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Present : Garvin J. and Jayewardene A.J.

ABDUL AZIZ *v.* THAMBY APPU *et al.*

5—*D. C. Avissawella, 23.*

Partition action—Sale after final judgment, but before formal decree—Validity.

Where, in a partition action, the Court approved of the scheme of partition proposed and made order allotting the shares in severalty in accordance with the scheme, but no final decree was entered,—

Held, that the order allotting the shares constituted the final judgment in the action and that a conveyance made after such judgment, but before the final decree was entered up, was valid.

THIS was an action for declaration of title to an allotment of land, which formed part of a larger land, in respect of which proceedings were instituted for partition. Interlocutory decree was entered on April 22, 1913, declaring the shares to which the co-owners were entitled. A commission was issued for the partition of the land and a scheme of partition was forwarded to the Court by the Commissioner on March 14, 1914; the learned District Judge

confirmed the scheme of partition, reserving to the fourteenth defendant an opportunity to prove his title to a certain allotment in severalty which, it was proposed, should be given for his share.

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This was done by an order entered on May 1, 1914. On July 29 the same year one Eheliyagoda, to whom the lot in suit had been allotted under the scheme of partition, conveyed it to Ahamado Lebbe, who sold it to the plaintiff. A formal decree for partition was entered in the case on May 3, 1916; Eheliyagoda conveyed the same allotment on August 1, 1919, to the third defendant.

The learned District Judge held that the defendant's title prevailed.

H. V. Perera, for plaintiffs, appellants.

Navaratnam, for defendants, respondents.

June 7, 1928. GARVIN J.—

The allotment of the land which is the subject of the contest forms part of a larger land in respect of which proceedings were instituted under the Partition Ordinance. An interlocutory decree was entered in those proceedings on April 22, 1913, declaring the fractional shares to which each of the co-owners was entitled. Among those co-owners was one Edwin Eheliyagoda. A commission was issued for the partition of the land, and a scheme of partition was forwarded to the Court by the Commissioner with the report on June 28, 1913. On March 14, 1914, a proceeding took place in Court, in the course of which the scheme submitted by the Commissioner was considered and the learned District Judge directed the confirmation of the partition proposed reserving, however, to the fourteenth defendant, whose proof of title had apparently not been completed, an opportunity to prove his title and obtain, as and for his 1/12th share, a certain allotment in severalty which, it was proposed under the scheme, should be allotted as and for that share. On May 1 this defendant adduced the necessary proof and the following order was entered :—

“The fourteenth defendant Sidappu is present. He produces deed No. 1,800 of November 25 (illegible). The 12th share which was allotted to the first defendant to go to fourteenth defendant. Amend decree by allotting that share (lot B) to (illegible) defendant.”

On July 29, 1914, Edwin Eheliyagoda, to whom the lot marked A had been allotted under the scheme of partition, sold and conveyed the same to one Ahamado Lebbe, who in the year 1921 conveyed it to the plaintiff. On August 1, 1919, Eheliyagoda passed another

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conveyance to the same allotment to the third defendant. The question for determination is which of the two conveyances made by Eheliyagoda is to prevail. The earlier conveyance of July 29, 1914, in favour of Ahamado Lebbe was also registered earlier than the deed under which the third defendant claims. But it is suggested on behalf of the third defendant that a formal decree for partition which was entered on May 3, 1916, had the effect of blotting out the title which Eheliyagoda had purported to convey to the plaintiff's predecessor, Ahamado Lebbe, in consequence of which the later transfer in favour of the defendant prevails. It is argued that the formal decree of May 3, 1916, must be regarded as a final judgment, and that the rights of the parties to the shares in severalty must be deemed to have been ascertained and declared as at that date. But what is conclusive is the final judgment, and not the mere formal decree. It is urged by the appellants that the orders of March 12, 1914, constitute the form of the final judgment. Now, it seems to me that that contention is clearly entitled to prevail. On the first of these two dates an entry on the record shows that the learned Judge approved the scheme of partition which had been proposed. He went further and allotted shares in severalty in accordance with the scheme to those who were entitled. But there is perhaps some substance in the contention that this order made on that date cannot be treated as a final judgment for the reason that he left it open to the fourteenth defendant to adduce formal proof of his title and take the share in severalty which had been marked out in respect of that undivided share. On May 1, when that proof had been adduced, all that remained to be done was done, when the Judge thereupon made an order which must be construed into a direction that the final decree should be entered in this case in accordance with the scheme of partition. It is true that the actual words used by him are " amend decree accordingly. " This formula was clearly employed because the District Judge had assumed that some sort of formal decree had been entered embodying his order made on March 14, 1914. It transpires that no such formal decree had been entered. Had it been entered there can be no question that the later order would have completed the determination of matters which remained to be determined and would have been a sufficient authority for the entry of a formal decree in terms of the scheme ; but the mere circumstance that a decree had not been drawn up in terms of his order of March 14, 1914, does not present any difficulty; for the orders taken together still remain, in my opinion, a final judgment determining all those questions which remained for determination at that date and must be construed to be a direction that a final decree should be entered in terms of the scheme. The formal decree of May 3, 1916, upon which counsel for the third defendant relies, was clearly based upon the view of the then acting

District Judge that these two orders amounted to a final judgment. There was no other adjudication and no other judgment than that to which I have referred. If those orders, therefore, did not amount to a final judgment, there is no foundation for the decree upon which the defendant relies. For these reasons the judgment under appeal must be set aside and judgment entered for the plaintiff declaring the second plaintiff entitled to this land. The plaintiffs will be entitled to their costs, both here and in the Court below.

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JAYEWARDENE A.J.—I agree.

Appeal allowed.

