1974 *Present :* **Walgampaya, J., Weeraratne, J., and Walpita, J.**

S. SIVANANDAN and another, Appellants, *and* SINNAPILLAI and 23 others, Respondents

S. C. 563/69 (F)—D. C. Point Pedro, 9503

Partition action—Interlocutory decree—Liability to be set aside if a claimant mentioned in the Surveyor's report has not been given due notice of the action—Partition Act (Cap. 69), ss. 12, 22 (1), 48 (1), 70, 77, 79—Civil Procedure Code, s. 356.

Where, in a partition action, a claimant (not being a party to the action) is mentioned in the Surveyor's report, the Court has no power to dispense with the service of notice on the person who is alleged to be a claimant. In such a case, the notice is imperative under Section 22 (1) of the Partition Act and the provisions of Sections 77 and 79 should be observed and Section 356 of the Civil Procedure Code followed in serving the notice. Where these Sections have not been strictly followed, the Supreme Court has power to set aside, in revision, the Interlocutory Decree entered in the absence of the claimant, more especially if no declaration under Section 12 of the Partition Act has been filed by the plaintiff.

APPEAL from a judgment of the District Court, Point Pedro.

A. Mahendrarajah, for the petitioner-appellants.

Respondents absent and unrepresented.

Cur. adv. vult.

June 28, 1974. WALPITA, J.—

This is an appeal by the Petitioners-Appellants from an order of the District Judge refusing to set aside the Interlocutory Decree entered in this case. These appellants were not parties to this action. They sought to have the Interlocutory Decree set aside, to have themselves added as parties, and to be given an opportunity to file statements of claim and thereafter proceed with the action. The learned District Judge after inquiring into their Petitioner refused the Petitioners' application. This appeal is from that Order.

The Plaintiff-Respondent has filed this action for a partition of a land called ' Kanchawarekanchiema '. In her plaint she stated *inter alia* that one Theivanai died leaving three children, Kathiratamby, Sinnadurai and Muttupillai, and that Kathiratamby also died leaving behind the 6th, 7th, 8th defendants and Parameswary, the 2nd Petitioner-Appellant in this case, and that she had been dowried other lands. In view of that averment

Parameswarie, the 2nd Petitioner-Appellant was not given any shares in this land according to the plaint nor made a party. When the Surveyor went to survey the land, the subject matter in this case, on a commission issued by Court, the only persons present at the time of the survey were the plaintiff-respondent, 3rd defendant-respondent and the 21st defendant-respondent. The plaintiff, according to the report of the surveyor, stated that the 21st defendant-respondent was occupying lot 2 in the Plan filed of record No. 1293 marked 'X'. The 21st defendant-respondent, however, had stated to the Surveyor that the entire land with its appurtenances belonged exclusively to her and was dowried about 4½ years ago to her daughter, the said Parameswary the 2nd Petitioner-Appellant, wife of Subramaniam Sivanandan the 1st Petitioner-Appellant, and that the two Petitioners were presently at 104, Mutwal Street, Mutwal, Colombo. In view of this statement of the Commissioner in his report, the plaintiff's proctor moved for notice on the claimant. Notice was issued through the Fiscal, Western Province, and on 12.2.1968 it was reported that the notice was not served as the inmates of the premises stated that there was no one by that name. Again on 13.2.1968 journal entry states that notice was not served as the inmates stated that there was no one by that name. In consequence of that, the proctor for the plaintiff moved that as the Fiscal had reported that there was no one by that name that the service of notice on this party be dispensed with. The Court accordingly made an order 'notice on disclosed party dispensed with'. Thereafter the Petitioners were not noticed nor according to them were they aware of the partition case. There was no contest in this case and the trial took place on 5.8.1968, when the Plaintiff-Respondent gave evidence. In her evidence she stated, in proving the pedigree, that Kathirathamby died leaving behind the 6th, 7th, 8th defendants, and Parameswary the 2nd Petitioner-Appellant, who was dowried other lands. Thereafter the judgment was given accepting the evidence of the plaintiff and Interlocutory Decree has been entered in terms of the judgment.

The Petitioners-Appellants made an application on the 29th of November, 1968 seeking to have the Interlocutory Decree set aside and that they be permitted to intervene and prove the claim of the 2nd Petitioner-Appellant. The grounds urged were that she had not been noticed in terms of Section 22 (1) of the Partition Act although the Surveyor had in his report referred to a claim on behalf of the 2nd Petitioner.

The learned District Judge after inquiring into their petition, stated the Court had no power to set aside the Interlocutory Decree on the grounds urged by the Petitioners and refused the

application with costs. In the course of the order the learned District Judge examined the law relating to this matter and stated that where a person, who is not a party, is disclosed as one who has claimed rights in the land at the time of the survey and the Commissioner makes a report to that effect, it is the duty of Court under Section 22 (1) to give notice of the action to such person. Such a person is not added as a party, but only notice of the action is given to him and it will be open to him under Section 70 to make an application to Court to have himself added as a party. Once he is added as a party he is entitled to have summons served on him. Failure to serve summons on such a party is a fatal irregularity which will enable that party to have an Interlocutory Decree or even a Final Decree set aside on the ground that no summons had been served. The case of a person who had been noticed to appear but who had not been added as a party is quite different and there are a series of decisions of the Supreme Court making this position quite clear.

If no notice has been served on a party who should have been noticed under Section 22 and the Interlocutory Decree or Final Decree had been entered thereafter, such party will not be entitled to have such a decree set aside for the non-service of notice. Section 48 (1) which declares an Interlocutory Decree and Final Decree final and conclusive will be binding on him " notwithstanding any omission or defect of procedure " or " the fact that all persons concerned are not parties to the Partition Action " and if he had any claim to a share in the land it would be open to him only to sue for damages the parties responsible for depriving him of that share. The learned District Judge has examined all the relevant authorities of this Court (vide 59 N.L.R. 400, 68 N.L.R. 313, 58 N.L.R. 575, 71 N.L.R. 73, 62 N.L.R. 572, 66 N.L.R. 241) and has in our view correctly come to the conclusion that the Petitioners in this case cannot seek to have the Interlocutory Decree set aside on the ground that notice of this action has not been served on them as required by Section 22.

Counsel for the Petitioners-Appellants, however, appealed to us to exercise our revisionary powers and consider setting aside the Interlocutory Decree in the circumstances of this case. We know that the 2nd Petitioner was mentioned in the plaint as a person who had inherited certain shares, but as she was dowried other lands she was not made a party. The plaintiff in her evidence also stated that she had been dowried other lands. Apart from that bare statement that she was dowried other lands no deed was referred to by which she was dowried other lands nor did the District Judge on whom is cast a duty in a partition action to examine the title of parties seek to probe

this matter. Further the 2nd Petitioner's name had been mentioned by the 21st defendant, the mother of the 2nd Petitioner, who stated that the 2nd Petitioner was entitled to the entire land. No doubt the Proctor for the Plaintiff-Respondent on seeing the report moved that the 2nd Petitioner be noticed and notice was in fact taken out, but as it was not served he had moved Court to dispense with the issue of notice. The Court had without considering the implications of such dispensation, allowed it. In fact the Court should have required that further attempts be made to serve notice on the disclosed party and even to direct that the notice be served by substituted service. If the 2nd Petitioner had been added as a party defendant, then she would have been entitled to have summons served on her and if summons had not been served on her, as the notice in this case had not been served, the learned District Judge would have ordered substituted service of summons. But because there was only a notice to be served this had not been done.

The learned District Judge was wrong when he dispensed with the service of notice on the 2nd Petitioner. Under Section 22 (1) such notice is imperative and the provisions of Sections 77 and 79 should have been observed and Section 356 of the Civil Procedure Code followed in serving such a notice. If these Sections are not strictly followed the protection given to rightful claimants to lands subject to partition will be removed resulting in serious loss to them. This Court should in such cases act by way of revision and correct mistakes in procedure.

Mr. Mahendrarajah, counsel for the Petitioners-Appellants drew our attention also to the fact that according to the Journal Entries, no declaration under Section 12 of the Partition Act appears to have been filed in this case. We have also examined the record and it seems to us the provisions of Section 12 of the Partition Act have not been followed. Under Section 12, after the partition action is registered as a *lis pendens* the plaintiff is under a duty to file a declaration from a Proctor certifying that all entries in the register maintained under the Registration of Documents Ordinance relating to the land which constitutes the subject matter of the action, has been personally inspected by that Proctor after the registration of the section as a *lis pendens* and it must contain a statement of the name of every person found on inspection of those entries to be a person whom the plaintiff is required under Section 5 to include in the plaint as a party to the action. Now in this case if there had been such a declaration, perhaps the interests of the 2nd Petitioner who is alleged to have got the entire land on Deed

Y2 would have been disclosed and she would have been added as a party and all these difficulties would have been obviated. Considering therefore the defects in the procedure adopted in this case, we are of the view that we should use our powers of revision and set aside the Interlocutory Decree in this case.

The Interlocutory Decree is therefore set aside. The case will go back to the District Court, the Petitioners will be added as parties to this action and summons served on them and the trial proceeded with *de novo*.

The appellants are entitled to costs of his appeal.

WALGAMPAYA, J.—I agree.

WEERARATNE, J.—I agree.

Appeal allowed.