1953 *Present :* **Nagalingam A.C.J.**

SETUN BIBEE *et al.*, Appellants, and ABUSALLY MARIKAR, Respondent

S. C. 129—C. R. Kegalle, 13,669

Partition action—Minority of defendants—Summons served on them personally—Minors not legally represented—Effect on proceedings—Civil Procedure Code, s. 480.

Some of the defendants in a partition action were minors. No appointment of a guardian *ad litem* had been made in respect of them, and service of summons was made on them personally. After final decree was entered they moved under section 480 of the Civil Procedure Code to have the decree set aside.

Held, that the final decree could be set aside for the reasons (1) that as the defendants were minors, the service of summons on them personally was ineffective, and (2) that section 480 of the Civil Procedure Code, which declares that an order made in an action in which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose, is not inapplicable to actions filed under the Partition Ordinance.

APPEAL from a judgment of the Court of Requests, Kegalle.

A. L. M. Hashim, for the defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *K. S. Rajah*, for the plaintiffs respondents.

Cur. adv. vult.

October 2, 1953. NAGALINGAM A.C.J.—

This is an appeal from an order refusing to set aside a final decree entered under the Partition Ordinance. The application to set aside the decree was made to Court on the ground that the 2nd to the 5th defendants-appellants were minors at the date of the institution of the action and that no appointment of a guardian *ad litem* had been made in respect of them and that the final decree too was entered without any representation of the minors having been made. None of the minors appeared in Court during the course of the proceedings, nor did even the sole major defendant appear. As to why the major defendant did not appear there is no explanation, but in the result the case was adjudicated upon *ex parte* on the testimony of the plaintiff in the absence of any of the defendants.

There is no evidence to show whether the plaintiff stood in any relationship to the defendants or not, but whatever that may be the alleged service of summons on the minor defendants cannot be regarded as a true report. Two of the defendants, namely the 4th and the 5th, were stated in 1950 to be fifteen and fourteen years of age respectively. The action was filed in 1940, so that at the date the summons was reported to have been served on these two defendants they were to say the least five and four years old. The 2nd and 3rd defendants must have been older, but it is obvious that no effective service of summons could have been effected on them too.

The learned Commissioner held, relying upon the cases of *Randeni v. Allis Appu* [1] and *Fernando v. Fernando* [2], that even though some of the defendants may have been minors the final decree entered under the Partition Ordinance was binding on them, and that their remedy lay under the other provisions of the Partition Ordinance. This view, however prevailed at a time when the final decree under the Partition Ordinance was regarded as sacrosanct and inviolable ; but that view has since been departed from.

In the case of *Jayawardene v. Weerasekera* [3] de Sampayo J. held that where the proceedings had not been conducted in conformity with the essential provisions prescribed by the Partition Ordinance, a decree entered thereunder acquired no immunity against its being declared null and void. In the case of *Caldera v. Santiago Pillai* [4] a final decree

[1] *(1900) 1 Br. 284.*
[2] *(1905) 9 N. L. R. 241.*
[3] *(1917) 4 C. W. R. 406.*
[4] *(1920) 22 N. L. R. 155.*

entered was set aside on the ground that service of summons on the defendant had not been duly effected. To the same effect is the more recent case of *Pablis v. Euginahamy*[1].

Once the barrier of the sacrosanct character of a final decree is broken through, the reasoning underlying the case of *Ranmeni v. Allis Appu* and *Fernando v. Fernando* (supra) for holding that the decree cannot be set aside fails, and one is free to consider what the effect of minority of defendants is on proceedings in a partition action, where they have not been legally represented.

One aspect of the question discloses the existence of reasons identical with those given for setting aside a decree on the ground that summons was not duly served on the defendant. Where the defendants are minors, no effective service of summons can be made on them personally. In this case, as pointed out earlier, two of the minors in any event were five and four years of age. It is difficult to understand the argument that the service alleged to have been made on those two infants, if the service was made at all, must be regarded as satisfactory. The true position, to my mind, is that no service of summons was effected on them and that there was a non-compliance with one of the essential steps that had to be taken under the Partition Ordinance before a valid decree could have been entered under it. This view would be directly based upon the cases of *Jayawardene v. Weerasekera*, *Caldera v. Santiago Pillai* and *Pablis v. Euginahamy* (supra).

The other aspect of the question is one that arises upon a consideration of section 480 of the Civil Procedure Code, which declares that an order made in an action to which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose. In this case the minors have made the necessary application and they are entitled to the relief provided by the section. I do not think it sound to say, as contended for by respondent's counsel, that section 480 has no application to actions filed under the Partition Ordinance. The Civil Procedure Code governs the procedure to be followed in all the Civil Courts of the Island subject to any special provision to be found in any particular enactment. The Partition Ordinance makes no provision with regard to service of summons or for the appearance of minors and the provisions of the Civil Procedure Code indeed do apply to Partition actions as well in regard to such service or appearance.

The appellants have made out their case and their appeal is entitled to succeed.

I therefore set aside the order of the learned Commissioner and vacate the decrees entered in the action and set aside all proceedings in the action subsequent to the order for the issue of summons. Summons will be taken out by the plaintiff on the 2nd to the 5th defendants and served on them or their guardian *ad litem* and the action will thereafter proceed in the ordinary way. The appellants will be entitled to the costs of appeal and of the proceedings had in the lower Court.

Appeal allowed.

[1] *(1948) 50 N. L. R. 346.*