1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

SIRIYA, Appellant, *and* AMALEE *et al.*, Respondents

S. C. 223—D. C. (Inty.) Kegalle, 8,077

Partition action—Interlocutory decree—Scope of its conclusive effect—Contesting defendant's absence due to causes beyond his control—His right to re-open the interlocutory decree—Partition Act, No. 16 of 1951, ss. 48, 79.

In a partition action governed by the Partition Act, No. 16 of 1951, interlocutory decree was entered in the absence of the contesting defendant (appellant) who was prevented by causes beyond his control from attending Court on the trial date or giving instructions to his Proctor. Although he fulfilled all the conditions which normally would entitle a party to relief from an *ex parte* order made against him for failure to appear at a stage of the action, the appellant was not given an opportunity of being heard.

Held, that section 48 of the Partition Act did not preclude the appellant from obtaining relief. The omission to give the appellant an opportunity of being heard was not merely an omission of procedure but was a far more fundamental matter in that it was contrary to the rule of natural justice embodied in the maxim *audi alteram partem.*

APPEAL from an order of the District Court, Kegalle.

C. R. Gunaratne, for the 10th defendant-appellant.

Felix Dias, with *Mrs. Lakshmi Dias*, for the plaintiff-respondent.

Cur. adv. vult.

April 11, 1957. WEERASOORIYA, J.—

This is an action by the plaintiff-respondent for the partition of a certain land on the basis that the original owners were two persons Wattuwa and Rattarana who were entitled to the land in equal shares. After the action had been filed the 10th defendant, who is the appellant, intervened and was added as a party. According to the answer filed by him the original owner was one Pincha who died leaving three children, namely, Wattuwa and Rattarana aforesaid, and also Undiya the father of the 10th defendant and he claimed an undivided $\frac{1}{3}$ share as the sole heir of Undiya. None of the other defendants filed any answer.

This being the only contest, the matter was set down for trial on the 8th June, 1955, on which date the 10th defendant was absent and his proctor stated that he had no instructions from his client and was not appearing for him. The Court then proceeded to hear the evidence of the plaintiff and after his examination-in-chief (there being no cross-examination) the case was put off for the 22nd and 23rd June, 1955, for the tendering of documents and for judgment respectively. It is not clear from the record whether the Court purported to hold the trial in which the plaintiff's evidence was taken as an *ex parte* or *inter partes* proceeding. But in view of the decision in *Andiappa Chettiar v. Sanmugam Chettiar* [1] the trial should be regarded as having been held *ex parte* since the 10th defendant's proctor said that he was not appearing

[1] *(1932) 33 N. L. R. 217.*

for him and had no instructions. The Partition Act No. 16 of 1951 (which governs the case) contains no provision dealing specifically with a situation where either a plaintiff or defendant is absent on the trial date, but section 79 states that in any matter or question of procedure not provided for in the Act, the procedure laid down in the Civil Procedure Code should be followed if such procedure is not inconsistent with the provisions of the Act. Assuming that in an *ex parte* trial of a partition action governed by Act No. 16 of 1951 the procedure laid down in the Civil Procedure Code should be followed, the question whether the interlocutory decree that is entered should be a decree *nisi* in the first instance does not appear to arise for determination in the present case. It is sufficient to state that the interlocutory decree that was in fact entered after the *ex parte* trial held on the 8th June, 1955, was a decree absolute in the first instance.

On the 17th June, 1955, the proctor for the 10th defendant filed a petition and affidavit of his client and moved that the case be refixed for trial. According to the affidavit the 10th defendant had been prevented by serious illness from attending Court on the trial date or giving instructions to his proctor. There is a journal entry under that date that the proctor for the plaintiff objected to this " as the case is already decided ". But, as pointed out by me, the case was far from decided at that date. The Judge made an order on the motion that the matter be mentioned on the 22nd June, 1955, (which was the date on which the case was to be called for tender of documents). On that date as some of the documents were not filed a further date (the 6th July, 1955) was given for filing them. The motion of the 10th defendant's proctor which was to be mentioned on the 22nd June appears to have been lost sight of completely. In the meantime, on the 25th June, 1955, the plaintiff filed all his documents and moved that judgment be given and the Court fixed the 6th July, 1955, for judgment, which was given on that date ordering an interlocutory decree for partition on the basis of the pedigree and shares as set out in the plaint. The interlocutory decree seems to have been entered on the 15th September, 1955. No appeal was filed against that decree.

On the 22nd August, 1955, the 10th defendant's proctor drew attention to the motion and affidavit of the 17th June, 1955, and it was only then that the Court fixed the matter for inquiry which ultimately took place on the 20th October, 1955. The Court delivered its order on the 21st November, 1955, holding that as interlocutory decree had already been entered the 10th defendant was precluded by section 48 of the Partition Act from obtaining the relief applied for. From this order he has appealed.

Section 48 (1) of the Act provides, *inter alia*, that the interlocutory decree that is entered thereunder shall, *subject to the decision on any appeal which may be preferred therefrom*, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates *and notwithstanding any*

omission or defect of procedure. The contention of learned counsel for the plaintiff-respondent is that as there was no appeal from the interlocutory decree section 48 precluded the 10th defendant from obtaining the relief applied for even though his motion and affidavit had been filed long before the interlocutory decree was entered, the omission (if any) on the part of the Court to make an order thereon prior to the entering of the decree being a procedural omission and covered by the terms of that section.

The statements in the 10th defendant's affidavit, if true, would seem to provide a reasonable explanation of his failure to be present at the trial on the 8th June, 1955, or to give instructions to his proctor. The truth of those statements was not disputed by the plaintiff's proctor at the inquiry nor does it appear that he contended that they did not constitute a reasonable excuse, or that there was undue delay in making the application. I shall assume, therefore, for the purpose of this appeal that the 10th defendant has given a satisfactory explanation that his absence on the 8th June, 1955, was due to causes beyond his control. If, however, the order of the learned trial Judge is correct it means that the 10th defendant is without any remedy even though he has not been given an opportunity of being heard and has fulfilled all the conditions which normally would entitle a party to relief from an *ex parte* order made against him for failure to appear at a stage of the action.

In my opinion an omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the maxim *audi alteram partem.* As stated in *Shaw v. The Attorney General* [1] a judgment obtained in such circumstances has the "incurable vice of being contrary to natural justice because the proceedings are *ex parte* and take place in the absence of the party affected by them ". Although no appeal has been filed against the interlocutory decree, the conclusive effect given to such a decree under section 48 (1) of the Partition Act does not, in my view, attach to it in the circumstances disclosed in this case. It is to be noted that while under section 48 (3) and (4) it is possible that in certain cases the interlocutory decree shall have the final and conclusive effect declared by section 48 (1) notwithstanding that it was entered by a Court not competent to do so or was obtained by fraud and collusion, no such effect is, in terms, given to a decree which has been entered *ex parte* in the sense that a party against whom it operates was not afforded an opportunity of being heard.

The present appeal is from an order which is tantamount to a refusal to give the 10th defendant an opportunity of adducing evidence in proof of his claim. While I refrain from expressing an opinion (as no argument was addressed to us on the point) whether once the interlocutory decree had been entered it was open to the trial Judge to vacate it on the grounds urged at the inquiry before him, I would, for the reasons already stated, set aside that order and (acting in revision) also the interlocutory decree. The case is remitted to the lower court so that the 10th defendant may

[1] *(1870) 2 P. & D. 156.*

be given an opportunity, with notice to all the other parties, of adducing evidence in proof of his claim and such further proceedings be taken thereafter as are in accordance with law.

The 10th defendant will be entitled to his costs of appeal. The costs of the trial and of the inquiry held on the 8th June and 20th October, 1955, respectively will be costs in the cause.

SANSONI, J.—I agree.

Order set aside.