1958 *Present:* **Basnayake, C.J., and Pulle, J.**

BRAMPY APPUHAMY, Appellant, *and* MENIS APPUHAMY *et al.*, Respondents

S. C. 1 (Inty.)—D. C. Gampaha, 2,972/P

Partition action*—Corpus—*Extent surveyed by Commissioner less than extent indicated in plaint—Position resulting therefrom—Partition Act, No. 16 of 1951, ss. 4, 16, 23 (1), 25, 48 (1)—Strict compliance with provisions of Act imperative.

In a partition action it is imperative that the provisions of the Partition Act should be strictly observed.

The *corpus* sought to be partitioned in the present action was described in the plaint as a land about six acres in extent, and a commission was issued to a surveyor to survey a land of that extent. The surveyor, however, surveyed a land of only 2 acres and 3 roods. Interlocutory decree was also entered in respect of a land 2 acres and 3 roods in extent without any question being raised by any of the parties as to the wide discrepancy between the extent given in the plaint and that shown in the plan made by the surveyor.

None of the defendants had averred under section 23 (1) of the Partition Act that only a portion of the land described in the plaint should be made the subject matter of the action.

Held, (i) that the Court acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint.

(ii) that when the surveyor proceeded to execute his commission and was unable to locate a land of about 6 acres, he should have reported that fact to the Court and asked for its further directions.

APPEAL from a judgment of the District Court, Gampaha.

Sir Lalita Rajapakse, Q.C., with *D. R. P. Goonetilleke* and *D. C. W. Wickremasekera*, for 6th Defendant-Appellant.

T. P. P. Goonetilleke, for Plaintiff-Respondent.

F. W. Obeyesekere, with *G. L. L. de Silva*, for 5th, 9th, 10th, 12th, 13th and 14th Defendants-Respondents.

November 13, 1958. BASNAYAKE, C.J.—

The plaintiff instituted this action for the partition of a land called Meegahawatte described in the schedule to the plaint. In that schedule the land is described as a land bounded on the north by Kongahawatta belonging to Gane Atchi Pathirennehelage Dingihamy and others, east by the live fence of the land belonging to Gane Atchi Pathirennehelage Podisingho, south by the ditch of the land belonging to Gane Atchi Pathirennehelage Baronchi Appu, and west by the land belonging to Gane Atchi Pathirennehelage Suwathan Appu and others, and containing

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in extent about six (6) acres together with everything belonging thereto, registered in F. 17/134. A commission was issued to a surveyor under section 16 of the Partition Act, No. 16 of 1951, requiring him to make a plan of the land described in the schedule to the commission. The description of the land in that schedule is identical with the description given in the schedule to the plaint except for the omission of the reference to the particulars of the register in which the deeds affecting the land are registered. The commissioner did not survey a land of six acres but he surveyed a land of 2 acres and 3 roods depicted in plan No. 1525 of 24th September 1952 and marked " X ". That land contains two well defined boundaries, a village committee road on the north-west and a cart road on the south-west. These boundaries find no place in the description of the land given in the schedule to the commission. Without any question being raised by any of the parties as to the wide discrepancy between the extent given in the plaint and that shown in the plan the trial proceeded. The plaintiff produced two deeds P2 and P3 in support of his title. Both these deeds speak of a land of about 6 acres in extent and describe it in the same way as it is described in the plaint. The learned District Judge after trial entered an interlocutory decree in respect of a land 2 acres and 3 roods in extent, allotting the shares which according to the evidence each of the parties was entitled to. The present appeal is by the 6th defendant. In his petition of appeal he has taken the objection that the land depicted in the plan filed of record is not the land described in the schedule to the plaint.

It is clear from the proceedings that the provisions of the Partition Act have not been strictly adhered to. Section 4 of that Act requires that " in addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented to a court for the purpose of instituting a partition action shall contain the following particulars :—

(*a*) the name, if any, and the extent and value of the land to which the action relates ;

(*b*) a description of that land by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint. "

In the instant case the plaintiff sought to partition a land of about 6 acres in extent and the surveyor was commissioned to survey a land of about that extent. His commission gave him no authority to deviate from the instructions issued to him. When the surveyor proceeded to execute his commission and was unable to locate a land of about 6 acres he should have reported that fact to the court and asked for its further directions. Without doing so he proceeded to survey a land of 2 acres and 3 roods in extent. He has therefore not duly executed his commission. Section 16 of the Partition Act No. 16 of 1951 requires the Court to order the issue of a commission to a surveyor directing him *to survey the land to which the action relates* and that order was accordingly made.

It is imperative that in an action such as a partition action which gives the decree under it (section 48 (1)) an effect which is " 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 decrees relate ", the provisions of the Partition Act should be strictly observed. In the instant case it does not appear that the Judge and the lawyers representing the parties gave close attention to the provisions of the statute under which these proceedings were taken.

The statute contains elaborate provisions designed to ensure that the land which is partitioned is the land which is described in the plaint except where a defendant avers that that land is only a portion of a larger land which should have been made the subject matter of the action or that only a portion of the land so described should have been made such subject matter (s. 23 (1)). Where such an averment is made a fresh commission has to be issued for the survey of the extent of land referred to in the averment.

In the instant case none of the defendants averred that only a portion of the land described in the plaint should have been made the subject matter of the action. The court therefore acted wrongly in proceeding to trial in respect of what appears to be a portion only of the land described in the plaint. Section 25 empowers the court to try and determine the matters referred to therein and examine the title of each party to or in the land to which the action relates. In the instant case the action relates to one land and the determination of the court to another. The proceedings, which are contrary to the provisions of the statute, must therefore be set aside.

It is unfortunate that these proceedings which commenced in 1952 should now after the lapse of six years have to be set aside and that the parties have to incur expense which could easily have been avoided had their lawyers been careful, and had the court itself shown vigilance in seeing that provisions of the Act were observed. We think that the fairest order in this case is that the case should go back for a retrial from the stage of the plaint. We accordingly set aside the interlocutory decree entered by the learned District Judge and direct that the case should be sent back for a retrial commencing from the first step prescribed by the Act. The plaintiff will no doubt consider whether his plaint needs amendment in the light of what has transpired. If any of the defendants had averred timeously that only a portion of the land described in the plaint should have been made the subject matter of the action to the plaint, the delay and expense consequent on taking the objection at this late stage could have been avoided. The proctors for the parties must take the blame for the present situation. It is their lack of care that has rendered a retrial necessary. We refrain from ordering the proctors to pay the costs of their clients in the hope that they will not charge fees from their clients in the retrial that has been rendered necessary. At the same time we wish to state that if like or similar cases in which parties have suffered for want of diligence or care

on the part of their proctors come before us we shall be compelled in the public interest to order the proctors to pay the costs of proceedings which have to be set aside owing to their want of care.

Our order in the instant case is that each party should bear his costs of the abortive trial. The 6th defendant-appellant is entitled to the costs of this appeal as we see no reason to depart from the rule that costs follow the event.

PULLE, J.—I agree.

Case sent back for retrial.