1955 *Present :* Pulle, J., and Weerasooriya, J.

MRS. J. H. RATNAYAKE, Appellant, *and* MRS. P. H. AMARASEKERE *et al.*, Respondents

S. C. 33—D. C. Colombo, 6,314/P

Partition action—Property not forming subject matter of action—Jurisdiction of Court to come to a finding on title thereto—Power of Court to order that any share shall remain unallotted—Partition Act, No. 16 of 1951, ss. 25, 26 (2) (f).

Upon a temporary division of property owned in common by three sisters, each entered into possession of separate properties and possessed them for fifteen years. Thereafter one of them instituted the present action to partition a property which had been allotted to her at the temporary division and which she had possessed upon that basis exclusively.

The appellant, who was one of the defendants, filed answer claiming that the division was a permanent one and also that she had acquired a title by prescription to the properties she had possessed exclusively, and prayed for a dismissal of the plaintiff's action. She participated in the trial and raised issues in support of her contentions. There were also pending actions in other courts filed by the plaintiff against the same defendants to partition some of the very properties which were claimed exclusively by the appellant.

Held, that it was not competent to the appellant in appeal to contend that it was outside the jurisdiction of the trial Court to come to a finding on title to properties not forming the subject matter of the present action inasmuch as she had invited the Court to adjudicate on the issues.

Held further, that, notwithstanding the provisions of section 26 (2) (*f*) of the Partition Act No. 16 of 1951, it was not competent to the Court to leave a third share unallotted pending decisions in the connected cases.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *Kingsley Herat*, for the 2nd defendant-appellant.

Sir Lalita Rajapakse, Q.C., with *F. R. Dias* and *T. G. Gunasekera*, for the plaintiff-respondent.

H. W. Jayewardene, Q. C., with *C. G. Weeramantry*, for the 1st defendant-respondent.

Cur. adv. vult.

July 5, 1955. PULLE, J.—

This appeal arises out of an action instituted on the 25th July, 1951, under the provisions of the Partition Act, No. 16 of 1951, which came into operation on the 1st June, 1951. The subject matter of the action is a property called "Summer" situated within the Municipal limits of Colombo. The parties to the action, namely, the plaintiff and the two defendants, of whom the 2nd defendant is the appellant, are the daughters of one Hendrick Dabera Appuhamy who died in 1930 leaving a last will by which he devised to them the property in question and several other in equal shares subject to certain conditions.

Although in form the action was one for partition the parties went to trial on issues the answers to which affected, at least incidentally, the title to all other immovable properties devised jointly to the three daughters. Stated very briefly the position taken up by the appellant as against her sisters who have made common cause against her is that the immovable properties jointly devised to them were amicably divided and that in that division the appellant was allotted the properties particularised in the schedule to her amended answer dated 29th June, 1953, and that the plaintiff was allotted, among others, the property which is the subject matter of the action. She also pleaded that she had acquired a prescriptive title to the properties in the schedule referred to and prayed that the action be dismissed. The learned District Judge found against the appellant on all the material issues, save issue No. 7 an answer to which did not arise, and declared the parties entitled to the property in three equal shares subject to the fideicommissum created by the last will. Apart from submissions on certain matters of law, it was strenuously argued in appeal that on the evidence the trial judge was wrong in holding that the appellant had not acquired, by prescription, title to the properties claimed exclusively by her and that in any event it fell outside his jurisdiction to come to a finding on title to properties not forming the subject matter of this action and that that finding should not be allowed to stand. The importance attached by both sides to the finding that the appellant had not made out a prescriptive title to the properties claimed by her to the exclusion of her sisters can well be appreciated because there are now pending actions in other courts filed by the plaintiff in the present case against the same defendants to partition some of those very properties.

Before dealing with the pleas raised by the appellant in her answer it is necessary to set out some facts which are beyond controversy.

When the testator died in 1930 his three daughters were minors and in terms of the will the management of the estate was taken up by the persons named therein, Don Thomas Appuhamy and Philip Perera.

By 1933 the 1st defendant, the eldest of the daughters, and the plaintiff had attained majority by marriage and the appellant, the youngest of them, was studying in a convent. She attained majority in April, 1937 and married in February, 1938. Early in 1935 the plaintiff filed an application in Testamentary case No. 4960 in which the last will was proved by which she asked, *inter alia*, for the removal from office of Thomas Appuhamy and Philip Perera and for an order directing that the heirs be given possession of their "distributive" shares. The court held by its order dated the 3rd August, 1935, that on the pretext that the appellant was a minor the managers were clinging to the entire estate, that there was no justification for preventing the two major daughters from the actual possession and enjoyment of their 2/3rd share and directed the managers to hand over immediate possession of that share to the two daughters.

On the 4th August, 1935, by the informal writing in Sinhalese marked P 11 the managers purporting to give effect to the order of Court of the previous day handed over to the two daughters the properties described therein as representing a 2/3rd share of the estate. On the same day the plaintiff and the first defendant signed an informal writing P 12 in Sinhalese by which they divided between themselves the properties they received from the Managers. The property which is the subject matter of the action was taken by the plaintiff. Both documents were drawn up by Thomas Appuhamy and one of the witnesses to P 12 was the other manager W. Philip Perera. The concluding paragraph of P 12 reads as follows :—

"We the said two persons undertook to divide and possess the said properties in this manner, until they are later divided among the three persons".

Now one of the issues tried in the case was whether the order of court dated 3rd August, 1935, made in case No. 4960 operated as *res judicata* in favour of the appellant. The answer was in favour of the plaintiff and the 1st defendant and was not challenged at the argument in appeal. An issue as to misjoinder of parties and causes of action answered in their favour was not pressed in appeal.

To continue the narrative. The objections raised by the plaintiff to the accounts rendered by the managers in case No. 4960 were referred on the 9th October, 1935, to arbitration and an award P 14 was made on the 21st April, 1937, the last paragraph of which reads :

"In the course of the proceedings and on the 19th December, 1936, a certain agreement was noted between the parties regarding the immovable property belonging to the estate, namely, that the present arrangement regarding possession was to continue until the 6th respondent becomes a major in or about April, 1937, and thereafter it shall be open to the heirs to take steps for a partition, proper division or any other adjustment."

After the appellant became a major in April, 1937, and towards December of the same year the three sisters attempted to reach a final settlement regarding the division of the immovable properties and to embody

that settlement in a decree of court in case No. 4960 The document P 17 shows the items of immovable properties taken over from the inventory in case No. 4960 with their respective values. Excluding item No. 16 which was a property devised solely to the 1st defendant, the value of the properties which fell to the appellant at the division in August, 1935, was Rs. 146,595 while the other two sisters got properties valued at Rs. 157,385. The desire on the part of the latter for a fairer division was only natural.

Probably in December, 1937, an informal writing (Vide P 20 and P 20A) purporting to be a scheme of distribution was drawn up in triplicate and signed by the three sisters. Each was witnessed by the husband of the plaintiff and Thomas Appuhamy, the manager of the appellant's share under the 1935 division. The appellant repudiated this settlement shortly afterwards and her claim now is that since then she had acquired by prescriptive possession title to all the properties retained by the managers on her behalf under the 1935 division. Before dealing with the oral evidence on this point and the finding of the trial Judge I would refer to some minutes in case No. 4960. The first dated the 16th December, 1937, reads :—

" The parties have arrived at a tentative settlement with regard to the distribution of the immovable properties. The 6th respondent, however, desires to have a further opportunity of considering it before finally agreeing to it. This matter also may be brought up on 20th January to see whether it is possible for the parties to come to a final adjustment of all the matters connected with the estate ." (Vide 2D 3).

The 6th respondent referred to is the appellant. On the 20th January, 1938, no settlement had been reached and the record reads—P 15 :

" Call the case on 17th March, 1938, to see whether the parties can come to a settlement with regard to the properties to be taken separately by each of them ."

On the 17th March, 1938, it was recorded—P 16—that no settlement was reached. Towards the end of 1937 the appellant was engaged to be married to one Mr. J. M. B. Ratnayake whose brother, Mr. J. H. L. Ratnayake, a Proctor, was acting for the appellant in connexion with the scheme of distribution recorded in P 20. The estate of the testator was being administered by the Secretary of the District Court and Proctor Ratnayake sought access to the deeds relating to the properties. It appears to be probable that particulars were being sought early in 1938 from the deeds and from the proceedings in case No. 4960 to prepare conveyances vesting title according to the scheme of distribution P 20.

It is common ground that after the settlement recorded in P 20 fell through each of the three sisters continued as before to possess the properties as fell to them under the tentative division of August, 1935, and appropriated the income without accounting to the other two. One of the properties retained on behalf of the appellant in 1935 was Kanuwana Estate of the extent of 70 acres. She and her husband effected improvements. In D. C. Negombo case No. 16262 the plaintiff in the

present case sought on 20th July, 1951, to partition Kanuwana Estate on the basis of a 1/3rd share to each of the sisters. The appellant has answered on the same lines as in this case but has claimed, in the alternative, that if a decree for partition is entered she be granted compensation for improvements in a sum of Rs. 150,000. The hearing of the cases in Negombo and in other courts awaits the determination of the case under appeal. Before dealing with the evidence on which the appellant bases her title by prescriptive possession I would refer to the documents P 21 and P 22. The former dated 4th February, 1944, is addressed by the 1st defendant, the eldest sister, to the Secretary of the District Court asking him to hand over to her Proctors the title deeds and other documents to enable them to file a partition action. The letter dated 14th February, 1944, is by the Proctors to the Secretary. It enclosed P 21 and stated that they had been instructed to file action "for the partition of the several lands belonging to the estate."

Now the burden of proving title by prescriptive possession lay on the appellant and it would, therefore, be convenient to examine first her own evidence and that of her witnesses. She stated that there was displeasure over her marriage because she refused to marry the brother of the 1st defendant's husband. Ultimately neither of the sisters attended her wedding. She admitted having signed the writings P 20 and P 20A. The reason for doing so was that she was to be married in February and her sisters came with their husbands and worried her to sign. She repudiated the agreement shortly after her marriage on the occasion that her sisters divided the movable properties among themselves. The reason given for the repudiation was that Thomas Appuhamy, who, incidentally, witnessed the agreement, and the appellant's mother told her that she had done an extremely foolish act. She described her discussion of the settlement with her sisters in these words :

"On that day there was a discussion in regard to the immovable property. I told my sisters that as this settlement was rejected by court and as everybody told me it was unfair I said I was willing to continue with the division of 1935 because I was made aware by everybody that as I was the minor in 1935 I was the only one who could have disagreed with it, but I told them I was accepting it and from that date I accepted it. That old division stood."

Referring to an attempted settlement in 1943 she said,

"I told them (the sisters) I had already settled, my husband had spent so much of his money on all these improvements, by that time he had done all the improvements, so I said—what settlement after I had spent so much time—and I did not agree because it was not possible at that time."

It would not be correct to say that there was any "rejection" of the settlement by court. The agreement being informal the appellant was free to resile from it and either bargain for another division or seek the appropriate legal remedy to obtain her share. The allegation that

pressure was brought to bear on the appellant by her sisters to agree to the division recorded in P 20 has been discounted by the trial Judge for the reasons which are fully set out by him and which I need not repeat. If there was any ouster it could not have been prior to 1943.

The appellant called her husband Mr. J. M. B. Ratnayake as a witness. who deposed, principally, to the improvements made to three of the large estates retained by the Managers on her behalf at the 1935 division. There is one item of evidence in his cross-examination which is not adverted to in the judgment but which was the subject of comment by learned Counsel who appeared for the elder sisters. It is the letter P 29 dated 9th September, 1939, written by Mr. Ratnayake to the plaintiff's husband in reply to one sent by the latter. In it he says,

"There is no objection whatever for me to have these things settled. I have been asking you several times whenever I met you to come to a settlement. It will be quite suitable to me any day that will be convenient to you and Mr. Rodrigo. Only let it be in Colombo or Jaela."

Mr. Rodrigo is the husband of the 1st defendant. It was put to Mr. Ratnayake that the proposal to have things settled had reference only to the making of a fresh attempt to come to an amicable division of the immovable properties but he denied it and ended by saying that he did not know what the settlement was about. During the re-examination certain journal entries in case No. 4960 were marked by way of suggesting that the matters therein referred to might have been the subject which Mr. Ratnayake intended to discuss. Of these entries, of which copies were not in the typed proceedings, the nearest in date to the letter P 29 of the 9th September, 1939, is the entry 2 D 15 dated the 24th November, 1939, which refers to the motion 2 D 14 of the 15th November, 1939. By this motion the appellant asked to be paid a sum of Rs. 95 which had been transmitted to case No. 4960 from the Court of Requests of Gampaha and it was paid to her on the 24th November. There is nothing to indicate any dispute over this small sum of money, when one has regard to the value of the estate and its income producing capacity, and it is most unlikely that the husbands of the respective sisters would have had any desire to discuss, what is plain from the testamentary case record, a matter which could not raise any serious controversy. The other entries do not afford any evidence of any serious disagreement. In my view the letter P 29 tends to support the evidence of the 1st defendant that after the appellant became a major attempts at reaching a settlement with the appellant were unsuccessful. The letter also renders improbable the version of the appellant that when she repudiated the arrangement recorded in P 20 she regarded the 1935 division as final and that she was not amenable to a negotiated settlement. Indeed when one examines the values of the properties—vide P 17—and their allocation in the 1935 division it would have been surprising had the appellant's sisters and their husbands remained inert without even inviting the appellant to consider fresh modes of settlement on an equitable basis. The steps taken in 1944 to institute a partition action appear to mark, perhaps, the stage when the two sisters had lost

all hope of dividing the inheritance otherwise than by process of court. The trial Judge has accepted the reason given by the 1st defendant to explain the delay in filing action.

The appellant argues that there was an ouster of the two sisters from the properties now claimed exclusively by her because on the occasion she repudiated the 1937 arrangement she told them that she stood by the 1935 division. The trial Judge held that there was no evidence of ouster and that the possession by the appellant was under a temporary arrangement and that the bare fact that more than ten years had elapsed before the partition actions were instituted did not invest that arrangement with the character of a permanent settlement. He also held that the making of improvements was an act consistent with co-ownership. Paying due heed to the relationship between the parties and the events which took place between 1935 and the institution of the actions I am not convinced that the Judge came to a wrong finding on the issue of prescriptive possession. In my opinion the repudiation by the appellant of the 1937 division resulted in no more than that the parties stood and continued to stand in relation to the division of the estate exactly as they were in 1935.

The point was pressed in appeal that the question, whether the appellant had acquired title by prescription to the properties which she claimed to the exclusion of her sisters, was wholly irrelevant to any issue properly arising in an action to partition a property not included among those which she claimed. Undoubtedly the question would have been directly in issue, for example, in the Negombo case. In this connexion there are two circumstances which have to be kept in mind. The appellant both in her answer and in her petition of appeal asked that the plaintiff's action be dismissed. To obtain a dismissal of the action it was necessary for her to establish a tripartite division of a final character, under which division the plaintiff became the exclusive owner of the property in suit and that, as a necessary corollary, the appellant became the owner of the properties entered in the schedule to her answer. It is difficult to explain the appeallant's participation in the trial on any other basis. Else how can it be that the eminent counsel who appeared for the appellant at the trial raised issue after issue directed to the question whether there was a concluded settlement in regard to the division of the estate and also invited the court to answer an issue of prescription ? The terms of the judgment appealed from indicate to my mind that the case was conducted on the footing, and was so understood by the equally eminent counsel who appeared for the plaintiff, that if the appellant failed on both the issues of family arrangement and prescription, the inevitable result was a declaration that the parties were entitled each to a third share of the property in suit. Further, I accept the argument on behalf of the two sisters based on *Thevaganasekaram v. Kuppammal et al.*[1] that it is not competent to the appellant to take up the position in appeal that the Court should not have adjudicated on the issues on which she expressly invited it to give its findings.

[1] *(1934) 36 N. L. R. 337.*

It is conceded that the plaintiff who claimed to be the owner of only a third share was entitled to maintain the action under the Partition Act and that a dismissal of the action was not warranted even though the appellant succeeded on the contest raised by her, provided the court ultimately held the property was held in common by the plaintiff and the 1st defendant. It was argued, on the assumption that the appellant could not have a third share thrust on her against her will, that a way out of the difficulty was to leave unallotted the third share which the plaintiff assigned to the appellant.

Express provision is made in section 26 (2) (*f*) of the Partition Act to enable the court to order that any share shall remain unallotted. I am unable to hold that the legislature contemplated that in the circumstances such as those proved in the present case, the court shall have left a third share unallotted pending decisions in the connected cases. Under section 25 it was the duty of the court to examine the title of each party. It might, perhaps, have been more desirable if the case under appeal had been laid by pending the decision of the Negombo case but it is not at all unlikely that the parties and their legal advisers thought that Colombo was a more suitable forum from the point of view of convenience than Negombo or other outstation. The convenience of the forum is pretty evident. Admittedly on the death of the testator a third share in the properties jointly devised passed to each of the daughters. The court was invited to hold by the youngest daughter that her share in the property in suit was extinguished at a point of time somewhere about 1947 or 1948. The court held against her on this point and it had now no alternative but to declare that each of the sisters was entitled to a third share.

I see no reason for interfering with the decree under appeal and I would dismiss it with costs.

WEERASOORIYA, J.—I agree.

Appeal dismissed.