Rasah. R V. Thambipillai

145/1965

Present: Sansoni, C.J., T. S. Fernando, J., Abeyesundere, J., Sri Skanda Rajah, J., and G. P. A. Silva, J.

R. RASAH and others, Appellants, and M. THAMBIPILLAI, Respondent

S. C. 414/62—D. C. Point Pedro, 6611/P

Partition action—Failure to register action duly as a lis pendens—Interlocutory decree—Intervention of a new party thereafter—Permissibility—Partition Act (Cap. 60), ss. 6, 13 (J), 26, 3(1), 48 (1) (2) (3), 49, 61, 67, 70 (1).

Held by SANSONI, C.J., T. S. FERNANDO, J., and ABEYESUNDERE, J. (SRI SKANDA RAJAH, J., and G. P. A. SILVA, J., dissenting): Where interlocutory decree has been entered in terms of section 26 of the Partition Act, a person is not entitled to avail himself of the provisions of section 48 (3) in order to intervene subsequently and have the decree set aside on the ground of failure to register the action duly as a lis pendens under the Registration of Documents Ordinance. The effect of section 70 (1) of the Partition Act is that no intervention can be permitted at any stage after interlocutory decree has been entered.

APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, Q.C., with If. Thevarajah, for Intervenients-Appellants.

V. Arulambalam, for Plaintiff-Respondent.

Cur. adv. vult.

December 7, 1965. SANSONI, C.J.—

The question arising on this appeal is the effect, on an interlocutory decree entered in a partition action, of the failure to register the action duly as a lis pendens under the Registration of Documents Ordinance. The appellants petitioned the District Court to quash all the proceedings on this ground, but the District Judge held that once interlocutory decree had been entered no such relief would be given to them and dismissed their application.

In two cases decided recently it was held that even if the lis pendens had not been duly registered, the interlocutory decree entered under section 26 and the final decree entered under section 36 cannot be set aside. The cases are—*Noris v. Charles* [1 (1961) 63 N. L. R. 501.] and *Odiris Appuhamy v. Caroline Nona* [2 (1964) 66 N. L. R. 241.]. According to these decisions there can be no intervention by a stranger to the action who pleads such a defect in the registration. The former decision does not refer to section 70 of the Partition Act, Cap. 69, but the latter does.

Section 70 (1) provides that the Court may at any time before interlocutory decree is entered add as a party to the action—

(a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or (b) any person who, claiming an interest in the land, applies to be added as a party to the action.

The effect of this provision is that no intervention can be permitted at any stage after interlocutory decree has been entered.

The argument for the appellants is that the interlocutory decree does not exist so far as they are concerned, and therefore section 70 does not apply. The reasoning on which this argument is based is that where the action has not been duly registered as a lis pendens, the appellants are entitled under section 48 (3) to say that there is no valid interlocutory decree. To consider this argument one must have regard to the whole of section 48.

Section 48 (1) reads:—"Save as provided in sub-section (3) of this section, the interlocutory decree entered under section 26 and the

final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

I omit the definition of "encumbrance" which follows, as it has no bearing on the matter under consideration.

Sub-section (3) provides that neither the interlocutory decree nor the final decree shall have the final and conclusive effect given to it by sub-section (1) "as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens".

Sub-section (2) is not relevant to the question at issue and I need not consider it.

The terms of the relevant sub-sections show that whether a decree has been entered in a court of competent jurisdiction or not, and whether the action has been duly registered as a lis pendens or not, the only effect of any omission or defect in these respect is to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an interest independently of the decree. He is not bound by it and is free to attack it as being incorrect where it defines the rights of the parties. There is nothing in section 48 or any other section of the Act to support the argument

that a decree which has either of the two flaws mentioned in section 48 (3) is invalid. On the contrary, the provision in section 48 (1) that "the decree shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him", is deliberately left unaffected. The decree is still to be treated as being in force, and effective, though it is not final and conclusive against the particular persons just mentioned.

Mr. Ranganathan then sought to equate the wrong registration of a lis pendens with the non-service of summons on a party to the action, by arguing that each constitutes a failure to take an essential step in procedure. Even if it be conceded that the correct registration of a lis pendens is an essential step in procedure which the Proctor for the plaintiff, and perhaps also the Proctors for the defendants, should seek to ensure, a wrong registration is still nothing more than an omission or defect of procedure such as section 48 (3) specially provides for. It is in no way to be compared with the non-service of summons on a party, for that has always been recognised as offending the first principle of justice, which requires that a party is entitled to be summoned and to be heard.

It is impossible to overlook, in this connection, the repeal of section 12 of the Registration of Documents Ordinance, Cap. 101, by the Partition Act. Section 12 had laid down that "a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a lis pendens." We have now the much less stringent provision in section 13 (1) of the Partition Act that "where the court is satisfied that a partition action has been registered as a lis pendens under the Registration of Documents Ordinance" it shall order that summonses, etc., shall be issued to the Fiscal. The Legislature cannot have overlooked the wording of the earlier provision, or inadvertently failed to provide for due registration if that was intended. Furthermore, the Partition Act itself shows that when due registration is necessary it says so in express terms. For sections 51 and 67 speak of due registration, and the omission of that requirement in section 13 (1) is significant.

Finally, Mr. Ranganathan who laid stress on the word "under" argued that an interlocutory decree entered under section 26 and final decree entered under section 36 can only mean decrees which are regular in the sense that they have been entered after all the requirements of the Act have been obeyed, and that they are valid not merely in form but in substance. This argument cannot be sustained in view of the very terms of section 48 (1) which contemplate decrees entered despite omissions or defects of procedure, or inadequate proof of title, or non-joinder of parties who had an interest in the land. For the same reason I would hold that registration of an action as a lis pendens under the Registration of Documents Ordinance (as required by section 13 (1)) does not mean registration in accordance with all the provisions of that Ordinance, since due registration is not required by section 13 (1).

Before I conclude I ought to say that my judgment dated 3rd February 1961 in S. C. 74—D. C. (Inty.) Colombo 8116/P, which was not followed in the two later judgments which I have cited, must be treated as wrong and is now overruled. I would dismiss this appeal with costs.

T. S. FERNANDO, J.—I agree.

ABEYESUNDERE, J.—I agree.

SRI SKANDA RAJAH, J.—After careful consideration of the arguments submitted to us from the Bar and the judgment of My Lord the Chief Justice I am confirmed in the view to which I ventured to give expression in the dissenting judgment in the Divisional Bench case of *Odiris Appuhamy v. Caroline Nona* [1 (1964) 65 N. L. R. 241 at 244.] The appeal should be allowed with costs.

G. P. A. SILVA, J.—It is with regret that I find myself in disagreement with the judgment of my Lord The Chief Justice and the other Judges who have concurred in it. As the facts are already set out in the main judgment I propose to state below my views on certain aspects of the law which persuade me to take a decision different from the one reached by the majority of this court.

The entire question at issue revolves round sections 48 and 70 of the Partition Act. Sub-section (1) of section 48 sets out in strong terminology the finality attaching to an interlocutory and final decree in a partition case filed under this Act, subject to the exception contained in sub-section (3). Sub-section (2) seeks to fortify this finality by expressly removing the exceptional circumstances in section 44 of the Evidence Ordinance which would ordinarily affect the finality of any other judgment. Sub-section (3), which is in the following terms sets out the exceptional case referred to in sub-section (1):— "The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by sub-section (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens affecting such land."

On an analysis of this sub-section the conditions which would prevent an interlocutory decree from having that final and conclusive effect are:—

(i) the person to be affected should not have been a party to the partition action, (ii) he should claim any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, and (iii) he should prove that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens.

There being no dispute as to the existence of any of these conditions in the instant case, I shall proceed to examine the question on the basis that the appellant in this case fulfilled these

conditions and was, therefore, qualified to be a person to whom the final and conclusive effect of the interlocutory decree did not attach.

If one pauses to consider what the resulting position will be, one will see that the law intended that such a person should not be adversely affected. The only reasonable way in which his right, title or interest to or in the land can be preserved will, in my view, be by permitting him to intervene. If any other view is taken such as that the party aggrieved should be entitled to assert his rights as against a holder of a decree in any steps which are sought to be taken, under it, it can lead to results which are far from reasonable. In *Noris v. Charles* [1 (1961) 63 N. L. R. 501 at 503.], Sinnetamby, J. stated in the course of his judgment at page 503 as follows:—"A person who was not a party to the partition action is not bound by the interlocutory decree if the lis pendens had not been properly registered. This does not mean that he is entitled to intervene and to have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are sought to be taken under it. He is in exactly the same position as a claimant to an interest in the land which had been partitioned under the repealed Ordinance, where the final decree had not been entered 'as hereinbefore provided'."

Earlier in this judgment, Sinnetamby, J. expressed the view that the Partition Act of 1951 sought to put an end to the considerable delay occasioned by such interventions. While this was a very correct observation, if I may say so with respect, it seems to me that the main decision he took in the appeal was to some extent influenced by this consideration. One has to be careful not to overstress the importance of expedition in the disposal of a partition case to the extent of overlooking the paramount consideration underlying such a case, namely, to put an end to the various problems arising from common possession and to give an unimpeachable title to the co-owners. It is because of the strictly binding nature of a partition decree once it has been entered that the law has taken great care to impose certain safeguards by way of obligations on the parties,

on the proctor, and even on the court before the stage of the interlocutory decree so that any party who has a claim of title, etc., shall be before court and that his case shall not go by default. A necessary corollary to this consideration is that the sanctity attaching to an interlocutory decree can only prevail when all the necessary parties are before court. The finality given to such a decree in section 48 (1) is also based on the broad assumption that all the parties have been represented, despite the notwithstanding clause which gives finality in spite of certain omissions. The notwithstanding clause does not, in my opinion, give a licence to omit certain essential steps. Whatever that may be, sub-section (3) definitely creates an exception to the notwithstanding clause or, to put it in another way, it expressly provides for two instances in which finality does not attach to an interlocutory or final decree. The instance with which we are concerned in this case is where a person, not having been a party to the action, claims a share in the land through a title not directly or remotely derived from the decree and is able to prove that the lis pendens was not properly registered.

There would be no purpose in making an exception in such a case unless it were to give the party who is benefited by such exception an opportunity to intervene and have his title investigated and his shares allotted. If such a course is not open to him and if he is to follow the course suggested in the judgment cited earlier he would either have to file a rei vindicatio action against all persons who were allotted any shares or, his rights as a co-owner not being extinguished, to bring a fresh partition action. This would, in my judgment, lead to a negation of the very object that the new Partition Act intended to serve, namely, the expeditious disposal of partition cases. For, instead of being allowed to intervene after the interlocutory decree was entered which would be a comparatively early stage in this situation we will have the curious position of an interlocutory decree having been entered in the teeth of a claim having been brought to the notice of court and the person affected filing another partition action or a vindicatory action all over again. For these and other reasons which are not relevant to this case, I think that in referring to the interlocutory decree in the Act the

legislature had in mind that interlocutory decree to which no exception was attached and which was unqualified in its scope. Therefore, when section 70 (1) went on to provide for the point of time before which a court may add a party, namely, at any time before the interlocutory decree is entered, it must be deemed to refer to an interlocutory decree in the normal case and not an interlocutory decree which was qualified by the exception provided in section 48 (3). For, if it is conceded that a person, who comes within the exceptions provided in section 48 (3), can, by reason of the inconclusive nature of an interlocutory decree or even the final decree so far as he is concerned, file another partition action or a vindicatory action in order to establish his rights which are protected by section 48 (3), it must surely stand to reason that he should be allowed to intervene in the same action rather than be told that even though his claim of title is sound he cannot intervene as the interlocutory decree has been entered. If he can bring an action long after an interlocutory and a final decree and, if successful, disturb all the shares allocated in the partition decree, a fortiori it must be possible for him to intervene soon after the interlocutory decree. In such an event the interlocutory decree will, by necessary implication, have to be set aside and a fresh interlocutory decree will have to be entered after consideration of the new claim of the intervening party. In short, one cannot, in my view, give a meaning to section 48 (3) unless it be construed as enabling a person falling in the category to which that sub-section refers to assert his rights which are kept alive by that sub-section. The other view, to my mind, will result in a situation which savours of being illogical and unreasonable. For, if a person in such a case is not allowed to intervene and the parties to the action have been allotted their respective shares of a land by the interlocutory and final decrees, there would be nothing to prevent such person who fell within the exception in sub-section (3) of section 48 and, therefore, was unaffected by these decrees, from filing another partition action on the basis of the original shares owned by him and the others who were parties to the action. In such a case the object of expeditious disposal will be completely defeated and there will be two partition cases in respect of the same corpus. Even though the earlier judgments have referred to the possibility of a vindicatory action in

such a situation, I can see serious difficulties in the way of such an action which will make it even more chaotic than a second partition action. The plaintiff in such a case will have to ask for a declaration of title to his share from each of the parties to the original partition action who have by now been allotted divided lots. Either alternative, therefore, would lead to a curious, not to call an absurd result.

The only reasonable view, therefore, seems to me to interpret the section in a way that will not lead to such a situation. This situation will not arise if it is construed that an interlocutory decree which is entered without due registration of the lis pendens is not the interlocutory decree which is in the contemplation of section 70 (1). Such a construction is, to my mind, not based on an argument of convenience but on the special provision contained in section 48 (3). Obvious as it may seem, chronologically too, section 48 precedes section 70 and the latter has, therefore, to be read subject not only to the main provision but also to the exception contained in the former. To refrain from doing so will be to ignore the exceptional circumstances provided for in section 48 (3) and to leave the person who is protected by this sub-section with only the feeling of satisfaction that the interlocutory decree does not have the conclusive effect so far as he is concerned but without any direction by the legislature as to what step he should or can take to retrieve his position after his lands have been apportioned in divided lots among his original co-owners by a decree of court. It has to be borne in mind that the remedies available to him are not those specifically provided by law but only those which have been judicially interpreted as possible remedies. The judgment referred to earlier and the judgment in the case of *Gomis Appuhamy v. Caroline Nona* [1 (1964) 66 N. L. R. 241.], which have decided that a person coming within the exceptions in section 48 (3) can bring a separate action, do not base such a right on a specific provision of law. A person who comes within the exception to section 48 (3) should, therefore, be allowed to intervene at any stage and the District Judge would have the power to set aside the interlocutory decree entered by him for this purpose because it ceases to be an interlocutory decree.

Although no submission was made by either counsel on this aspect it occurred to me during the consideration of this judgment that it may be useful to peruse the proceedings in Parliament during the passage of the New Partition Bill in order to get an insight into the intention of the legislature in regard to the relevant sections. A perusal of these proceedings has fortified me in the view I have already expressed as I find therein a definite pointer to the intention of the legislature in enacting sub-section (3) of section 48.

According to the Hansards, the Partition Bill was presented in the Senate on 20th September, 1950, deemed to have been read the first time, and ordered to be printed. On the 4th of October, 1950, the Bill was read a second time and debated. On the 6th of October, 1950, it was decided that the Bill be referred to a Select Committee. At that stage section 48 of the Bill contained only sub-section (1) of the present Act and not sub-sections (2) and (3). The Select Committee which consisted of some eminent lawyers held several meetings at which a large volume of evidence and suggestions was received. On the 20th of March, 1951, the Report of the Select Committee was presented together with the Minutes of the Proceedings, and was ordered to lie upon the Table. The Select Committee reported that clause 48—which is the present section 48 (1)—should be amended by adding a proviso as follows:—
"Provided that it shall not prevent any person who is not a party to the proceedings or privy of such party from impeaching such a decree on the ground that the lis pendens has not been duly registered or on the ground of want of jurisdiction." (Minutes of Proceedings—20th January, 1951).

On the 27th of March, 1951, clauses 34 to 52 as amended by the Select Committee were ordered to stand part of the Bill. It must, therefore, be assumed that sub-sections (2) and (3) were inserted in section 48 to give effect to the decision of the Select Committee. The result was that the Bill laid down definitely that the validity of an interlocutory decree can only be impeached on the ground that the lis pendens in respect of the action has not been duly registered or on the ground of want of jurisdiction. On the same day the Bill was reported with the amendments, read the third time, and passed. The

second and third readings of this Bill were taken up in the House of Representatives on the 6th of April, 1951, and passed without amendment.

The history of the Partition Act, therefore, shows that the intention of the legislature was to give an opportunity to a party who was prejudiced by an absence of due registration of the lis pendens to impeach the decree. It seems fairly clear that it was not the intention of the legislature to give this same opportunity to the other categories such as mortgagees, lessees, fidei commissaries, beneficiaries of trusts, etc. In my view, it is to safeguard these categories whose rights may have been extinguished by an interlocutory decree that specific provision has been made in section 49 empowering such party by a separate action to recover damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued, and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any other person who has benefited by any such act of such party. The fact that there is no such specific provision to protect a person who has been prejudiced by the failure to register duly the lis pendens by empowering him to bring a separate action appears to me to be an additional reason for thinking that the impeachment of the interlocutory decree referred to by the Select Committee was to be achieved by such a party being allowed intervention after the interlocutory decree. The fact that what was sought to be achieved was the impeachment of the interlocutory decree presupposes that an interlocutory decree did exist in form earlier. Such interlocutory decree would, however, be lacking in one of the essential attributes, namely, the due registration of the lis pendens at the appropriate stage, which decree for that reason will be invalid. The requirement in section 70 that a party should intervene before the interlocutory decree will, therefore, have no application to a case where the lis pendens has not been duly registered.

The question may arise here as to whether the remedy prescribed in section 49 is or is not available to the category of persons referred to in section 48 (3). I can see at least three reasons for

answering this question in the negative. In the first place, section 48 (3) refers to a person who claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, while section 49 refers to a party whose rights to the land to which the action relates have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action. Secondly, a party under section 48 (3) to whom the final and conclusive effect will not apply can claim the benefit of this sub-section if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered as a lis pendens. There is no such requirement for one to claim a benefit under section 49. Thirdly, if the remedy under section 49 was to apply to the category of persons mentioned in section 48 (3) as well, I should have expected section 49 to have been part of section 48 or at least to have some connecting link with section 48 (3) so as to include among the persons who can recover damages by a separate action, the category referred to in section 48 (3).

In all humility and with the utmost respect to the views of my Lord The Chief Justice and my brother Judges from which I have dissented I would say that the interpretation which I have given above will, without doing any violence to the provisions of the Act, enable the smooth working thereof and where two views are possible it behaves the court to lean towards the view that is conducive to the smooth working of an Act of the Legislature.

As there was considerable argument on the question of registration simpliciter and due registration of the lis pendens, it is apposite to say a word or two on that aspect. When I state in the earlier paragraph that the requirement of section 70 will have no application to a case where the lis pendens has not been duly registered, I must not be understood to mean that under section 13 of the Act it is necessary for a court to be satisfied that a partition action has been duly registered as a lis pendens. I think the omission of the word "duly" in this section and its presence in section 48 (3) is of significance. Whereas under section 13 a court

has to be satisfied inter alia, that the step of registering the lis pendens has been taken, under section 48 (3) the categories of persons mentioned therein will be able to impeach the decree if only the lis pendens has not been duly registered. That is to say, that, despite all the steps for the registration of the lis pendens being taken by the plaintiff as required by section 6, if some error has occurred in the actual registration in consequence of which a necessary party would have been prejudiced, such a party would be able to impeach the decree.

For these reasons, I would allow the appeal, set aside the order of the learned District Judge dated 31st August, 1962, as well as the decree of sale dated 30th November, 1960, and make order that proceedings be held de novo from the point of time of the registration of the lis pendens—In view of the circumstances under which the learned District Judge found himself constrained to decide this matter against the appellant, I make no order for costs.

Appeal dismissed.