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*Present :* Branch C.J. and Maartensz A.J.

PAULU *v.* RENGISHAMY.

*137—D. C. Galle, 22,221.*

*Partition action—Commission to partition—Notice by the Commissioner to the public—Ordinance No. 10 of 1863, s. 5.*

In a partition action the notice given by the Commissioner, in terms of the proviso to section 5 of the Ordinance, of his intention to partition the land, must be a notice to the public.

It is not a sufficient compliance with the terms of the section to give such notice to the parties only.

The failure to give such notice to the public deprives a partition decree of its conclusive character.

APPEAL from an order of the District Judge of Galle refusing the appellant to intervene in an action for the partition of a land called Galpotte-elamanana. The appellant moved to set aside the final decree either by way of appeal or in revision on the ground, among others, that the Commissioner who was appointed to carry out the commission had not complied with the terms of section 5 of the Partition Ordinance, in that no notice as required by the proviso to that section was given. It would seem that no notice was fixed on the land ; there was no beat of tom-tom ; and the survey was held on April 4, 1925, while the commission issued only on March 13, 1925.

*Soertsz*, for intervenient, appellant.

*J. S. Jayewardene* (with him *Croos Da Brera*), for plaintiff, respondent.

February 26, 1926. BRANCH C.J.—

This was a partition action in which the appellant made application to intervene. The learned District Judge refused the application as a final decree had already been entered, and this Court is asked to set aside the final decree either by way of appeal or in revision. No action has been taken on the decree. The intervenient-appellant, hereinafter called the appellant, would appear to be entitled to a portion of the land, which is the subject of the partition proceedings, and her case is that she has been fraudulently kept out of the partition proceedings by the plaintiff and the defendant in the Court below, who have acted in collusion in

order to deprive her of her rights. The following are the principal grounds on which Mr. Soertsz, counsel for the appellant, relies for setting aside the decree :—

(i.) The provisions of section 5 of the Partition Ordinance, 10 of 1863, have not been complied with, in that no such notice as that required by the proviso to section 5 was given. No notice was affixed on the land ; there was no beat of tom-tom ; and the survey was held on April 4, 1925, while the commission issued on March 13, 1925.

(ii.) The final decree was entered in respect of a land different from that proposed for partition.

The case is in certain respects suggestive of fraud by one or both the parties in the Court below. As regards that aspect of the matter, Mr. J. S. Jayewardene, who appeared for the plaintiff-respondent, referred to such cases as *Fernando v. Marsal Appu*[1] ; and as regards non-compliance with section 5 (*supra*), he quoted *Jayewardene v. Weerasekere*[2] as conclusive in his favour. In that case Wood Renton C.J. agreed with the view expressed by De Sampayo J., that the notice required by section 5 of the Partition Ordinance is primarily a notice to the parties and not to the world in general, and that want of such notice would not result in the partition decree being set aside, the only remedy of a person deprived in such a case of his interest by the partition being the remedy in damages given by section 9 of the Ordinance. During the argument in *Jayewardene v. Weeresekere* (*supra*) no mention seems to have been made of the cases *Catherinahamy et al. v. Babahamy et al.*[3] and *Sanchi Appu v. Marthelis*,[4] and they are not referred to in the judgments. In the latter case Lascelles C.J. and Pereira J. held that parties cannot by agreement dispense with the appointment of a Commissioner, and Pereira J., in dealing with that point, said at page 298 :—

" It seems to me that parties cannot avoid the appointment of a Commissioner because unless a Commissioner were appointed the procedure laid down in the proviso to section 5 of the Ordinance as to the notice to the public cannot be observed, and the reason for giving a conclusive effect to the final decree under section 9 of the Ordinance is largely referable to that procedure."

In *Catherinahamy v. Babahamy* (*supra*) Hutchinson C.J. referred to the Commissioner giving " public notice " under section 5. The material part of that section is as follows :—

" Provided that the Commissioners shall, thirty days at least before making such partition, affix on some conspicuous part of the land, a written notice of the day on which they

[1] (*1922*) *23 N. L. R. 370.*

[2] (*1917*) *4 C. W. R. 406.*

[3] (*1908*) *11 N. L. R. 20.*

[4] (*1914*) *17 N. L. R. 297.*

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propose to make the same, and give further notice thereof by beat of tom-tom in the village or place where such land is situated, and in such other manner as shall appear best calculated for giving the greatest publicity thereto."

The partition decree referred to in section 9 of the Partition Ordinance is the final judgment under section 6 (see *Catherinahamy v. Babahamy* (*supra*) ), and I think that the preliminary notice under section 5 is an essential and imperative step in the action. I regret I find myself unable to agree with the conclusion arrived at by Wood Renton C.J. and De Sampayo J. in *Jayewardene v. Weeresekere* (*supra*). I think that when such a very important matter as the notice under section 5 has been omitted altogether, as would appear to be the case in the present action, it cannot be said that the decree for partition has been given " as hereinbefore provided " (section 9) and that the decree is good and conclusive against all persons whomsoever and relegates a party prejudiced by the partition to recover damages from the party or parties by whose act the damages had accrued.

It is to be observed that the Partition Ordinance provides nothing in the nature of an assurance fund out of which a person who through no fault of his own has lost land by the partition, may seek damages, and if such a very important provision as that relating to notice is to be disregarded, the gravest hardship might be caused in cases where the party responsible for the exclusion of a co-owner is a man of straw.

It happens sometimes too that the land itself carries a value to the owner much in excess of the amount of damages recoverable in respect of its loss, and if the publicity given by a notice such as that prescribed by section 5 can be avoided and the resulting decree holds good, the door will be opened to fraud and collusion with no adequate remedy at hand. It must be understood that there is no suggestion in the case that the Commissioner was concerned in any fraud or collusion, and, indeed, no facts have been proved bringing home fraud to anyone.

In my opinion, therefore, the notice required by section 5 is a notice to the public, and not to the parties only, and in a case like the present it is impossible to ignore its absence. On that ground I would set aside the decree of the District Court of June 12, 1925, and remit the case for further inquiry and adjudication.

As regards the second point of appeal, I think that the land in respect of which the final decree was entered is substantially the same as that proposed for partition. The facts in this case are not the same as those which influenced the decision in *Jayasekere v. Perera*,[1] but I think they add point to the argument on the first

[1] (*1923*) *26 N. L. R. 198.*

ground. So far as I can see, the deeds on which the parties relied in the Court below have not been proved as required by the Ceylon Evidence Ordinance, 1895, and this point will no doubt receive attention in the further inquiry.

The appellant should, I think, have the costs of this appeal; the cost of the proceedings in the Court below being left in the discretion of the learned District Judge.

MAARTENSZ A.J.—

The intervenient-appellant in this action appeals from an order of the District Judge refusing to allow him to intervene in the action which is one for the partition of a land called Galpotte-elamanana.

The order refusing the application is as follows:—"I have no power to do this."

This order is quite right, as final decree was entered in the action before the application to intervene was made.

The intervenient moves this Court to set aside the final decree either by way of appeal or in revision on the following grounds:—

(1) That the land in respect of which the interlocutory decree was entered is not the same as the land in respect of which the final decree was entered.

(2) That the Commissioner who carried out the commission has not complied with the provisions of section 5 of the Partition Ordinance, No. 10 of 1863.

The first objection is not one which I would uphold in the circumstances of this case. The plan filed with the plaint, which depicts a land 5 acres 3 roods and 3·55 perches in extent, is clearly an incomplete plan, and the difference in area of about 1½ acres was to be expected.

The land is substantially the same, and the difference in area does not prejudice the intervenient. Other considerations would arise if the intervenient had claimed a share out of the extra 1½ acres on the ground that it was a land, or formed part of a land, other than the land Galpotte-elamanana.

The second objection is a more serious one. It is clear from the proceedings themselves that the Commissioner has not complied with the provisions of section 5 of Ordinance No. 10 of 1863.

The proviso to section 5 provides as follows:—

". . . . Provided that the Commissioner shall, thirty days at least before making such partition, affix on some conspicuous part of the land a written notice of the day on which they propose to make the same, and give further notice thereof by beat of tom-tom in the village or place where such land is situated, and in such other manner as shall appear best calculated for giving the greatest publicity thereto."

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In this case the commission issued to the Commissioner on March 13, 1925. The plan was, on the face of it, made in pursuance of this commission on April 4, 1925. The Commissioner, if he gave any notice at all, of which there is no evidence, at the most gave only twenty-one days' notice of the day on which he intended to partition the land.

The appellant's contention is that the final decree is therefore not conclusive, as it is not a decree given as "hereinbefore provided." (Section 9.)

The notice which the proviso to section 5 requires has been the subject of judicial decisions and comment.

In the case of *Catherinahamy et al. v. Babahamy et al.* (*supra*), the question at issue was whether the final decree referred to was the decree made under section 4 or the decree made under section 6.

Hutchinson C.J. held that the final decree was the decree made under section 6, and remarked that "if the Legislature intended the decree under section 4 to be the final decree, there would have been no object in the provisions of sections 5 and 8 requiring the Commissioner to give public notice of the proceedings. (Section 8 refers to decree where a sale has been ordered.)

The final decree was entered up by the District Judge without reference to a Commissioner, in *Sanchi Appu v. Marthelis* (*supra*). An informal partition agreed on by the parties before the action being adopted as the scheme of partition. One of the parties who was not agreeable to the scheme appealed. Pereira J., in setting aside the decree, said :—

> ". . . . Unless a Commissioner were appointed the procedure laid down in the proviso to section 5 of the Ordinance as to notice to the public cannot be observed, and the reason for giving a conclusive effect to the final decree under section 9 of the Ordinance is largely referable to that procedure."

In neither case was the question whether the notice was an essential step in the proceedings directly in issue, as in the case of *Jayewardene v. Weeresekere* (*supra*). In the last mentioned case it was held that—

> "The provision in section 5 of the Ordinance requiring the partition Commissioner, before partitioning the land, to give notice of the day on which he proposes to do so, has regard only to the parties to the action who have already been declared entitled to shares by the preliminary decree."

It was further held that—

> " The object of the notice is to enable those parties to be present at the actual partitioning of the land and raise objections, and not to give general information to the world at large of the pendency of the proceedings, and that the provision is directory and is not a condition precedent to the conclusive character of the final decree under section 9. The expression " decree given as hereinbefore provided " was held to have reference to such essential steps as investigation into the title, the order to partition the land, and the allotment of shares in severalty accordingly to the Commissioner's report . . . ."

I venture to think that in the case of *Jayewardene v. Weeresekere* (*supra*) too narrow a view was taken of the scope of the notice required by section 5.

Section 9 of the Ordinance provides that—

> " The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty."

The only remedy a person has, who has been prejudiced by such partition or sale, is an action for damages.

I would therefore expect the Ordinance to make provision for giving public notice of the pendency of the partition action. The only sections which provide for such notice are, in the case of a decree for partition, section 5 and, in the case of a sale, section 8.

If the Legislature intended this notice to be a notice *inter* parties, it need only have provided that the Commissioners should give such parties notice by a writing under their hand.

The section, however, provides in imperative terms that a notice should be affixed on the land, and that further notice should be given by beat of tom-tom in the village or place where the land is situated, and in such other manner as shall appear best calculated for giving the greatest publicity thereto.

I find it impossible to ignore the terms of this section, and I am of opinion that the notice was intended to give the public notice of the intended partition, so that any body affected thereby, whether he be a party or not, might intervene before the final decree was entered.

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My opinion is confirmed by the fact that under section β a notice has to issue to the parties before the partition proposed by the Commissioner is confirmed.

It is I think incumbent on a party to a partition action to see that every necessary step is taken in the action, if he wishes to rely on the conclusive character of the decree, especially as it has been held that a final decree in a partition suit cannot be set aside even on the ground that it had been obtained by fraud and collusion. I need only refer to the case of *Fernando v. Marsal Appu* (*supra*).

The conclusive character of the final decree in a partition action has been of the greatest value in settling title to land, and I would hesitate to whittle down the effect of such a decree ; but where, as in this case, the notice is in the face of the proceedings defective and no transactions have taken place on the faith of the decree, I think the application to set aside the decree should be granted.

I accordingly set aside the decree of the District Court dated June 12, 1925, and remit the case for further inquiry and adjudication.

The cost of such proceedings to be in the discretion of the District Judge. The appellant should, I think, have the costs of appeal.

*Set aside ; case remitted.*