1968 *Present:* H. N. G. Fernando, C.J., and Samerawickrame, J.

A. M. M. HUSSAIN and another, Petitioners, *and* U. M. U. NAINA and others, Respondents

S. C. 224/67—Application for Revision in D. C. Kalutara, 30222/P

Partition action—Surveyor's report—Disclosure therein of a claimant other than a party to the action—Procedure thereafter—Position where a person (not being a party) is mentioned in the surveyor's report as having been merely present at the survey—Interlocutory decree—Right of a person to have it set aside on ground of failure to serve summons on him—Scope—Partition Act (Cap. 69), ss. 18 (1), 22 (1), 48 (3), 49, 70 (1) (a) (b).

(i) Where a claimant (not being a party to the action) is mentioned in the report of the surveyor under section 18 (1) of the Partition Act, the Court will ordinarily follow the procedure set out in section 22 (1) of the Act and issue a notice in the first instance. The Court will not ordinarily add such claimant as a party unless and until he applies under section 70 (1) (*b*) of the Act to be added as a party. However, if the Court adds him as a party under the provisions of section 70 (1) (*a*), he is entitled to have the interlocutory decree set aside if summons was not served on him.

Leelawathie v. Weeraman (68 N. L. R. 313), discussed.

(ii) Where the return to the surveyor's commission refers to a person, who is not a party to the action, as having been present at the survey but does not state that he made any claim or the nature of his claim, there is no material upon which the Judge can properly form an opinion under section 70 (1) (*a*) of the Partition Act that such person "should be made a party to the action". If, nevertheless, a Court wrongly makes such a person a party to the action, but summons is not served on him, the Supreme Court can in appropriate circumstances correct the error by ordering the deletion from the record of the name of the person as having been a party to the action; if so, sections 48 (3) and 49 of the Partition Act will apply as though he had never been a party.

(iii) Where, in a partition action, a party moves the Supreme Court in revision to set aside the interlocutory decree on the ground that summons was not served on him, the Court will consider whether the circumstances justify its intervention long after the decree was entered.

APPLICATION in revision to set aside an interlocutory decree entered by the District Court, Kalutara, in a partition action.

S. Sharvananda, for the 8th and 13a Defendants-Petitioners.

S. Nadesan, Q.C., with *R. Manikkavasagar*, for the 2nd Defendant-Respondent.

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen*, for the Plaintiff-Respondent.

C. Ranganathan, Q.C., with *M. T. M. Sivardeen*, for the 5th, 17th, 31a to 31d and 37th Defendants-Respondents.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne*, for the 3rd and 4th Defendants-Respondents.

Cur. adv. vult.

July 5, 1968. H. N. G. FERNANDO, C.J.—

This is an application inviting this Court, in exercise of its powers of revision, to set aside an Interlocutory Decree in a partition action.

The action was instituted in April 1954. Upon a commission for survey being issued, the commissioner inspected the land in June 1954. His return to the commission contains the following statement :—

" Present : Plaintiff and 1st five defendants and the following new parties :—

1. A. A. M. Silly Hamona
2. A. M. Manwa Umachia
3. S. L. Mohamed
4. A. M. Hussain."

(The 4th named person is the present petitioner.)

Thereupon, the Court ordered notices to be issued on the " claimants ", and such a notice was served on the present petitioner, who was one of the persons referred to in the commissioner's return as a " new party ". The notice called upon the petitioner to show cause why he should not be added as a party to the action, and why he should not file a statement of his claim. The petitioner took no step at all in response to this notice. In May 1955, the Court made order that he be added as a party, and his name was accordingly entered on the record as the 8th defendant.

In July 1959, another commissioner inspected the land, and his report shows that the petitioner was again present on the occasion of the inspection.

No summons was issued or served on the petitioner, and the Court proceeded to the trial of the action. The interlocutory decree was entered in June 1966, and the 3rd defendant then lodged an appeal to this Court against the decree. Notice of the appeal was apparently served on the petitioner, who then applied to the District Court to set aside the decree on the ground that summons had not been served on him. The Court

held that it had no power to set aside the decree, because the appeal to this Court was then pending. Nine months later, in June 1967, the petitioner filed his present application in revision.

Counsel for the petitioner relied very heavily on the decision of a bench of five Judges in *Leelawathie v. Weeraman*[1]. holding that the Court has power to add as defendant a claimant whose name is disclosed in the surveyor's return to a commission, and that when a party is so added the next step is to order summons to be issued on the new party.

I must say with the utmost respect that I cannot agree with some of the grounds of the decision just cited. For instance, it is stated in the judgment of Sansoni, C.J. that " clearly the Judge was wrong when he ordered notice to be issued instead of a summons ". But the facts of the case were that the name of the claimant was disclosed in the surveyor's report, and s. 22 (1) of the Partition Act provides that " the Court *shall order notice of a partition action* to be issued for service on every claimant (not being a party to the action) who is mentioned in the report of the surveyor under sub-section (1) of s. 18 ". It thus appears that s. 22 lends support to the view that the consequence of a claim being made to the surveyor is that a notice must be served on the claimant in the first instance, and that he will not usually be added as a party unless and until he applies under paragraph (*b*) of s. 70 (1) of the Act to be added as a party. The problem which presented itself in *Leelawathie v. Weeraman* would not have arisen if the District Court had refrained from adding the claimant as a party, and had instead acted under s. 22 (1) as a first step.

We are well aware of the delays and inconveniences which arise when persons who have no intention of putting forward claims in Court are joined as parties in partition actions. Not only have summonses to be served on all such persons ; notices of appeal have also to be served ; and difficulty is often encountered in tracing the whereabouts of such persons and in effecting service. Furthermore, the death of any such person impedes the action, and substitution of parties is again a source of delay and difficulty. We have ample experiences of long delays in the disposal of appeals caused by the death of parties pending the hearing of appeals.

The *ratio decidendi* of *Leelawathie v. Weeraman* is ONLY that the District Court has power to add as a party a person who is disclosed as a claimant in the surveyor's report, but NOT that the District Court should not proceed under s. 22 and issue a notice in the first instance.

Section 70 of the Act provides for the addition of parties in two cases :—

(*a*) where the Court is of opinion that a person should be, or should have been, made a party to the action ;

(*b*) where a person applies to be added as a party.

[1] *(1966) 68 N. L. R. 313.*

What was held by the bench of five Judges was that the fact of a claim having been made to the surveyor can justify the Court in reaching the opinion that the claimant should be made a party. But the bench did not hold that the Court should not be content to follow the express provision in s. 22, and then await the claimant's application, if any, to be added as a party. And if he is so added on his own application, there will ordinarily be no need for summons to be served on him thereafter. Sansoni, C.J. himself had this in contemplation, when he observed :— " If he appears before the Court and is permitted to take part in the proceedings, he may be said to have dispensed with the need for complying with the rule ", namely the rule that summons must be served on every party to an action.

I trust therefore that Courts of first instance will ordinarily follow the procedure set out in s. 22 (1) of the Act, and will not ordinarily add a claimant as a party until he applies to be so added. This procedure will avoid the delays and difficulties to which I have referred, and will reduce to a minimum the occasions for setting aside interlocutory decrees on the ground upheld in the case of *Leelawathie v. Weeraman*.

Subject to the observations made above, the present Bench is bound by the recent decision, and must follow it unless the facts of the present case are distinguishable. I am satisfied that this is so.

Section 18 (1) of the Act requires the surveyor to state in his report " the name and address of any person (not being a party to the action) who, at the time of the survey, preferred any claim, and the nature of such claim ". In the instant case, the report merely states that the petitioner was present at the survey and refers to him as a " new party ". The report does not state that he made any claim, nor (quite understandably) does it record the nature of his claim. It is highly improbable that the petitioner did in fact state what his claim was ; in the case of other persons present at the survey, the report does set out particulars of their claims. That being so, there was no material (which there apparently was on the facts of the case of *Leelawathie v. Weeraman*) upon which the Judge could properly form an opinion under s. 70 (1) (*a*) of the Act that the petitioner " should be made a party to the action ". It follows that in the instant case the Court wrongly added the petitioner as a party. I shall deal at a later stage with the mode in which this error is to be rectified.

Another ground for distinguishing the instant case from the former one is that it is the jurisdiction of this Court in revision, and not in appeal, which the petitioner invokes. The jurisdiction being exercisable in discretion, it is relevant to inquire whether the circumstances justify

the intervention of this Court at the present stage to set aside a decree entered in 1966, in an action which commenced in 1954. Let me state briefly why there is no such justification :—

(*a*) The petitioner was undoubtedly aware, ever since June 1954, that this action was pending ; he was present at both the surveyor's inspections in 1954 and in 1959. But he did not feel the need to safeguard his alleged interests by taking steps to intervene in the action.

(*b*) As already shown, the petitioner did not state to the surveyor the nature of his claim, if any. Up to date, he has not stated, either to the District Court or to this Court, the nature of the claim.

(*c*) The petitioner received notice from the Court of the pending action in 1955. It is beyond comprehension that, if he had any claim which he imagined to be one of substance, he would have stayed out of Court for over 10 years. If he had consulted a Proctor on receipt of the notice, he would undoubtedly have been advised to file a statment of claim. The failure to file such a statement, even at this very late stage, shows how speculative his alleged claim must be, and how little interested he was in his alleged rights. It seems clear that he does not now intervene in good faith.

(*d*) Even the present application to this Court has been made only after the lapse of 9 months from the time when the District Court refused to set aside the interlocutory decree.

There are in my opinion quite sufficient grounds for denying to the petitioner the relief which he now claims.

My finding that the petitioner was wrongly made a party to this action means that summons need not have been served on him. Nevertheless his name is still on record as a party (8th defendant). But just as much as he did not enjoy the rights of a party defendant, he equally must not suffer any disadvantage by the improper joinder. Sections 48 (3) and 49 of the Act confer certain rights on persons who have not been parties to a partition action, and it is proper that the petitioner should not be deprived of recourse to those rights. I accordingly order that his name be struck off the record as a defendant to this action.

Before concluding this judgment, I must point out that the notices served on claimants in this case were not in the proper form. The proper form is prescribed in the Second Schedule to the Act (Vol. III, p. 167).

Subject to the order for the striking off of the petitioner's name from the record, the application is refused. I make no order as to costs.

SAMERAWICKRAME, J.—I agree.

Application refused.