

1970 Present: H. N. G. Fernando, C.J., and Weeramantry, J.

H. P. CATHIRINA and another, Appellants,  
M. A. JAMIS and others, Respondents

S. C. 124/67 (Inty.)—D. C. Matara, 4612/P

*Partition action—Failure of a defendant to file statement of claim on due date—Duty of Court nevertheless to issue notice to him of the date fixed for the trial—Inapplicability of s. 85 of Civil Procedure Code—Partition Act (Cap. 69), ss. 24, 25, 79—Interpretation Ordinance—Scope of s. 8 (2).*

Where a defendant in a partition action fails to file a statement of claim on the due date, an *ex parte* hearing and disposal of his case in terms of section 85 of the Civil Procedure Code is not authorised by section 79 of the Partition Act on the ground of a *casus omissus*. In such a case section 24 of the Partition Act must be read with section 25 and the Court is bound to give notice to the defaulting defendant of the date fixed for the trial of the case, despite his absence on the day when the trial date is fixed. An interlocutory decree entered without such notice is liable to be set aside at the instance of the defendant.

If the trial of a case is fixed for a day which turns out subsequently to be a public holiday, section 8 (2) of the Interpretation Ordinance does not render the next working day automatically the due date of trial.

## APPEALS from an order of the District Court, Matara.

*N. E. Weeresooria, Q.C.*, with *W. D. Gunasekera*, for the 15th and 16th defendants-appellants.

*H. W. Jayewardene, Q.C.*, with *N. R. M. Daluwatta*, for the plaintiff-respondent.

*Cur. adv. vult.*

January 16, 1970. H. N. G. FERNANDO, C.J.—

The two appellants in this case are the 15th and 16th defendants in a partition action. Summons had been served on both these defendants, and according to the Journal Entry of 4th November, 1965, which was the summons returnable date, the 16th defendant was present in Court when the case was called.

On 4.11.65 the parties who were present were given the date 20th January 1966 to file their statements, but this date was subsequently declared a Public Holiday, and the case was called on 21st January 1966, for the statements of parties, but no statements were then filed. On 31st March 1966 the case was called again, because summons on the 2nd defendant had not been served until sometime before that date. On

this occasion some of the parties who had previously appeared on 4th November 1965 were given time until the 13th of July 1966 to file their statements. These statements were not in fact filed, and the case proceeded to trial between the plaintiffs and those defendants who had filed their statements. Judgment and decree were entered after trial on 10th August 1966.

In September 1966, the 15th and 16th defendants made an application that the decree be set aside, and that they be permitted to file their statements of claim. The learned Judge then held an inquiry into this application at which the 15th and 16th defendants gave evidence.

The 15th defendant stated that she had in fact been present in Court on 4th November 1965, but had not then come forward as she did not hear her name being called. She further stated that she came to know that the date 20th January 1966 had been fixed for the filing statements of claim, and that she came to Court on that day and found the Court house closed; she then returned home and was waiting in expectation of a notice from Court in order to take steps to file a statement. It is manifest that even if she did come to Court on 20th January, she had given no instructions for the filing of a statement on that day in Court.

The 16th defendant also stated in evidence that she had come to Court on 20th January 1966 and found the Court house closed. She admitted that she learned from other parties that time had been extended until 10th August 1966 for the filing of statements, but she gave quite dubious reasons for not having filed any statement of claim.

The principal ground relied on by these defendants in their application to have the decree set aside was that the case was called on 21st January 1966, which was not a date of which they had notice.

The learned District Judge was of opinion that s. S (2) of the Interpretation Ordinance justified the action of calling the case on 21st January.

The marginal note "computation of time" indicates the purpose of s. S. Sub-section (2) provides that where an act or proceeding cannot be done or taken in a Court on a due date because the Court is not then open, then the act or proceeding shall be considered to be done or taken *in due time* if done or taken on the next working day. In this way a party to an action will not be in default by the failure to do or take an act or proceeding on the due date, if he takes the necessary step on the next working day. But the section does not in my opinion cover situations of a different nature. Thus, if the trial of a case is fixed for a day which turns out subsequently to be a public holiday, the next working day does not automatically become the due date of trial. While no doubt

there was a failure on the part of the appellants to file their statements of claim even on 21st January 1966, the only consequence of that failure was that there were in fact no statements of their claims.

The substantial complaint of the appellants is that the trial was fixed for 10th August 1966 without due notice to them. In the case of the 15th defendant, the learned trial Judge has not disbelieved her evidence that she did come to the Court on 20th January 1966 and found it closed, and that she had thereafter waited in expectation of a notice from the Court, and at this stage we must assume that the evidence was true. This being so, the question which arises is whether the Court was bound to give notice to this defendant of the date fixed for the trial, even though she had not filed a statement of claim.

Section 24 of the Partition Act (Cap. 69) provides that if the Court so orders, notice of the date of trial shall be given in such manner and to such persons as the Court shall specify. While the section does confer a discretion on the Court as to the persons to whom and the manner in which this notice is to be given, there can be no doubt that the discretion must be exercised in accordance with the principles of natural justice; and those principles require in this context that every person who would be entitled to participate at the trial must in some manner receive notice of the date of trial. In the case of parties who are present or represented in Court when the date of trial is announced, the announcement itself would be notice to such parties. Hence the problem which arises in the present case is whether the 15th and 16th defendants would, despite their absence when the trial date was fixed, have been entitled to participate at the trial; for, if so, the Court had a duty to give them notice of the date.

In this connection the learned Judge has relied on *Menchina Hamine v. James Appu*<sup>1</sup>. In that case of an action for a declaration of title to land, the defendants had failed to file answer on the due date, and this Court held that the proper course then was that the case be set down for *ex parte* trial under s. 55 of the Civil Procedure Code. The decision was to the effect in other words that a defendant who files no answer is not entitled to participate in a trial. But this penalty which attaches to the failure to file answer is one plainly imposed by s. 55.

In the case of the Partition Act however, there is no provision which corresponds to s. 55 of the Code, and that section will therefore apply only if section 79 of the Partition Act can be said to bring it into application on the ground that there is a situation of a *casus omissus*.

The Partition Act, while it entitles a defendant to file a statement of claim and requires him to file a list of documents on which he proposes to rely, does not declare that a party may not prove his rights at the trial

<sup>1</sup> (1937) 39 N. L. R. 249.

unless he has previously filed a statement of claim and a list of documents. If for instance a defendant relies solely on prescription, there is no provision in the Ordinance which expressly prevents him from leading evidence at the trial to establish his right. Instead s. 25, in very wide terms provides that "the Court shall examine the title of each party and shall hear and receive evidence in support thereof". Indeed, it is not uncommon that a Partition Decree allots interests to defendants upon the evidence of the plaintiff, without evidence being tendered by such defendants themselves.

Having regard to the wide terms of s. 25 and the other considerations noted above, I am unable to hold that s. 85 of the Code is applicable in the case of a partition action. The requirement in section 85 that there shall be an *ex parte* trial in the event of the failure of a defendant to appear or to file answer is inconsistent with the requirements in s. 25 of the Partition Act which I have mentioned. That being so, the language of s. 79 of the Act precludes the application of s. 85 of the Code in a case where a defendant fails to file a statement of claim.

For these reasons I must hold that the 15th defendant could have participated at the trial and led evidence, at least to establish a prescriptive right. That being so, my discussion of the principle governing s. 24 of the Act shows that she should have been given notice of the date of trial.

The case of the 16th defendant is different, for the learned Judge has held that she was aware that the trial had been fixed for 10th August, and there was no excuse for her failure to attend Court on that day. Nevertheless this defendant also was entitled to a notice from Court as to the date of trial, and she can at least technically complain that she was not given such notice. Since there will be in any event a fresh trial in consequence of the appeal of the 15th defendant, there seems to be no practical objection to allowing the 16th defendant also to participate at the trial.

For these reasons the appeals are allowed and the Interlocutory decree is set aside. The District Judge will now entertain the statements of claim filed by the 15th and 16th defendants, and will fix a fresh date of trial. Further proceedings will thereafter be taken in due course. The order for costs made by the District Judge on 5th July 1967 is also set aside.

I make no order as to the costs of this appeal.

WEERAMANTRY, J.—I agree.

*Appeals allowed.*