

1957 *Present* : Basnayake, C.J., and Pulle, J.

K. D. RODRIGO *et al.*, Appellants, and D. H. WEERAKOON *et al.*,
Respondents.

S. C. 445—D. C. Panadura, T.K. 310/23,558

Execution of decree—Application for writ more than one year after decree—Service of notice on judgment debtor—Imperative requirement—Civil Procedure Code, s. 347.

Where more than one year has elapsed between the date of a decree and the application for its execution, the provision in section 347 of the Civil Procedure Code that the Court shall cause the petition to be served on the judgment-debtor is imperative and not merely directory. Non-observance of the requirements of section 347 by the Court would render the proceedings void.

Silva v. Kavaniamy (1948) 50 N. L. R. 52, not followed.

APPPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *C. de S. Wijeratne* and *P. Ranasinghe*,
for Plaintiffs-Appellants.

Walter Jayawardene, with *P. Somatilakam*, for 7th and 8th Respondents-
Respondents.

¹ 3 *Bing. N. C.* 29.

July 15, 1957. BASNAYAKE, C.J.—

This is an appeal by the 1st plaintiff, a minor, (who appears by his next friend the 2nd plaintiff), in a partition action in which lot 12 in extent 7 acres, 1 rood and 24·8 perches was allotted to him. In the partition decree he was also condemned to pay a sum of Rs. 55 in the result to the 2nd and 6th defendants in equal shares and also pro rata costs of the action to the 6th defendant. Final decree was entered on the 28th of August 1948 and on the 26th of October 1951 the 6th defendant applied for writ of execution against the plaintiffs. The application has not been made in conformity with section 224 of the Civil Procedure Code and the plaintiffs have not been named as the respondents to the petition nor has the court as required by section 347 of the Civil Procedure Code caused the petition to be served on the judgment-debtor. The Fiscal, in pursuance of the writ which was issued, proceeded to the residence of the judgment-debtor as required by section 226 of the Civil Procedure Code, and not finding him there proceeded to seize and sell lot 12 which was allotted to the plaintiff. The land was sold for a sum of Rs. 1,525 and was purchased by the 2nd defendant. Thereupon the plaintiffs took steps to have the sale set aside on a number of grounds which were urged at the trial but which were not upheld by the learned trial Judge.

Of the points taken in appeal the only point which seems to be of substance is that the provisions of section 347 of the Civil Procedure Code have not been complied with. That section requires that where more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor. It is a rule of interpretation of statutes that enactments which regulate the proceedings in courts are usually imperative and not merely directory. In the instant case the failure to comply with the provisions of the Statute has not been on the part of one of the parties to the proceedings but on the part of the court itself, and the question for decision is whether the non-observance of the requirements of section 347 by the court would render the proceedings void. The rule governing this aspect of the matter is stated in *Maxwell on the Interpretation of Statutes at page 380* :—

“The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the statute, but a duty imposed on a court or public officer in the exercise of the power conferred on him when no general inconvenience or injustice calls for a different construction.”

In the instant case the failure to comply with the provisions of section 347 of the Civil Procedure Code has resulted in 7 acres of land allotted to the minor plaintiff being sold at a price disproportionate to the market value of the land, clearly resulting in injustice to him.

Learned counsel for the appellants has referred us to the decisions of this Court as to the construction of section 347 of the Civil Procedure

Code. In the case of *de Silva v. Upasaka Appu*¹ and *Fernando et al. v. Thambiraja*² it was held that the failure to comply with the requirements of section 347 of the Civil Procedure Code is fatal. He has also drawn out attention to the case of *Silva et al. v. Kavaniamy et al.*³, where it has been held that the provisions of section 347 of the Civil Procedure Code are merely directory and that the failure to serve the petition as required by that section is only an irregularity. We find ourselves unable to agree with the view taken in the last named case and we prefer the view taken in the cases mentioned earlier that the requirements of section 347 of the Civil Procedure Code are imperative and that the failure to comply with them is fatal.

We therefore set aside the order of the learned trial Judge and allow the appeal. The appellants are entitled to costs both here and in the court below.

PULLE, J.—I agree.

Appeal allowed.

