1948 *Present :* **Dias and Gratiaen JJ.**

MUTHUMENIKA *et al.*, Appellants, *and* APPUHAMY, Respondent.

S. C. 515—D. C. Kurunegala, 1,362A.

Partition action—Preliminary survey—Claim before surveyor—Party not noticed—Decree as hereinbefore provided—Section 9—Duty of plaintiff in partition action—Action for damages—Measure of damages.

Failure to notice a party disclosed in the surveyor's report does not destroy the conclusive effect of a final decree in a partition action.

It is the duty of the plaintiff to see that all the necessary parties are brought before the Court. Where, therefore, the plaintiff knew that there was an intervenient disclosed in the surveyor's report, his failure to make such intervenient a party amounts to such a breach of duty as would give rise to a claim for damages under section 9 of the Partition Ordinance.

The measure of damages suffered by such person is the value of his right in the land which he lost by reason of the final decree being entered.

APPEAL from a judgment of the District Judge, Kurunegala.

F. A. Hayley, K.C., with *C. R. Gunaratne*, for defendants, appellants.

N. E. Weerasooria, K.C., with *W. D. Gunasekera* and *G. T. Samarawickreme*, for plaintiff, respondent.

Cur. adv. vult.

September 8, 1948. DIAS J.—

The present plaintiff instituted a partition action, D. C., Kurunegala, 1,362, in regard to a land called Kahatagahamulawatta, valued at Rs. 1,000. His root of title was a Crown Grant P 1 dated July 19, 1929. The original co-owners were said to be :—

Ukkubanda, who was entitled to	..	3/8
Dingirimenika, who was entitled to	..	3/8
Singhoappu, who was entitled to	..	2/8

Ukkubanda's share devolved on the plaintiff ; Singhoappu's 2/8 devolved on the defendant to that action subject to the plaintiff's life interest. Dingirimenika's share was alleged to have also devolved on the defendant, but as those deeds were not available the plaintiff did not recite them in his plaint in the partition action.

That action had rather a chequered career. The journal of the case is the exhibit D 6. The action was instituted in 1943. Although this was a partition action, and the law requires that no summons should issue until the *lis pendens* is registered, there is nothing to show that this was done. Summons was served on the sole defendant, who is a servant of the plaintiff. He filed no answer but appeared in person and accepted the share allotted to him in the plaint. Thereupon a commission was

issued for what is known as the preliminary survey. The plan was filed on July 7, 1943, whereupon the Court fixed the case for " *ex parte* trial ".

Had the plaintiff's proctor done his duty, or had the Court been vigilant, the surveyor's report D 1 dated July 5, 1943, would have indicated that one K. M. Kiribanda or some person on his behalf had made a claim to the corpus sought to be partitioned. Ordinarily, in such cases, the Court would add the party disclosed and order process to issue on him so as to enable him to intervene. This was not done.

The trial took place in December, 1943. We do not know what evidence, oral or documentary, was led, and whether the defendant produced his deeds or proved his title. After trial interlocutory decree was entered and a commission was issued for the final partition. The report of the surveyor is dated April 18, 1944, and states that he made the partition " after *due notice* to the parties and in the presence of the defendant after *affixing notices on the land* and *by beat of tom-tom* have done in accordance with Ordinance No. 10 of 1863 ". Final decree was entered on June 21, 1944.

The plaintiff then took out a writ of possession. On November 3, 1944, when the Fiscal endeavoured to place the plaintiff in possession of his divided share, he was obstructed by the appellants and possession could not be given him.

Action under section 325 of the Civil Procedure Code had to be taken by the plaintiff thereafter. The Court ordered both parties to file proper pleadings. The result is that the subsidiary proceedings (D. C., Kurunegala, 1,362A) is an action by the plaintiff to the original action against the two appellants who are in possession of the disputed lot B.

The plaintiff is now seeking to be declared entitled to Lot B, for the ejectment of the appellants and for damages.

The appellants, on the other hand, contend that Lot B is the land called Walaspitiyapahalahena. Admittedly, the land claimed by both sides is the same land. The appellants say that the original owners were Ranhamy and Appuhamy, and that on the chain of title pleaded by them that land has devolved on them. They assert that Ukkubanda, Dingirimenika and Singhoappu (who are the persons through whom the plaintiff claims) fraudulently obtained the Crown grant dated July 19, 1927. In D. C., Kurunegala, 13,919 K. M. Kiribanda (the husband of the 1st appellant) sued Singhoappu (1st defendant), Ukkubanda (2nd defendant), Magiris (3rd defendant) and Podinona (4th defendant) to vindicate title. In that case K. M. Kiribanda and Podinona were declared entitled to the land in dispute and that they and their successors are in possession. They assert that the partition action was collusive, that the decree in case No. 13,919 operates as *res judicata*, and that the decree in the partition action does not bind them because they were given no notice of it, and because there has been no proper investigation of title. Alternatively, they claim that if the final decree is held to be binding on them, they should be awarded a sum of Rs. 1,000 as damages under section 9 of the Partition Ordinance.

It is obvious from the evidence led in the second trial that when the surveyor went to the land to make the preliminary plan, the lot in dispute was in the possession of a person claiming through or on behalf of K. M. Kiribanda (deceased). The plaintiff in his evidence says that the 1st appellant was present. She however denies this. Plaintiff says that he expected trouble from the appellants and that is the reason why he instructed his proctor to take out a writ of possession. It is also clear that had the facts stated in the surveyor's report regarding the claim on behalf of Kiribanda been brought to the notice of the Judge, the course which the trial subsequently took would have been different. There is, however, no evidence before us to hold that the partition decree was obtained fraudulently or collusively. The Privy Council has laid down that in civil proceedings fraud must be established beyond reasonable doubt. A finding of fraud cannot be based on mere suspicion or conjecture—*Narayanan Chettiar v. Official Assignee* [1], *Coomaraswamy v. Vinayagamoorthy* [2]. The appellants, on whom this heavy onus rested, have led no evidence to establish this.

We are, therefore, in the presence of a final decree which has been entered in a partition action, and which binds the whole world. The burden of proof rests on the appellants to establish some ground to show that it does not bind them.

It is urged that the conclusive nature of the final decree is destroyed by the fact that neither the plaintiff nor the Court took steps to notice the party disclosed in the surveyor's report.

The Partition Ordinance does not make provision for interventions. Owing to local conditions, however, a long established practice has grown up of admitting interventions up to the final decree stage and up to the time a decree for sale is entered. As an auxilliary to this, another long standing practice has grown up of ordering what is called a preliminary survey. The practice in different Courts vary, but either before the issue of summons or more frequently after all the parties have been brought before the Court, a commission is issued to a surveyor to go to the land and demarcate the corpus which the plaintiff seeks to partition. The reason for this is stated in *Jayawardene on Partition at p 71 :* " If a survey is made on the orders of the Court on notice publicly given, persons claiming shares or interests in the land sought to be partitioned, *whom the plaintiff has failed to join as parties*, will have an opportunity of intervening and asserting their claims before the Court proceeds to hear evidence. Otherwise, claimants who have not been made parties to the action will, as a rule, not have any notice of the action, except perhaps accidentally, until after evidence has been recorded and an interlocutory or final decree entered, the commissioner proceeds to the spot to survey and partition, or to sell the land under section 5 or 8. Very frequently in these suits, claimants who have been kept out of the case by the plaintiff, or the defendant, come into Court with petitions of intervention, after the commissioner has proceeded to the spot to execute the interlocutory decree, and only those who have to deal with such interventions know the delay, trouble and waste of time caused thereby ". It will be noted that these preliminary surveys are not an essential step provided by the Partition Ordinance itself. Nevertheless, they are now recognised as a regular step in the action.

[1] *(1941) A. I. R. Privy Council 93.* [2] *(1945) 46 N. L. R. at p. 249.*

Did the failure of the Court to notice the intervenients destroy the conclusive effect of the final decree ? The power of the Court to add a party to any action is governed by section 18 of the Civil Procedure Code. That power is discretionary. I do not think the failure of a Judge to perform an act which is discretionary can affect the final decree in a partition case. In order to deprive a final decree in a partition action of its conclusive character it is necessary in terms of section 9 of the Ordinance to show that such decree was not "given as hereinbefore provided". A Divisional Court in *Siwanadian Chetty v. Talawasingha* [1] held that this means that in order to attack the conclusive nature of a final decree it must be shown that there was a failure to observe such *essential steps* as might be considered imperative, *i.e.*, by the Ordinance itself. As I have pointed out it is nowhere provided by the Partition Ordinance that it is the duty of a plaintiff to draw the attention of the Court to possible intervenients. The duty of the plaintiff prescribed by the Ordinance is to be found in section 2. He must disclose the names of all the co-owners, and mortgagees. There is no statutory duty cast on him to disclose intervenients. That duty has been imposed on him by a practice having the force of law which has been evolved by judicial interpretation. My view is that while his failure to disclose an intervenient he is aware of or should have been aware of, may give rise to a claim for damages against him under section 9, it will not entitle an intervenient who has been shut out by such omission to attack the validity of the final decree on the ground that it was not "given as hereinbefore provided".

It is next contended that there was no proper investigation of title in the partition action, and that, consequently, the final decree is not conclusive. Assuming that the deeds produced in that action have not been proved by calling the notary and one attesting witness as required by the Evidence Ordinance, the onus was still on the appellants to show that the oral evidence adduced did not establish title. For example, the claimants in a partition action may have no deeds or documents. Their title may be based exclusively on prescriptive possession and inheritance. It cannot be assumed in the absence of proof that the evidence led was defective. It was for the appellants to produce certified copies of the evidence led in the partition case to show that there was no proper investigation of title. In the absence of such evidence it cannot be said that they have succeeded in rebutting the presumption of regularity attaching to judicial acts.

It is also argued that the requirements of the *proviso* to section 5 of the Partition Ordinance have not been complied with in regard to the notice to be given before the final partition is made. The commissioner is the officer of the Court. In this case he has reported : "I made a partition of the land after *due notice* to the parties . . . . . after affixing notices on the land and by beat of tom-tom" in accordance with the provisions of the Partition Ordinance. When a person calls on a friend and relates that fact to another, he does not say "I walked up to the front door, rang the bell, asked if they were at home, and walked in after wiping my feet on the door mat". He merely says

[1] (*1927*) *28 N. L. R. at p. 509.*

" I called on X ", and it will be presumed that he did the other things which he does not refer to. In the same way, when the commissioner made his report, there is a rebuttable presumption that he performed all the acts required to be done by law. It is for the appellants to rebut that presumption of regularity. They have failed to do so.

It is, therefore, impossible to hold that the final decree in this case was not given " as hereinbefore provided " within the meaning of section 9 of the Partition Ordinance. I hold that the final decree is valid and binding and wipes out whatever title the appellants had to this land.

In regard to the appellants' claim for damages, the position is different. The facts prove that the plaintiff never had possession of the land in dispute. When the preliminary survey was made the plaintiff became aware that the 1st appellant was in possession and was claiming the land through her husband, K. M. Kiribanda. The act of the plaintiff in proceeding with the case without disclosing a possible intervenient was a wrongful act, and was a breach of a duty incumbent on a plaintiff to a partition action. It was not a duty expressly created by the Partition Ordinance, but is one which arises out of the practice established by a long established *cursus curiae* having the force of law. In the case of *Cassim v. De Vos*[1] it was laid down that where a person knowing that another claimed to be the owner of a land instituted an action for partition without making that other a party thereto, the latter was entitled to damages. Ennis J. with whom de Sampayo J. agreed said " It is unnecessary to consider whether the act of the 1st defendant was fraudulent or wilful. It is sufficient that he caused damage, and that it was done knowing that the present plaintiff has preferred a claim to the land ". In *Suweneris v. Mohamed*[2] a Divisional Court held that " a right to recover damages must be based on a breach of a legal duty, and in my opinion the words of the *proviso* can only point to some breach by the party sought to be charged of a duty which he owed to the person seeking to recover damages. They cannot, in my opinion, refer to something which is solely attributable to the operation of the Ordinance. I can see nothing which the defendant has done or omitted which his duty to the plaintiffs required him not to do or to omit. By no fault or unfairness on his part, by no lack of care or inquiry which he was under any obligation to make, but simply and solely by availing himself of the Partition Ordinance he has given an indefeasible title to what he purchased under due process of law ".—See also *Almeada v. Dissanayaka*[3].

It is well established that it is the plaintiff whose duty it is to have the management and conduct of a partition action through the Court. The Judge looks to the plaintiff and his legal advisers to see that all steps are taken, and that all the necessary parties are brought before the Court. Even an uncontested partition case takes some time before it terminates in a final decree. Therefore, even if the plaintiff and his proctor did not know at the outset that there was an intervenient disclosed in the surveyor's report, it was their duty to take steps by examining the record and relevant papers to satisfy themselves before final decree was entered that nobody is shut out. Their failure to do so in my opinion amounts to such a breach of the duty owed to the 1st appellant

[1] *(1924) 25 N. L. R. 447.* [2] *(1928) 30 N. L. R. 11.*
[3] *(1948) 49 N. L. R. 257.*

which gives rise to a claim for damages. There are also these further circumstances: Admittedly the land claimed by the appellants is a part of the corpus partitioned. There was the earlier decree in the action No. 13,919 against the plaintiff's predecessors in title. There is the fact that the plaintiff knew that there were persons in possession claiming adversely to him and which made him realise that he could not get possession. The cumulative effect of all these facts, coupled with the failure of the plaintiff to intimate to the Court that there was at least one intervenient, is a breach of a duty he owed to the appellants. In my opinion there was here not only *damnum*, but *injuria* as well.

The measure of the damages suffered by the appellants is the value of their rights in the land which they lost. On this point there is no evidence. In the partition action the plaintiff valued the whole corpus at Rs. 1,000. We do not know what the value of lot B is. The case must, therefore, go back in order that the appellants' damages may be assessed, unless the parties agree on the *quantum* of damages. This will be the value of lot B which the appellants have lost.

I affirm the decree declaring the plaintiff entitled to lot B, the order for the ejectment of the appellants therefrom and for the payment of damages by the appellants to the plaintiff at Rs. 50 per annum. I set aside the decree dismissing the appellants' claim in reconvention and enter judgment in their favour for the damages sustained by them in consequence of being deprived of their title to lot B. The case will go back to the District Court for the assessment of these damages unless the parties reach an agreement on this point. The measure of the appellants' damages will be the value of lot B at the date of the final decree. This sum the plaintiff must pay to the appellants. Each party will bear their own costs in the lower Court. The plaintiff will pay to the appellants half the costs of this appeal.

GRATIAEN J.—I agree.

Decree varied.