the latter had executed in 1924 in favour of the children. The two minors were added as the second and third defendants and their guardian was, as such, added as fourth defendant.

Kumarappa Chettiar's interests had passed to one D. G. Joseph, who intervened and was added as the fifth defendant.

The proceedings in action No. 11350 were much protracted. Charles de Zylva died in 1929 and three of his children were substituted as plaintiffs in his place. Evidence was led after this stage. One of the substituted plaintiffs stated that Charles de Zylva had died leaving a last will, but the terms of the will were not proved; nor was there any statement as to the persons to whom or the mode in which the deceased's interests devolved on death. No reference was made to the deed of 1924 upon which the intervening second and third defendants claimed a one-eighth share. The whole purport of the evidence led for the plaintiffs and for Joseph the fifth defendant was to prove the title of Charles de Zylva and the fifth defendant, and to explain to the Court a compromise by which Joseph agreed to take certain lots as his share and the other parties agreed to take what are now lots E, F, G and H as representing the share of the deceased Charles. In the interlocutory decree entered on October 1937 effect was given to this compromise, and the rights of the second and third defendants were also impliedly recognised. Lots E, F, G and H were by the decree allotted to the substituted plaintiffs and to the second, third and fourth defendants.

Thereafter Madalena, one of the three substituted plaintiffs, died, and steps were taken to substitute four heirs of Madalena in her place. At this stage it was apparently discovered that there had been no due substitution after Charles de Zylva's death, for he had left six children in all, and also his widow. Hence, when application was made for substitution of the heirs of Madalena, application was also made for the additional substitution of Charles de Zylva's other three children and his widow. In the result, the substituted plaintiffs thereafter comprised five of Charles' children and the heirs of his deceased child Madalena, and his widow.

Mr. Thiagalingam argued before us that no notice of these substitutions was served on the second, third and fourth defendants, and that they cannot be bound by any consequences flowing from that substitution. We do not think it appropriate in the circumstances to consider this objection which is based on an assumption of facts which were not put in issue at the trial of the present action.

After the substitutions above mentioned, final decree was entered allotting the four lots to " the substituted plaintiffs and the second, third and fourth defendants ". In the caption of the decree the name of the fourth defendant was qualified by the description " guardian *ad litem* " of the second and third defendants.

The dispute in the present action concerns the quantum of shares to which the substituted plaintiffs on the one hand, and the second, third and fourth defendants on the other, became entitled under the earlier partition decree. The present two defendants claimed successfully in the lower court that under the interlocutory decree title to the four lots passed in equal shares to the six persons, i.e. the three children of Charles (who were first substituted after his death) and the second, third and fourth defendants. On that basis the learned Trial Judge has held that the second, third and fourth defendants became entitled to one-sixth share each in the four lots.

In determining the dispute by reference to the interlocutory decree the Trial Judge has for unexplained reasons ignored his own correct statement that the principal issue concerns the construction of the final decree. That issue he left unanswered and we have now to answer it.

I would respectfully adopt the statement of Bertram C.J. (Garvin J. and Jayewardene A.J. agreeing) in *Carlinahamy v. Juanis* [1] that in a partition decree assigning lots to a family group, " the Court must have intended that they should hold it in undivided shares according to their respective interests whatever they were ", and that in such a case there is no *prima facie* inference that the members of the group would acquire title in equal shares. I would venture to add the observation that the finality of a partition decree does not touch matters which the decree does not in terms purport to define with finality. Let me take the common case of an allotment of shares to " the heirs of the deceased party ". Unless the allotment purports to be in equal shares, there is no definition of the quantum of the shares, and that quantum will remain to be determined by reference to various matters, such as the question whether the deceased party left a surviving widow or husband and the particular family law which may be applicable.

Despite Mr. Thiagalingam's submissions to the contrary, it is clear, from the evidence led and from the circumstances, that the earlier partition action was not intended to define the interests of those claiming under Charles de Zylva. He was originally the sole plaintiff, and he sought a partition between himself and one defendant who he thought was sole co-owner. Although the second and third defendants intervened to claim one-eighth share under their deed, their title was not in fact proved, investigated or admitted at the trial. The substituted plaintiffs merely proceeded to obtain a partition of the land as between the fifth defendant on the one hand and those claiming under Charles de Zylva, as a group,

[1] *(1924) 26 N. L. R. 129.*

on the other. I would hold therefore that interests of the members of the group *inter se* were not defined either by the interlocutory decree or by the final decree.

The only interest which the second and third defendants had was a one-eighth share jointly under the deed to which they referred when they intervened, and which was proved for the first time in the present action. The fourth defendant was it is true mentioned in the family group, but he was so mentioned only because he had been named as the fourth defendant in his capacity of guardian of his two minor children. It would be absurd to impute to the Court which entered the decree any intention to allot to the fourth defendant, who had merely intervened as guardian, any interest in his own right. I would hold therefore that no interest passed to him under the decree.

I should add as a matter of caution that there has been no occasion on this appeal to consider the provisions of the new Partition Act.

In the result the appeal has to be allowed with costs. The interlocutory decree entered in the present action is set aside, and the case is remitted to the District Court for interlocutory decree to be entered as prayed for by the plaintiffs.

SRI SKANDA RAJAH, J.—I agree.

Appeal allowed.