

1953

Present : Gratiaen J. and Gunasekara J.

D. N. W. A. KUMARASINGHA, Appellant, and H. ANDIRISHAMY,
Respondent

S. C. 145 (Inty.)—D. C. Tangalle, P 182

Partition action—Interlocutory decree—Improvements made by co-owner—Special direction to Commissioner relating to them—Scope—Partition Ordinance, s. 5.

When a Court enters interlocutory decree in an action for the partition of a land it would be acting prematurely if, without examining all the relevant considerations, it gives an *unconditional* special direction to the Commissioner to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements.

APPEAL from an order of the District Court, Tangalle. 67

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff appellants.

Vernon Wijetunge, for the 7th defendant respondent.

Cur. adv. vult.

March 25, 1953. GRATTIAEN J.—

In this case the learned District Judge entered an interlocutory decree for the partition of the land depicted in Plan No. 350 filed of record, allotting shares to the parties as indicated in paragraph 7 of the plaint. There was no dispute as to the soil shares, but there was a contest as to the claim of the 7th defendant in respect of an improvement represented by Building No. 3 standing on Lot B. The learned District Judge held as a fact that this building had been constructed by the 7th defendant before the action commenced, and in his interlocutory decree he gave a "special direction" that the Commissioner should in his scheme of partition give the 7th defendant his rights in the soil so as to include this building. The present appeal is directed against this "special direction".

A Court, when entering an interlocutory decree, undoubtedly possesses jurisdiction under section 5 of the Partition Ordinance to give a special direction to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements. *Jayawardena on Partition* p. 91. But a Court should, I think, be slow to make such a direction *unconditionally*, unless the Court has perfectly satisfied itself, upon an examination of all the relevant considerations, that such a scheme of partition is practicable and just. In *Sinchi Appu v. Wijegoonesekera*¹, Wendt J. directed that, in the circumstances of that particular case, "in the partition the Commissioner making it will, *if possible*, so divide the land that the buildings may fall in the defendants' moiety, but if that be not possible, some other division will be adopted which will give the defendants the entire value of the buildings". Similarly, in *Sinchi Appu v. Marthelis*² Pereira J. ordered an interlocutory decree "declaring that the second defendant is entitled to compensation in respect of the house from his co-owners" and directing that, "*if practicable*, the second defendant, on the partition, be given a portion with the house on it".

The circumstance that a particular co-owner had, in the exercise of his rights as co-owner, built a house on the common land is certainly, even in the absence of special directions by the Court, a weighty consideration to be taken into account by the Commissioner who prepares a scheme of partition for confirmation by the Court. But it is not necessarily the only consideration. In the present case, for instance, the plaintiff draws attention to his claim to be the owner of the land on the east immediately adjoining the portion on which the building stands, whereas the 7th defendant owns the adjoining land on the west which is far removed

¹ (1902) 6 N. L. R. 1 at page 11.

² (1914) 17 N. L. R. 296 at page 297.

from the site of the building. The learned Judge has given no expression in his judgment to his opinion on these or any other factors, but he seems instead to have been influenced almost entirely by his suspicion that the plaintiff, who is wealthier than the 7th defendant, desired a sale instead of a partition of the land so as to "swallow up all the rights in it". This theory is disproved by the plaintiff's evidence where he expressly asked for partition and not for sale.

I am not convinced that the unconditional special direction given to the Commissioner was not premature. It would have sufficed, I think, to have given only a general direction that due consideration should be given by the Commissioner to the circumstance that the 7th defendant was the co-owner who had constructed the building No. 3, and I would prefer not to fetter the Commissioner's discretion to any further extent for the present. It seems to me that, after the scheme of partition which the Commissioner ultimately recommends has been duly submitted, the Court would be in a better position to adjudicate upon any objections which a party might raise against it.

I would amend the decree by substituting for the special direction given by the learned District Judge a direction that the Commissioner should pay due regard to the circumstance that the 7th defendant is the co-owner who constructed the building No. 3 standing on Lot B. Subject to this variation, I would affirm the judgment of the learned District Judge dated 25th May, 1951. In all the circumstances, I would make no order as to costs of this appeal.

GUNASEKARA J.—I agree.

Decree amended.
