

1948

*Present : Dias and Nagalingam JJ.*PABLIS, Appellant, and EUGINAHAMY *et al.*, Respondents*S. C. 49—D. C. Negombo, 13,434**Partition action—No proper service of summons on a party—Irregularity discovered after final decree—Party not bound by such decree.*

Where summons in a partition action is not properly served on a party, such party is not bound by the final decree in the case. The Judge can vacate such decree even where the irregularity has been discovered after final decree was entered.

APPEAL from a judgment of the District Judge, Negombo.*C. R. Gooneratne*, for fifth defendant appellant.*H. A. Koattigoda*, for plaintiff respondent.*Cur. adv. vult.*

September 2, 1948. DIAS J.—

This is a partition action. The following are the material facts :—

The proceedings began in May, 1945. The fifth defendant could not be served with summons. The plaintiff moved for and obtained an order for substituted service of summons on him. The process server's affidavit dated January 29, 1946, shows that he merely affixed a copy of the summons and the plaint to a coconut tree on the land. On January 31, 1946, the journal entry reads "Summons is served on second, fourth, fifth and eighth defendants by substituted service They are absent". The trial took place in September, 1946, and interlocutory decree was entered. A commission was issued for the partition of the land. On January 24, 1947, the surveyor's plan was received, and the Court ordered notice to issue on all parties in order to enter final decree.

On March 21, 1947, the Fiscal reported that the fifth defendant could not be served with this notice. Fifth defendant, however, appeared in Court, and Messrs. de Zoysa & Loos filed his proxy, and notice of objections was given. Time was allowed to the fifth defendant to file his objections on April 18, 1947. On that day the fifth defendant filed no objections, nor was any extension of time asked for. Final decree was therefore entered. The Judge, however, made the following minute in the journal: "I note that Mr. de Zoysa states that his client (fifth defendant) has not been given the correct share in the interlocutory decree. Fifth defendant is bound by the interlocutory decree, and I am unable to interfere in this matter now".

What that order means is clear. At that date it was not known to anybody that an irregularity had occurred in the service of summons on the fifth defendant. The proctors for the fifth defendant apparently had not been instructed that summons in the action had not been personally served on their client. Everyone believed, erroneously as subsequent investigations have shown, that there had been a proper substituted service of summons on the fifth defendant. That is why the District Judge recorded that the fifth defendant is bound by the interlocutory decree and entered the final decree.

Thereafter the irregularity was discovered. There is an affidavit dated May 19, 1947, and a petition bearing date May 20, 1947, in which the point is expressly taken that no notice of the action had been given to the fifth defendant. The Judge ordered the case to be called on May 26, 1947, and thereafter on June 23, 1947. On the latter date it is recorded that the "Plaintiffs and respondents have no objection". The plaintiff however appears to have thought better of it, for he filed objections. The matter came up for inquiry on August 29, 1947. The

District Judge held that there has, in fact, been no proper substituted service of summons on the fifth defendant. He nevertheless refused to give him any relief to appear and prove that he was entitled to a larger share in the land than has been allotted to him on the ground that he has appeared after the interlocutory decree was entered and although given the opportunity to do so, he failed, before the final decree was entered, to file any objections to the interlocutory decree and other proceedings on the ground that the procedure was irregular and that substituted summons had not been duly served on him. He, therefore, held that the final decree was entered *inter partes* and is binding on the fifth defendant, who appeals from that order.

Section 3 of the Partition Ordinance directs that summons shall be served upon the defendants or such of them as can be found, or if they cannot be found, *upon the person or persons in the actual possession of such property*, "or if there be no person in possession, *in such manner as the Court shall direct*". The District Judge has found as a fact that there has been no proper service or substituted service of the summons on the fifth defendant. He was not resident on the land, but in another locality. There was no person on the land who could be served with summons on his behalf. The Court gave no directions as to the manner in which the substituted service was to be effected. Therefore to affix the process and a copy of the plaint to a tree on the land cannot be regarded as a proper substituted service.

The law on this point is fully set out in Jayewardene on Partition at pages 65 *et seq.* The requirements of section 3 must be strictly followed, otherwise even a final decree is liable to be set aside at the instance of a party who proves that its provisions have not been observed—*Juan Perera v. Stephen Fernando*¹, *Caldera v. Santiagopillai*², *Thambirajah v. Sinnamma*³. In the last case Maartensz J. following *Caldera v. Santiagopillai* held that a Court of first instance had power to vacate a final decree in a partition action upon proof that summons had not been served upon a party to the action.

The question then is whether the relief claimed by the fifth defendant can be denied him simply because he only discovered the irregularity after the final decree had been entered? The final decree derives its validity from the interlocutory decree, which in turn depends upon the proper service of summons on the various parties to make it a binding *inter partes* decree. No question of estoppel arises in this case. In my opinion the fifth defendant is entitled to the relief he seeks. To deny him that relief would be an injustice. The plaintiffs apparently thought so too, because they first agreed to the application, but later thought better of it. Once it is conceded that there has been no proper service of summons on him, the fifth defendant is not bound by the final decree which has been entered *ex parte* against him.

I would therefore allow the appeal with costs.

NAGALINGAM J.—I agree.

Appeal allowed.

¹ (1920) 22 N. L. R. 155.

² (1935) 36 N. L. R. 442.

³ (1902) 3 Br. 5.