1957 *Present :* H. N. G. Fernando, J., and T. S. Fernando, J.

S. UKKU, Petitioner, *and* M. SIDORIS and others, Respondents

S. C. 492—In the matter of an Application in Revision or for Restitutio-in-integrum in D. C. Kegalle, 9,355.

Partition action—Interlocutory decree—Scope of its finality—Lunatic—Failure to appoint manager—Effect—Civil Procedure Code, ss. 480, 501—Partition Act, No. 16 of 1951, s. 48.

Section 48 of the Partition Act No. 16 of 1951 which enacts that an interlocutory decree shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever does not affect the extraordinary jurisdiction of the Supreme Court exercised by way of revision or *restitutio in integrum* where circumstances exist in which such extraordinary jurisdiction has been exercised in the past.

Therefore, where the Court orders interlocutory decree to be entered in the absence of, and despite the fact that it is aware of the need for, the appointment of a manager in respect of the interests of a defendant who is a lunatic, such defendant would not be bound by the interlocutory decree entered in contravention of the provisions of section 480 read with section 501 of the Civil Procedure Code. In such a case, section 48 of the Partition Act No. 16 of 1951 would not be a bar to relief being granted, in revision or by way of

***restitutio in integrum*, (1) setting aside the order directing that interlocutory decree be entered and (ii) giving an opportunity to the defendant to file his statement of claim.**

APPLICATION in revision or for *restitutio in integrum* in respect of an order of the District Court, Kegalle.

C. R. Gunaratne, for the 1st defendant-petitioner.

S. W. Jayasuriya, with *N. Abeysinghe*, for the 5th and 7th defendants-respondents.

S. Sharvananda, for the plaintiffs-respondents.

Cur. adv. vult.

August 19, 1957. T. S. FERNANDO, J.—

This is an application by the 1st defendant, a lunatic, appearing by the 9th defendant, the manager of her estate duly appointed by court, seeking (i) the setting aside of an order directing that interlocutory decree be entered in a partition case, and (ii) an opportunity for her to file her statement of claim in that case. The facts giving rise to the application may be stated shortly as follows :—

The action for partition of the land in question was instituted on 29th January 1954, and the plaint contained an averment that the 1st defendant was entitled to a 6/12th or a half-share of the land. The caption of the plaint contained a reference to the fact that the 1st defendant was a lunatic. After certain preliminary steps had been taken in the case, the proctor for the plaintiffs filed papers on 29th July 1954 seeking the appointment of the present 9th defendant as manager of the 1st defendant's estate. Although notice issued on the 9th defendant for 20th September 1954 and the 9th defendant was present in court that day, no appointment of manager was made, and thereafter the requirement of such an appointment appears to have been overlooked both by the plaintiffs and by the Court.

The trial took place on 31st May 1955. On this date the only parties who appeared or were represented were the plaintiffs and the 6th and 8th defendants. The following having been entered of record in the case,

> "All the disputes in the case are settled. It is to be noted that the settlement of the dispute in this case is not to prejudice the rights of parties in other lands of the same inheritance."

the plaintiffs, through the uncontested evidence that day of the 1st plaintiff, sought to support the title of the several parties to the case. In his evidence, the 1st plaintiff, who had earlier stated in his plaint that the 1st defendant was entitled to a half-share, supported her title

only to the extent of a quarter-share of the land. No explanation of the discrepancy between the share allotted in the plaint and that admitted in the course of the 1st plaintiff's evidence was attempted ; and the learned District Judge delivered judgment on 15th June 1955 ordering interlocutory decree for partition to be entered according to the shares disclosed in the evidence of the 1st plaintiff.

On 22nd September 1955—at a time when the ministerial act of entering the decree in terms of the judgment of 15th June 1955 had not yet been performed—the proctor for the plaintiffs moved the court that his application of 29th June 1954 for the appointment of the 9th defendant as manager of the estate of the 1st defendant "*be now allowed since by an oversight it was not so done on 20th September 1954*". The 9th defendant was present in court on 22nd September 1955 and consented to his appointment, and the appointment was accordingly made on that day. On 22nd November 1955, the act of appointment along with a proxy by the 9th defendant in favour of Mr. Abeywickreme, proctor, was filed in court. When the appointment was filed the Court made order that the case be called on 13th December 1955, and on that day Mr. Abeywickreme moved for a date for the filing of the statement of claim by the manager of the 1st defendant's estate. On the 6th defendant objecting to any statement of claim being so filed, the matter of this objection was set down for inquiry, and after inquiry in due course the learned District Judge made order on 31st May 1956 stating that he had no power to allow the application of the manager, the 9th defendant. The application to this court was thereafter made on 20th November 1956 seeking the relief already referred to above.

As the District Court was aware of the need for an appointment of manager both at the time of the filing of the plaint and after its attention was pointedly drawn to the matter on 13th July 1954 (*vide* journal entry of that date) and again by the plaintiffs' application of 29th July 1954 for the appointment of a manager of the 1st defendant's estate, it is obvious that the trial should not have been held on 31st May 1955 in the absence of such an appointment. The Court should have known that the 1st defendant had been given no opportunity to file a statement of claim if she so desired. It is possible that the plaintiffs themselves believed that the appointment of a manager had in fact been made and that no statement of claim was being filed. That belief may account for the fact that when the manager sought to fire a statement the plaintiffs themselves did not see it fit to raise any objection. As the 1st defendant who was a lunatic at all material times was not represented in the case he would not, in my opinion, be bound by an interlocutory decree entered in the circumstances related above—*vide* section 480 read with section 501 of the Civil Procedure Code. I do not therefore consider that an interlocutory decree could have been regularly entered or, even if entered, would have been binding on the 1st defendant. The case before us, being one in which a lunatic's property is affected is stronger on the facts than the case of *Menchinahamy v. Muniweera* [1] where, as a result of the heirs of a deceased defendant

[1] *(1950) 52 N. L. R. 409.*

not being substituted as parties, this Court by way of *restitutio-in-integrum* set aside an interlocutory decree entered in a partition case even after that decree had been subsequently affirmed in appeal by the Supreme Court.

It may be mentioned that counsel appearing before us for two of the other defendants in the case did not object to the granting of the present application. The plaintiffs, although they do not appear to have objected to the application made by the 9th defendant to the District Judge for an opportunity to file a statement of claim, resisted the application made to this Court, and their counsel relied on section 48 of the Partition Act, No. 16 of 1951, as being a bar to relief being now granted to the 1st defendant. While that section enacts that an interlocutory decree entered shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of opinion that it does not affect the extraordinary jurisdiction of this Court exercised by way of revision or *restitutio-in-integrum* where circumstances in which such extraordinary jurisdiction has been exercised in the past are shown to exist. It may be mentioned that notwithstanding the provisions of sections 9 and 20 of the repealed Partition Ordinance (Cap. 56), the right of the Supreme Court to exercise in partition actions its powers in revision and by way of *restitutio-in-integrum* has never been doubted.

I have already stated above why I consider that the interlocutory decree ordered to be entered in this case cannot bind the 1st defendant. I would therefore set aside the judgment of the District Court dated 15th June 1955 and direct that the 1st defendant be permitted an opportunity to file a statement of claim and that the trial be held in due course thereafter.

The plaintiffs will pay to the 1st defendant her costs of this application.

H. N. G. FERNANDO, J.—I agree.

Order set aside.