1967 *Present:* **Manicavasagar, J., and Tennekoon, J.**

M. A. DON LEWIS, Petitioner, *and* D. W. S. DISSANAYAKE and others, Respondents

S. C. 483/66—Application for Revision or Restitutio in Integrum *in D. C. Colombo, 8862/P*

Partition action—Interlocutory decree—Omission to serve summons on a party previously—Circumstances when relief will not be granted by way of revision or restitutio in integrum—*Partition Act, s. 22.*

[1] *(1880) Law Reports, Volume 16, Chancery Division, Page 551.*
[2] *(1962) 64 N. L. R. 427.*
[3] *(1967) 69 N. L. R. 381.*

In this application for Revision or *Restitutio in integrum*, the petitioner sought to have the interlocutory decree entered in a partition action set aside. The main ground urged was that although the petitioner was disclosed as a claimant in the Surveyor's report, no notice or summons was thereafter served on him as required by section 22 of the Partition Act. The 8th defendant-respondent also supported the application on the ground that, although he was named as 8th defendant in the plaint, he never received any summons or notice.

The facts showed that the petitioner had tried to pass off as, and usurp the place of, the 8th defendant-respondent and that, long before the interlocutory decree was entered, he could have sought to have himself added as a party instead of taking the inexplicable course he did. Further, even when his application to intervene was dismissed by the District Court, the petitioner did nothing for 8 months.

Held, that it was not the function of the Supreme Court, in the exercise of the jurisdiction now invoked, to relieve parties of the consequences of their own folly, negligence and laches. The maxim *vigilantibus, non dormientibus, jura subveniunt* provided a sufficient answer to the petitioner's application. Further, the petitioner did not display the honesty and frankness expected of a person seeking the extraordinary powers of the Court.

Held further, that the right of a party in a partition action to be served summons may be lost by acquiescence on his part. In the present case the 8th defendant had not only been allotted his due share but had also failed to take steps for nearly one year to have the interlocutory decree set aside after he became aware of it. He was not entitled, therefore, to any relief.

APPLICATION to revise an order of the District Court, Colombo.

W. S. S. Jayawardena, for the Petitioner.

J. G. Jayatilleke, for the Plaintiff-Respondent.

W. D. Gunasekera, for the 7th Defendant-Respondent.

D. R. P. Goonetilleke, for the 8th Defendant-Respondent.

Cur. adv. vult.

March 12, 1967. TENNEKOON, J.—

The petitioner, one Munasinghe Aratchige Don Luwis of Talangama, seeks to have this court, in the exercise of its powers of Revision or Restitution, set aside the judgment and Interlocutory Decree entered in this case. The main ground urged is that the petitioner was disclosed as a claimant in the Surveyor's Report, but no notice or summons was thereafter served on him.

Upon the notice of the present application being served on H. Carolis Caldera whose name appears as 8th defendant-respondent, a statement of objections has been filed by him, in which far from objecting to the application he himself prays that the Interlocutory Decree entered in this case be set aside by this court, on the ground, among others, that although he was named as 8th defendant in the plaint, he has not since the institution of the action received any summons or notice. He

pleads that he has consequently had no opportunity of filing his statement of claim and that he has lost certain rights to the land under the Interlocutory Decree.

The examination of some of the factual questions involved in this application is rendered more difficult by reason of fact that the District Court Record of the case has been lost ; what is now used as the record is one of the type-written briefs prepared in the course of an appeal that had been taken to this court against the Interlocutory Decree by the 1st defendant-respondent. That appeal incidentally was dismissed sometime in March 1965. None of the proxies filed by the parties or the fiscal's report on service of summonses in the early stages of the case are available. These might have been of some assistance in resolving the questions that now arise for consideration.

The claim of the petitioner to have been entitled to notice under section 22 of the Partition Act as a claimant before the surveyor and the claim of Carolis Caldera the 8th defendant-respondent that no summons had been served on him since the institution of the action have necessarily to be considered together for reasons that will become apparent on the facts as stated hereafter.

The plaint in this case was filed in July 1959. There were eight defendants named in the plaint, the 8th being captioned thus :—

" 8. Carolis Caldera of Talangama."

The commission to survey was issued on 18th September, 1959, and summons on the eight defendants shortly thereafter. The journal entry of 25th November 1959 reads :—

" .....

(*a*) Notice to V. H. served.

(*b*) Notice to Fiscal published.

(*c*) SS served on 1–7 defdts.
Proxy of 7 D filed.
Proxy of 1–6 and 8 Defts filed.
Not served on 8th deft.
Vide Supra.

(*d*) Return to Commission due filed with plan No. 623, Report, copy of field notes and memo.

.....

(3) Add parties disclosed in the Surveyor's Report.

....."

The Surveyor's report reads (in its relevant portions) as follows :—

" The plaintiff was represented by her husband but all the other parties were present in person.

.....

Makanduwage William Gomis c/o. M. W. Appuhamy of Bostal, Veyangoda was present at the time I surveyed and stated his claim. The 8th defendant stated that his name should be Munasinghearatchige Don Lewis and not Carolis Caldera. He is from Talangama.

....."

The first sentence quoted seems to suggest that Carolis Caldera the 8th defendant was present before the surveyor. But it can be gathered from the latter part of the report quoted that this was not the case. Apparently a person appeared before the surveyor and stated that he was the 8th defendant but that his name was Munasinghe Aratchige Don Luwis. I cannot understand how a person, who does not claim to have a name given in the caption to a plaint, can attach himself to a mere numeral in the caption while totally disclaiming the name against that numeral. The court itself upon reading the Surveyor's report merely ordered that " parties disclosed be added ". In pursuance of this order only the name of Makanduwage William Gomis was added as 9th defendant and summons issued and duly served on him. Munasinghe Aratchige Don Luwis was not added. What happened subsequently is that right up to the Interlocutory Decree Carolis Caldera was completely ignored. Apparently all notices went to the person who had said that he was the 8th defendant though he was not Carolis Caldera. The record shows that on 30th of March, 1960, a Proctor had filed answer on behalf of the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th defendants. Paragraph six of that answer reads as follows :—

" The 8th defendant abovenamed further states that his name as given in the caption is incorrect and should be amended to read as Munasinghe Aratchige Don Lewis."

Later an amended answer was filed by the same Proctor on the 21st February, 1962, on behalf of " 8th defendant abovenamed Munasinghe Aratchige Don Luwis, wrongly stated as H. Carolis Caldera ". It is strange that this Proctor also encouraged the person calling himself Munasinghe Aratchige Don Luwis and having no claims to the name of Carolis Caldera to file answer as 8th defendant.

The record thereafter shows that on numerous dates the " 8th defendant " was either present or was represented by lawyers. There is no doubt in my mind that Carolis Caldera was never present or represented on any of these occasions. There is also no doubt in my mind that the person who appeared before the surveyor and claimed to be the 8th defendant and who later filed answer and amended answer as 8th defendant and continued to appear as such was none other than the present petitioner Munasinghe Aratchige Don Luwis.

The case went to trial on the 13th of March 1963. The 1st, 2nd, 3rd 4th, 5th, 9th and 10th defendants were present. The 7th defendant was represented by counsel. The record also says that counsel appeared

for 1st to 6th, and 8th defendants. Only the plaintiff gave evidence. And in the course of which she said that the 3rd defendant—

> " transferred all her rights upon deed No. 6087 of 1957 marked P 12 to the 8th defendant Don Lewis ".

A reference to the document P 12 shows that the transferee there was H. Carolis Caldera and not Don Lewis. The caption of the case still referred to the 8th defendant as H. Carolis Caldera and accordingly when the judgment and the Interlocutory Decree (as amended) proceeded to award the rights under P 12 to the 8th defendant it must be taken to be an adjudication, in terms of the deed, in favour of H. Carolis Caldera and not in favour of Munasinghe Aratchige Don Luwis.

There was thereafter an appeal by the 1st defendant against the Interlocutory Decree. This was ultimately dismissed on 31st March, 1965. The record was lost at this stage. The next event of note is an application dated 9th September, 1965, by the present petitioner Munasinghe Aratchige Don Luwis to the District Court praying that the Interlocutory Decree be set aside. He is at this stage represented by a different proctor. In the caption he has named himself as " Munasinghe Aratchige Don Luwis of Talangama petitioner " ; he has omitted the name of Carolis Caldera from among the defendant-respondents ; and the first paragraph of his petition (as also of the affidavit which accompanied it) is to the effect he " is the 8th defendant in this case ". He further goes on to say even if he is not the 8th defendant he was a party entitled to notice under s. 22 (1) (*a*) of the Partition Act.

The court inquired into this application on 9th February 1966 and 9th March 1966, and dismissed the application on the latter date with the remark that the petitioner's remedy, if any, was by way of revision. It is of importance to note that the record of the proceedings of the 9th February 1966 gives clear and categorical proof of the fact that Carolis Caldera was present in court on that date. The court makes a special note of the fact in the following terms :—

> " The parties present are the plaintiff ; the 8th defendant H. Carolis Caldera, the petitioner Munasinghe Aratchige Don Luwis and the 3rd and 4th defendants."

After this application was dismissed the petitioner waited another 8 months before making the present application to this court, a delay which the petitioner has not sought to explain at all. It is significant that unlike in his application to the District Court the present application names the Carolis Caldera as 8th defendant-respondent, thereby for the first time abandoning his attempt which he persisted in for about 7½ years to dislodge the 8th defendant and occupy his room in the caption.

These being the facts the first question that arises for consideration is whether this court should exercise its extraordinary powers of revision or by way of *Restitutio in Integrum* in favour of the applicant. There is no doubt in my mind that the petitioner was aware of the partition action from the date the Surveyor first went on the land. Petitioner has only himself to blame if he pursued the ill-advised course of trying to usurp the place of the 8th defendant-respondent. Petitioner could, long before the Interlocutory Decree, have sought to have himself added instead of taking the inexplicable course he did. Even after the Interlocutory Decree was entered the petitioner in seeking to intervene persisted in trying to persuade the District Court that he and Carolis Caldera were one and the same person. Further when his application to intervene was dismissed by the District Court (which in its order explicitly stated that the petitioner's remedy if any was by way of an application for revision to this court) the petitioner did nothing for 8 months. It is not the function of this court in the exercise of the jurisdiction now being invoked to relieve parties of the consequences of their own folly, negligence and laches. The maxim *Vigilantibus, non dormientibus, jura subveniunt* provides a sufficient answer to the petitioner's application on the ground now under consideration.

Further even in his present application to this court the petitioner does not display the honesty and frankness which is expected of a person seeking to invoke the extraordinary powers of this court. Instead he tries to make out that the person who had, as Munasinghe Aratchige Don Luwis appeared before the surveyor, filed answer as " 8th Defdt" and otherwise sought to pass off as 8th defdt, was not himself but an unknown third person—a story which I find extraordinarily difficult to accept.

To take now the case of Carolis Caldera the 8th defendant-respondent : I am satisfied that this respondent did not receive any summons or notice since the institution of the action until at least the Interlocutory Decree was entered. Such a failure to comply with the *audi alteram partem* rule would ordinarily be sufficient for this court to set aside the decision of a tribunal. But it is equally true that the right to impugn the decision of a tribunal for a breach of the *audi alteram partem* rule may, even in cases where the necessity for compliance with the rule is not a matter of inference but of statutory provision, be lost by acquiescence ; there can also be cases in which a party may be found to have approbated the defective proceedings or where, having regard to the applicant's conduct, the court will not in its discretion set aside the impugned proceedings. It is therefore necessary to examine the matter further.

It is to be noted as mentioned earlier in this judgment that on 9th February 1965, the date on which petitioner's application for intervention was being inquired into by the District Court, Carolis Caldera was undoubtedly present in court. It is evident that on that date he would

have become aware, if he had not done so earlier, of the existence of the Partition Action and that the judgment of the District Court had already awarded a 1/18th share of the land to him on the basis of the Deed P 12. In the statement of objections filed in these proceedings the 8th defendant states that—

> " The 8th defendant-respondent claims certain rights to the said land sought to be Partition on Deed No. 6087, of 1957, marked P 12 in the said Deed and the learned Trial Judge has not given him those share in the Interlocutory Decree. Thus the 8th defendant-respondent has completely lost his rights on the said Deed No. 6087 of 1957."

The allegation that he has completely lost his rights on P 12 proceeds on the supposition that when the judgment declared the " 8th defendant " entitled to a 1/18th share, it meant that Munasinghe Aratchige Don Luwis was entitled to a 1/18th share. That is a wrong assumption. As mentioned earlier, the caption of the case has never been altered by court and any reference in the judgment or the Interlocutory Decree to " the 8th defendant " must be taken and read, as it necessarily must, to be a reference to H. Carolis Caldera and not to the present petitioner Munasinghe Aratchige Don Luwis. In this view of the matter there is an award of 1/18th share to the 8th defendant-respondent Carolis Caldera in the Interlocutory Decree. Counsel for the 8th defendant-respondent did not at the hearing before this court seek to satisfy us that a larger share than 1/18 could be claimed by his client on P 12 or that he had any other claims to agitate as owner of any plantations or buildings or in any other capacity whatsoever. In the result this court is satisfied that the allegation of the 8th defendant-respondent that the omission to serve summons on him has resulted in an Interlocutory Decree which deprives him of his rights in the land is unfounded.

There is also the further fact that having become aware of the judgment and Interlocutory Decree by the 9th February 1965 at the latest he took no steps whatsoever to seek the assistance of this court to have these supposedly damaging adjudications set aside. This inactivity is only explicable—and no other has been offered by the 8th defendant-respondent himself—on the basis that he was quite satisfied with the rights given to him in the judgment and was content to leave it undisturbed. It was only on the 3rd February 1966, about an year later, that he thought of making an endeavour to have the proceedings in the partition case set aside ; and he does not by initiating proceedings to that end himself but only by taking advantage of the fortuitous circumstance of the petitioner having made this application to this court.

Having regard to what has been said above in regard to the conduct of the 8th defendant-respondent I am of the opinion that he has disentitled himself to obtain relief from this court on the ground of omission to serve summons on him.

The petitioner and the 8th defendant-respondent also seek to support their applications on the ground that there has been an insufficient investigation of title in the court below. The appeal (referred to earlier in this judgment) taken by the 1st defendant against the Interlocutory Decree was based on substantially the same ground of insufficient investigation of title. That appeal having been dismissed by this court (in March 1965) I see no reason for this court to re-examine that question.

In the result the application of the petitioner is dismissed with costs payable to the plaintiff-respondent and the 7th defendant-respondent; the application of the 8th defendant-respondent is also dismissed.

MANICAVASAGAR, J.—I agree.

Applications of the petitioner and the 8th defendant-respondent dismissed.