1960 *Present :* **Weerasooriya, J., and T. S. Fernando, J.**

BININDA, Appellant, *and* SEDIRIS SINGHO and others, Respondents

S. C. 532—D. C. Kegalle, 9,116/P.

Partition action—Preliminary survey—Inclusion of land other than that which is referred to in the plaint—Irregularity—Surveyor's fees—Lis pendens—*Partition Act, No. 16 of 1951, ss. 23 (1), 48 (1), 48 (3).*

When preparing a preliminary plan in a partition action it is irregular for a Surveyor, in the absence of an additional commission issued to him under section 23 (1) of the Partition Act, to survey and include in the corpus any land other than that which is referred to in the plaint and which his commission authorises him to survey. The surveyor will not be entitled to receive fees in respect of that part of the survey which he makes in excess.

APPEAL from a judgment of the District Court, Kegalle.

V. J. Martyn, for the petitioner-appellant.

D. R. Wijegoonewardena, for the 1st–7th defendants-respondents.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

October 7, 1960. WEERASOORIYA, J.—

The plaintiff filed this action for the partition of a land called Nekatipuranehena of two pelas paddy sowing extent. The preliminary plan "X" prepared by the surveyor depicts a land of six allotments numbered 1, 2, 3, 4, 5 and 6 and totalling in extent 7A. 0R. 33P. In paragraph 2 of the surveyor's report it is stated that according to the plaintiff the land sought to be partitioned consisted of lots 4, 5 and 6 only, while lots 1, 2 and 3 formed a different land called Galamunehena. But

the surveyor surveyed lots 1, 2 and 3 as well and included them in the land depicted in the preliminary plan because the 1st to the 7th defendants-respondents insisted that they formed part of the land Nekatipuranehena.

Section 23 (1) of the Partition Act, No. 16 of 1951, provides that where a defendant in a partition action avers that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action, the Court may issue a commission to a surveyor directing him to survey the extent of land referred to by that defendant. If the 1st to the 7th defendants claimed that lots 1, 2 and 3 also formed part of Nekatipuranehena they should have applied to the Court under section 23 (1) for the issue of an additional commission to the surveyor to survey those lots as well. In the absence of such a commission the action of the surveyor in proceeding to survey those lots and include them in the corpus depicted in the preliminary plan was quite irregular as the commission under which he purported to act did not authorise him to survey any land other than that to which the plaint referred. Learned counsel for the 1st to 7th defendants did not seriously contend at the hearing of the appeal that lots 1, 2 and 3 in the preliminary plan form part of the land Nekatipuranehena. It is common ground that the only registration of the action as a *lis pendens* is in respect of a land in that name as described in the plaint. Had an additional commission issued to the surveyor in terms of section 23 (1), directions could have been given by the District Judge under the further provisions of that section for the registration of the action as a *lis pendens* affecting any additional portion of land brought into the corpus sought to be partitioned and for service of notice of the action on the person or persons claiming an interest in such portion.

At the trial the plaintiff too fell into line with the position taken up by the 1st to the 7th defendants that lots 1, 2 and 3 formed part of Nekatipuranehena. He was the only witness called, and at the conclusion of his evidence judgment was pronounced ordering that an interlocutory decree be entered for the partition of the entire land of six allotments as depicted in the preliminary plan. The final decree of partition was entered on the 12th July, 1956.

On the 12th December, 1956, the appellant, who is not a party to the action, filed an application to have the final decree set aside and the portion of the corpus alleged to represent the land called Galamunehena, of which he claimed to be the owner, excluded from the partition. The 1st to the 7th defendants objected to this application, and after inquiry the learned District Judge made order dismissing it with costs. The present appeal is from that order.

Mr. Martyn who appeared for the appellant conceded that in view of section 48 (1) of the Partition Act—and even apart from it—his client's application was misconceived since the District Court would have no jurisdiction, once the final decree of partition was entered, to set it aside even if the land Galamunehena was wrongly included in the corpus to be

partitioned and there has been no due registration of the action as a *lis pendens*. While not denying, therefore, that the appeal should be dismissed, Mr. Martyn submitted that in view of the irregular manner in which the surveyor came to include lots 1, 2 and 3 in the land depicted in the preliminary plan we do, acting in revision, set aside the interlocutory decree as well as the final decree of partition and remit the case to the District Court for fresh proceedings to be taken in accordance with section 23 and the other provisions of the Partition Act.

This Court has, no doubt, ample powers to interfere by way of revision in a case like the present one even though no special application in that behalf has been made. But, having regard to the time that has elapsed since the final decree was entered, I do not think that we should, in the exercise of those powers, now disturb the partition of the corpus that was effected under that decree, especially as there is nothing to show that all the parties who may be prejudiced by the adoption of such a course are before us and have had an opportunity of showing cause against it. Moreover, in view of section 48 (3) of the Partition Act, the rights of the appellant, if any, to the portion which he claims to have been wrongly included in the corpus would appear to be unaffected by the entering of the interlocutory or the final decree in this case and it would be open to him, if so advised, to vindicate his rights to that portion as against the 1st to the 7th defendants (who are the parties declared in the final decree to be entitled to the same in divided lots) or against any subsequent transferee from them.

The appeal is dismissed with costs payable to the 1st to 7th defendants-respondents. I also direct that as the surveyor who prepared the preliminary plan had no authority from Court to survey lots 1, 2 and 3 in the plan he be paid no fees for that part of the survey. If he has already drawn any fees for such work he must refund them to the plaintiff.

T. S. Fernando, J.—I agree.

Appeal dismissed.