

1967 Present : Abeyesundere, J., and Siva Supramaniam, J.

SIMON SINGHO, Appellant, and MAGIE NONA and others, Respondents

S. C. 57/66—D. C. Panadura, 9728

Partition action—Final decree—Allotment of lot F to a number of persons—Omission to specify the share given to each of them—Subsequent partition action in respect of lot F—Power of Court to examine the interlocutory decree entered in the earlier action.

Where a final decree entered in a partition action assigns a particular lot (lot F) to a group of persons without specifying the share to which each of those persons is entitled, it is open to the Court, in a partition action instituted subsequently in respect of lot F, to look beyond the final decree and examine the interlocutory decree in the earlier action in order to ascertain the shares in which those to whom lot F was allotted in that action were to hold that lot.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *L. W. Athulathmudali*, for plaintiff-appellant.

G. D. Welcome, for 1st to 5th defendants-respondents.

March 7, 1967. ABEYESUNDERE, J.—

This partition action is in respect of the corpus depicted on plan marked X. The title of the plaintiff and the 5 defendants depends on the decree entered in partition action No. 21278 of the District Court of Kalutara in 1940. By the final decree in the last mentioned action the corpus in the instant case was allotted as lot F to Simon Singho (the plaintiff in the instant action), Podi Nona (mother of the defendants in the instant action) and Podi Nona's 5 children (the defendants in the instant action). In that final decree the shares in which those to whom lot F was allotted were to hold that lot were not specified. But the interlocutory decree entered in the earlier partition action states that the plaintiff in the instant action is entitled to 10/20 shares, the aforesaid Podi Nona is entitled to 5/20 shares and her 5 children (the defendants in the instant action) are entitled to 5/20 shares.

The learned District Judge who tried the instant action did not examine the interlocutory decree in the earlier partition action to ascertain the shares in which those to whom lot F was allotted in that action were to hold that lot. He has stated in the judgment that in view of the decision of this Court in the case of *Leelaratne and another v. Nikulas and others*¹ it is not open to him to look at the interlocutory decree entered in the earlier partition action to determine the shares in which lot F was to be held by those to whom it was allotted by the final decree in that action. For that reason he did not adopt the shares allotted to the parties

¹ (1965) 68 C. L. W. 111.

concerned in the interlocutory decree entered in the earlier partition action, and in the interlocutory decree entered in the instant action assigned to the plaintiff 5/35 shares and to each of the 1st to 5th defendants 6/35 shares. The plaintiff has appealed from the learned District Judge's decree.

In the aforesaid case of *Leelaratne and another v. Nikulas and others* the final decree entered appears to have specified the shares in which the 4 persons to whom lot 6 was allotted were to hold that lot. The problem that arose in that case was whether it was open to the District Judge, having regard to the interlocutory decree, to hold that Pettappu, who was the person to whom a 1/4 share had been allotted by the final decree, was not the correct person to receive that share and that such share should correctly have been allotted to the 5th defendant in that case. In the case before us there is no need to alter the persons to whom lot F has been allotted by the final decree in the earlier case. The problem arising in the instant case is to ascertain the shares in which the persons to whom lot F was allotted were to hold that lot. As the final decree in the earlier case is silent in regard to the shares in which the persons to whom lot F was assigned were to hold that lot, it was open to the trial Court to have referred to the interlocutory decree entered in the earlier case to ascertain the shares that had been assigned to the persons to whom in the final decree lot F was allotted. The judgment in the aforesaid case of *Leelaratne and another v. Nikulas and others* does not, in the set of facts occurring in the instant case, prevent the interlocutory decree from being read for ascertaining the shares in which those to whom lot F was allotted were to hold that lot. We are fortified in the view we have expressed in this judgment by the decision of this Court in the case of *Carlinahamy v. Juwanis*¹.

For the aforesaid reasons we vary the judgment and interlocutory decree of the learned District Judge—

(a) by substituting therein, for the shares of the respective parties set out therein, the following new shares :—

Plaintiff is entitled to 1/2 share
 1st defendant is entitled to 1/10 share
 2nd defendant is entitled to 1/10 share
 3rd defendant is entitled to 1/10 share
 4th defendant is entitled to 1/10 share
 5th defendant is entitled to 1/10 share ;

(b) by the deletion of the order that the plaintiff shall pay a sum of Rs. 31.50 as costs of contest and by the substitution therefor of the order that 1st to 5th defendants shall pay the plaintiff a sum of Rs. 31.50 as costs of contest.

The appellant is entitled to his costs of the appeal.

SIVA SUPRAMANIAM, J.—I agree.

Judgment and decree varied.

¹ (1924) 26 N. L. R. 129 at page 134.