

1947

*Present : Wijeyewardene and Jayatileke JJ.*

JOHN SINGHO, Appellant, and PEDRIS HAMY, *et al.*, Respondents.

S. C. 59—D. C. (Inty.) Kalutara, 24,550.

*Partition action—Points in dispute agreed on—Other matters decided—Duty of trial Judge.*

Where in a partition action all parties agree on the points in dispute and state them to Court the Judge should not consider without giving due notice to the parties any other matters that may appear to him to arise between the parties in the course of the proceedings. The position will however be different where the points in dispute are not set down in the form of issues.

<sup>1</sup> (1926) 28 N. L. R. 401.

<sup>2</sup> (1946) 47 N. L. R. 564.

**A** PPEAL from a judgment of the District Judge of Kalutara.

*E. A. P. Wijeratne*, for the plaintiff, appellant.

*S. W. Jayasuriya*, for the defendants, respondents.

May 14, 1947. WIJEYWARDENE J.—

This is a partition action. At the commencement of the trial the Judge made the following note :—

“The dispute is whether Andiris Naide owned the land or whether Aberan, his son, owned the land. The plaintiff says Andiris owned it, the fifth and eleventh defendants say that Aberan owned it.”

On the evidence before him, the Judge was satisfied that no one who was not a party to the action had an interest in the property. He found also on a balance of evidence that Andiris Naide, and not Aberan, was the original owner. On those findings he should have entered a decree declaring the successors in title from Andiris Naide entitled to the undivided shares of the land as ascertained by him. Instead of following that procedure—and he should have followed that procedure in view of the note he made at the beginning of the trial—he took upon himself to decide whether some of the successors in title of Aberan had not acquired title by prescriptive possession against all the other parties. This appears to have been a self-imposed task, considering that the parties had told him that the dispute between them was whether Andiris Naide or Aberan was the original owner. It cannot be said that the plaintiff has not been prejudiced by the action of the District Judge in deciding the question of prescriptive possession in these circumstances. A Judge may find it frequently very convenient to state, in the form of issues, the matters in dispute between the parties in a partition action. After satisfying himself that no person other than the parties to the action has interests in the property, he will in such a case decide the issues framed by him and enter a decree for partition or sale according to his finding on those issues. He should not in such circumstances consider, without giving due notice to the parties, any matters in dispute that may appear to him to arise between them in the course of the proceedings. The position, of course, will be different where the Judge does not set down, in the form of issues, the matters in dispute in a partition action. In such a case the parties will be presumed to have asked the Court to adjudicate on all the matters in dispute as disclosed by the pleadings. It is contended for the contesting respondents that they did not intend to confine themselves only to the question of fact recorded by the Judge, and the manner in which the Judge dealt with the case seems to support this contention to some extent.

I set aside the judgment of the District Judge and send the case back for a fresh trial before another Judge. The contesting respondents will pay the appellant the costs of proceedings of November 19, 1945, and the costs of appeal.

JAYETILEKE J.—I agree.

*Sent back for re-trial.*