

1935

*Present : Maartensz J.*THAMBIRAJAH *v.* SINNAMMA *et al.*

235—C. R. Anuradhapura, 16,789.

*Partition action—Final decree entered—Summons not served on party—  
Application to vacate decree—Powers of Court.*

A Court has power to vacate the final decree entered in a partition action upon proof that summons had not been served upon a party to the action.

**A** PPEAL from a judgment of the Commissioner of Requests, Anuradhapura.

*C. V. Ranawake*, for the first defendant, appellant.

*P. Tiyyagarajah*, for the plaintiff, respondent.

April 5, 1935. MAARTENSZ J.—

This is an action for the partition of a land called Batugahahena *alias* Kongahahena which admittedly belonged to Ranhamy Veedi Arachchi and Chettiar Thandavanayer in equal shares. The share of the former

has passed to the second and third defendants. The plaintiff allots to himself and his wife, the first defendant, the half share of the latter. Summons was reported to have been served on the first defendant and the other defendants; evidence was recorded on February 18, 1931, and an interlocutory decree entered in terms of the prayer of the plaint. Final decree was entered on September 16, 1931. On June 14, 1934, the first defendant filed a petition and an affidavit in which she stated that she had not been served with summons; that the plaintiff is not an heir of Thandavanayer and that she is entitled to the whole of that half share, and moved that the decree entered in the case be set aside.

The learned Commissioner acceded to the request of the parties that he should first determine the question whether he had authority to set aside the decree even if the allegations in the first defendant's petition and affidavit were true. He has held on the authority of certain cases referred to by him that he had no jurisdiction to set aside the interlocutory decree and the final decree entered in the case. He did so on the authority of two cases—*Randeni v. Allis Appu*<sup>1</sup> and *Ranhamy v. Perera*<sup>2</sup>. The latter case was a decision which proceeded on entirely different facts and is not apposite to the question for decision in this case. But the former case certainly supports the order of the learned Commissioner. That case however was decided in 1900 and since then the trend of authority is against it. In the case of *Perera v. Fernando*<sup>3</sup> the final decree was set aside because, among other reasons, summons was not served on the appellant. In the case of *Podi Sinno v. Coyanis Appu*<sup>4</sup> it was held that the District Judge had jurisdiction to amend the decree on the application of a party to the suit who had not received notice of trial. It is true that since that case it has been held that a party who is served with summons is not entitled to receive notice of the trial—see *Kannangara v. Silva*<sup>5</sup>. But that decision does not interfere with the principle laid down in the case of *Podi Sinno v. Coyanis Appu* (*supra*). Finally in the case of *Caldera v. Santiago Pillai*<sup>6</sup> it was held that the District Court had jurisdiction to set aside a decree on the application of a party to the suit who had not been served with summons.

Whatever my own opinion may be, I think I must follow the trend of recent authority and I set aside the order appealed from and send the case back for the Commissioner to determine whether the first defendant had been served with summons. If he finds that she has not been served with summons he will set aside the interlocutory decree and the final decree and entertain the claim made by the first defendant and proceed with the trial *de novo*.

The costs of this appeal will be paid by the first defendant if she is not allowed to intervene in the suit on the ground that she has been served with summons. If an order is made in her favour, the plaintiff will pay her the costs of the appeal. Each party will pay his or her costs of the proceedings of July 24, 1934.

*Sent back.*

<sup>1</sup> (1900) 1 *Brown's Reports* 284.

<sup>2</sup> 34 *N. L. R.* 437.

<sup>3</sup> (1902) 3 *Brown's Reports* 5.

<sup>4</sup> (1919) 6 *Ceylon Weekly Reporter* 118.

<sup>5</sup> (1933) 35 *N. L. R.* 1.

<sup>6</sup> (1920) 22 *N. L. R.* 155.