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Present: Schneider, Garvin, and Dalton JJ.

SIWANADIAN CHETTY *v.* TALAWASINGHAM.

110—D. C. Chilaw, 7,176.

Partition—Notice by Commissioner—Thirty days—Notice to public—Imperative requirement—Ordinance No. 10 of 1863, ss. 5 and 9.

In a partition action the notice given by the Commissioner of the proposed partition, in terms of the proviso to section 5 of the Ordinance must be a notice to the public.

The requirement that thirty days' notice of the proposed partition should be given to the public is imperative, and failure to comply these with deprives a partition decree of its conclusive character.

CASE referred to a bench of three Judges on the question whether in a partition action the notice given by a Commissioner of the proposed partition, in terms of the proviso to section 5 of the Partition Ordinance, must be a notice to the public and whether the failure to give thirty days' notice to the public would deprive a partition decree of its conclusive character.

E. W. Jayewardene, K.C. (with him *Bartholomeusz, Peri Sunderam,* and *E. V. R. Samarawickreme*), for appellant.—There are two very recent decisions of this Court which hold that the notice contemplated by the section is a notice to the public, and not to the parties only (*Dewattee Umma v. Selappu* [1] and *Paulu v. Rengishamy* [2]).

This view is not a recent one. As far back as 1896 Bonser C.J. expressed the opinion that the object of the notice was that "any one so advised may intervene." Later decisions which have adopted the same view, as would appear from certain dicta appearing in the course of the judgments, are to be found in the case reported in *Catherinahamy v. Babahamy* [3] and *Sanchi Appu v. Marthelis.*[4]

[1] *(1927) 8 C. L. Rec. 134.*
[2] *(1926) 27 N. L. R. 260.*
[3] *(1908) 11 N. L. R. 20.*
[4] *(1914) 17 N.L.R. 297.*

A proceeding under the Partition Ordinance is in many respects like a proceeding *in rem;* and on reference to *Hukum Chand* it would appear that in such proceedings a notice to the public is necessary (*vide Hukum Chand, at p. 494*).

Hayley, K.C. (with him *H. V. Perera, Rajaratnam,* and *Ponnambalam*), for respondent.—The provisions of section 5 are for carrying out the decree as between the parties before the Court. Else it is rather extraordinary that the notice to the public should be left to a layman, like a surveyor, and should be done at the end of the case. It is clear that if the notice contemplated was a notice to the public, it would have been directed to be given as soon as the plaint had been accepted.

With regard to the argument adduced that the judgment is a judgment *in rem*, the submission is that it is not so. A judgment and decree in a partition case is merely a statutory judgment, having in effect the same consequences as a judgment *in rem*. So that if the Legislature has made no provision, as it is submitted it has made none, then the procedure must take its usual course.

Why a notice to the parties is necessary is that very often there is no contest as to title, and some parties never even turn up in Court. This notice gives them an opportunity of coming to the survey and getting their blocks according to their convenience.

[GARVIN J.—The words "but calculated to give the greatest publicity thereto" clearly indicate an intention of a notice to the public.]

That view seems to have been taken in *Jayawardene v. Weerasekere* [1] and for the first time these words were unduly stressed. After all, in most partition cases what was contemplated was the little village, and the co-owners mostly constituted the populace.

[SCHNEIDER J.—Where else is it possible to find a notice to the public directed to be given?]

The Ordinance provides for none. If this is to be considered a notice to the public, of what is it to be a notice? Is it to be a notice that a decree has been entered, &c.? Surely if such a notice had been intended at any stage, it would have been much earlier—certainly before trial.

It is a different matter of the argument is that there has been no such provision, and therefore the Courts will see that such a provision will be introduced. In which case it would not be an imperative section, and a reasonable notice will then be sufficient, as in this case, a notice of twenty-nine days, instead of the statutory thirty days.

The words "given as hereinbefore provided" appearing in section 9 have been unduly stressed.

[1] *(1917) 4 C. W. R. 406.*

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The construction sought to be put upon these words would stand if the word used had been "obtained," not "given."

In conclusion, it would seem very hard that where an admitted co-owner, who was not a party to the action, is deprived of his rights he cannot re-open a decree even though there has been fraud; while a stranger purchaser, such as in the present case, should be able to impeach the decree on a mere irregularity, such as the failure to give the full complement of thirty days' notice. An intending purchaser will have to go through the whole record.

Counsel cited *Perera v. Fernando*, [1] *Samarakoon v. Jayewardene*, and *Neelakutty v. Alvar*. [3]

June 8, 1927. GARVIN J.—

The subject-matter of this action is the land called Periaomerikadu situated in the Chilaw District. In a proceeding under the Waste Lands Ordinance this land was claimed as against the Crown by Ibrahim Naina Segu Meera Lebbe among others. The claim was referred to Court, and in D. C., Chilaw, No. 3,137, Ibrahim Naina Segu Meera Lebbe was declared to be the owner by a decree absolute dated August 2, 1905. In 1910, by a deed P 2 Meera Lebbe sold and conveyed the premises to Naina Mohamadu Natchia, who by deed P 17 of 1914 conveyed the same to Venathithan Chetty. In 1915, by a deed marked P 18 Venathithan Chetty conveyed the premises to Vengadasalam Chetty, who thus became the legal owner thereof. In 1919 the same Meera Lebbe purported to convey the same premises to Armstrong Talawasingham, the second defendant, and Sidambaram Tambiah, who has since died and is represented in this action by the fourth defendant. The consideration for this transfer is set out in the deed as the sum of Rs. 10,000, but a sum of Rs. 500 alone was paid at the execution. Shortly after, if not before, this conveyance was made, and before the balance consideration was paid, the vendees came to the knowledge that Meera Lebbe had previously parted with his interests, and that all the deeds in the chain of title by which these premises ultimately became vested in Vengadasalam Chetty had been duly registered. On March 2, 1920, the second defendant purported to convey half of his half share to the third defendant and Meera Lebbe in the proportion of a half to each. An action for the partition of this land was instituted in the District Court of Chilaw and bears No. 6,492. The fact that title to this land was outstanding in Vengadasalam Chetty was concealed from the Court, and an interlocutory decree was entered declaring Meera Lebbe, who is the first defendant in the present action, entitled to one-eighth, Sidambaram Tambiah to four-eighths, Talawasingham to two-eighths, and Velupillai

[1] *(1902) 3 Browne 5.* [2] *(1909) 12 N. L. R. 316.*

[3] *(1918) 20 N. L. R. 372.*

Sidambaram, the third defendant in this action, to one-eighth. A commission to carry out the partition in terms of the above decree was issued to Mr. C. H. Frida and is dated October 11, 1920. The commission was made returnable on November 22, 1920. The return was actually made on November 21, 1920, and the Secretary of the District Court, who has given evidence in these proceedings, speaking with reference to the return made by the Commissioner stated as follows:— "The plan shows that the land was partitioned on October 23, 24 and 25." A decree was entered in terms of the Commissioner's report by which certain lots in severalty were assigned to those who had by the interlocutory decree been declared entitled to this land. Vengadasalam Chetty died some years ago, and his estate is now being administered by the plaintiff, who brings this action praying that the decree in the partition action No. 6,492 above referred to "be set aside on the ground of fraud and that the plaintiff be declared entitled to the land, and that the defendants be condemned to pay the plaintiff the sum of Rs. 1,000 as damages." Alternatively he prayed that if the decree cannot be set aside in law, that the first, second, third, and fourth defendants be condemned to pay the sum of Rs. 16,000 as damages. It is evident that if the question of the title of the parties be decided independently of the partition decree entered in D. C., No. 6,492. Vengadasalam Chetty's title must prevail. It is contended by the plaintiff, apart from the grounds upon which he seeks to have this decree set aside, that it is not a decree which can be pleaded in bar of his title. He was not a party to the partition proceedings and the only decree, therefore, which can bar his title is a decree for partition, to which conclusive effect is given by section 9 of the Partition Ordinance.

It is urged that this is not such a decree for the reason that the evidence of the Secretary of the District Court shows that thirty days' notice which the Commissioner is required by section 5 of the Ordinance to give before making the partition was not given; that the failure to give such notice is a failure to comply with an imperative provision of the Ordinance, and any decree entered under the circumstances is not a decree to which the conclusive effect of section 9 attaches.

Two questions arise for decision. The first is a question of fact. Does the evidence upon record show that the Commissioner has failed to give the notice required by section 5? If this question be answered in the affirmative, is the decree for partition entered in this case a decree "given as hereinbefore provided" within the meaning of section 9, and as such binding upon the appellant?

It was thought desirable that these two questions should be referred to a bench of three Judges mainly with a view to an authoritative decision on the second of them.

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The question of fact must be answered against the respondents. The Secretary of the District Court gave evidence of the contents of the record of the partition case, and that evidence has passed unchallenged. The survey plan annexed to and forming part of the return made by the Commissioner is said by this witness to show that the land was partitioned on October 23, 24, and 25. Inasmuch as the commission bears date October 11 of the same year, it is impossible that the Commissioner could have given thirty days' notice of the intended partition as required by section 5. It is an irregularity which is patent, and appears on the record of the proceedings in the partition case. It is not a hidden defect which is brought to light by evidence extraneous to and other than that of the record itself. Anyone who examined the record of the partition case would have seen what the Secretary saw in the record that thirty days' notice of the intended partition had not been given by the Commissioner.

The argument addressed to us by counsel for the respondent on the second of these questions is divisible into two parts. He contended in the first place that the notice by which a Commissioner is required to give by section 5 is a notice to the parties and not to the public. In the next place he contended that the words " given as hereinbefore provided " in section 9 of the Partition Ordinance have no significance beyond referring the reader to the section which provides for the giving of a decree for partition; in short, that the conclusive character given to final decrees by section 9 of the Ordinance attached to every decree for partition which purported to be given under the provisions of the Ordinance, even though important provisions of the Ordinance had not been complied with. This point was raised and developed for the first time at the hearing before this bench of three Judges. The contention that the notice referred to in section 5 is merely a notice to the parties in so far as it is supported by authority rests solely on the judgment of de Sampayo J. and Wood Renton C.J. in *Jayawardene v. Weerasekere.*[1] This ruling was dissented from by Branch C.J. and Maartensz A.J. in the case of *Paulu v. Rengishamy.*[2] The question next came up before my brother Lyall Grant and myself in the case of *Dewattee Umma v. Sellappu.*[3] We decided to follow the ruling in *Paulu v. Rengishamy* (*supra*). The view that the notice which a Commissioner is required to give is a notice to the public is not a new one. As far back as the year 1896 Bonser C.J. in the case of *Peris v. Perera* [4] said with reference to the proviso to section 5 " This provision seem intended to give notice to all persons who may be interested in the land, and who may not be parties to the proceedings, of what is being done, *so that they may intervene in the*

[1] *(1917) 4 C. W. R. 406.*
[2] *(1926) 27 N. L. R. 260.*
[3] *(1927) 8 C. L. Rec. 134.*
[4] *(1896) 1 N. L. R. 362.*

suit if so advised." In the judgments in *Catherinahami v. Babahamy* [1] and *Sanchi Appu v. Marthelis*,[2] cases which were decided in 1908 and 1914 respectively, there are dicta which indicate that this Court has consistently taken the view expressed by Bonser C. J. The case of *Jayawardene v. Weerasekere* (*supra*) decided in 1917 was the first and only case in which the opposite view was expressed. The weight of authority is decisively in favour of the view that the notice under the proviso to section 5 is a notice to the public and not merely to the parties, and that its purpose is to notify all persons of the pendency of the partition proceedings. The notice must comply with the requirements of the proviso to section 5, and it is essential that thirty days' notice should be given.

To my judgment in *Paulu v. Rengishamy* (*supra*) I have little to add. But perhaps attention might be drawn to the striking similarity of the language of this section to the language in which the Legislature prescribes the notice to be given of sale in section 8. In each case it is a requirement that the notice shall be given " in the manner best calculated to give the widest publicity thereto." The notice of sale under section 8 is obviously and admittedly a notice to the public. There is no reason to suppose that the same words in section 5 do not import the same idea.

The main argument of counsel for the respondent was that inasmuch as the Legislature had not provided for a notice to the public of the pendency of a partition at an early stage of the proceedings it could not have intended that the notice prescribed by section 5, which is only given after the preliminary decree, should be a notice to the public of the pendency of an action for partition. The intention of the Legislature is usually gathered from the language of an enactment. In this instance the language clearly indicates an intention that notice of the intended partition is to be given to the public. It is repugnant to elementary justice that there should be no notice whatever to the public of the pendency of a proceeding which is to terminate in a decree final and conclusive as to title against all persons whomsoever. The absence of any provision for a notice to the public at an earlier stage is no reason why we should ascribe to the Legislature an intention not to give any notice whatever to the public of a proceeding in which individuals who are not parties to the proceeding may be vitally interested. The right to maintain an action for damages is at best a poor substitute for such a deprivation without notice and without any fault on the part of the victim.

This brings me to the consideration of an aspect of the question which was not touched on in the course of argument. A conclusive effect is assigned by section 9 to " the decree for partition or sale given as hereinbefore provided." It is now well settled law that

[1] *(1908) 11 N. L. R. 20.*

[2] *(1914) 17 N. L. R. 297.*

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the decree for partition referred to in this section is not the decree under section 4, which is only preliminary, but the final decree under section 6. In the case of *Bandara v. Baba* [1] a bench of three Judges held that where a sale and not a partition was decreed a conclusive character attaches to the decree for sale, which is a decree under section 4. It follows that a decree under section 4 is final and conclusive if what is decreed is a sale, but not when a partition is decreed. In the result, when the Court decrees sale, that decree is final and conclusive, binding on all persons, whether they were parties to the action or not, and despite the circumstance that in the procedure prescribed by the Ordinance up to the stage of a decree under section 4 there is no provision for any notice to the public.

It is to be noted that there existed a current of authority, of which the most recent case is that of *Catherinahamy v. Babahamy* (*supra*), in support of the view that in the case of a sale under the Partition Ordinance the conclusive character assigned by section 9 attaches to the issue of the certificate of sale, which is the last step in such a proceeding, and not to the decree for sale under section 4. Had the matter been allowed to rest there none of the anomalies which now exist would have arisen. At the stage of a decree under section 4, whether a partition or a sale be ordered, the proceedings would only have reached a penultimate stage. In both cases, before the final termination of the proceedings the public would have had notice which, whether it be of the sale or of the partition, the Ordinance insists shall be given " in the manner best calculated to give the greatest publicity thereto. But in *Bandara v. Baba* (*supra*) it was held that the language of section 9 indicated that it was the decree for sale to which a conclusive effect was given. The only decree for sale is the decree under section 4. *Bandara v. Baba* (*supra*) is a binding decision, and however anomalous the resulting position may be, it must be regarded as settling the law in the sense in which it was there declared. It is evident that we have now reached a stage when the law can only be placed upon a more satisfactory footing by the intervention of the Legislature.

This does not, however, affect the opinion I have already expressed, that the notice which a Commissioner is required to give by section 5 is a notice to the public. If in the present state of the law it is possible to enter a decree for sale conclusive as to title of persons not parties to the action without any notice to them that is no reason why they should also lose the advantage of notice of the intended partition which in terms is a notice to the public.

It remains still to consider the submission that the words " given as hereinbefore provided " have no special significance, and that a decree which is in form a final decree made in a proceeding which purports to be taken under the provisions of the Partition Ordinance

[1] *(1916) 19 N. L. R. 1.*

despite the fact that provisions of the Ordinance have not in fact been complied with. It is not strictly correct to say that there is no reported case prior to *Jayawardene v. Weerasekere* (*supra*) in which the words " given as hereinbefore provided " are set out in a judgment and expressly considered. The words are specially noticed by Wendt J. in *Samarakoon v. Jayawardene.*[1] But there is a strong body of authority for the proposition that the conclusive character assigned by section 9 to decrees only attaches to decrees entered in a proceeding which strictly complies with the essential and imperative provisions of the Ordinance.

There are several cases in which this Court has refused to treat decrees as conclusive where owing to irregularities the proceedings were held not to amount to partition proceedings.

In *Fernando v. Perera* [2] a decree for sale was set aside on the ground that the decree was entered of consent without any adjudication on the title of the parties, and a person who sought to intervene was admitted and added as a party to establish the rights he claimed. The case of *Perera v. Fernando* [3] is an instance of a final decree for partition being set aside at the instance of a party defendant who denied that he had been served with summons for that reason and because it did not appear that the Commissioner had given the notice required by section 5. The case of *Samarakoon v. Jayawardene* (*supra*) has a special application to the circumstances of the case under consideration. A partition decree was pleaded in bar of the plaintiff's claim to a declaration of title. Wendt J. pointed to many irregularities in the proceedings which resulted in the decree. Among them the absence of evidence that thirty days' notice of the intended partition had been given by the Commissioner as required by section 5; he drew attention to the form of the decree and refused to give it the conclusive effect claimed for it.

The words "given as hereinbefore provided" were definitely considered and construed in *Jayawardene v. Weerasekere* (*supra*) by de Sampayo J. as having reference "to such essential steps as might be considered imperative." This view has been approved by Bertram C. J. in *Neelakutty v. Alvar* (*supra*), and in *Dissanayake v. Don Dias* [4] de Sampayo J. set aside a partition decree at the instance of a party on the ground that he received no notice of the day appointed for the consideration of the scheme of partition proposed by the Commissioner.

Where there is such a clear, strong, and consistent body of judical decisions against the contention of counsel for the respondent, I must decline, even were I so minded, which I am not, to disturb what must be considered well settled law.

[1] *(1909) 12 N. L. R. 316.*
[2] *(1898) 1 Thambyah 71.*
[3] *(1902) 3 Browne 5.*
[4] *(1919) 6 C. W. R. 137.*

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There is ample authority for holding that the final decree pleaded in this case is not one to which the conclusive effect of section 9 attaches, for the reason that it was given in a proceeding in which the imperative and essential requirement of thirty days' notice to the public of the intended partition was not complied with. The decree does not therefore bar the plaintiff's title.

SCHNEIDER J.—There is nothing I can add usefully to the judgment of my brother Garvin, which I have had the advantage of reading and with which I entirely agree.

DALTON J.—

The point reserved for the opinion of this Court is whether the final decree entered in partition case, D. C., Chilaw, No. 6,492, is one to which the conclusive effect of section 9 of the Partition Ordinance, 1863, could not be given. It is clear from the record in that case, and it is not contested that the commission to the surveyor was issued on October 11, 1920, and the land was partitioned on October 23-25, 1920. The Commissioner, therefore, did not give the requisite notice provided for in section 5 of the Ordinance. It is set out there that he shall, thirty days at least before making the partition, affix on some conspicuous spot on the land a written notice of the day on which he proposes to make the partition, and give further notice thereof by beat of tom-tom in the village or place where the land is situated, "and in such other manner as shall appear best calculated for giving the greatest publicity thereto." If he has failed to comply with this requirement, but a final decree nevertheless follows, can such a decree be said, under section 9 of the Ordinance, to be "given as hereinbefore provided," so as to have attached to it the special qualities given by section 9 to a decree for partition or sale? Basing his conclusion upon the decision of this Court in *Jayawardene v. Weerasekere* (*supra*) the trial Judge held that, in spite of the omission on the part of the Commissioner, the decree was conclusive within the meaning of section 9. There are, however, decisions of this Court to the contrary, the two latest being subsequent to the trial of the case now under appeal. In *Paulu v. Rengishamy* (*supra*) Branch C.J. and Maartensz A.J. were unable to agree with the conclusion come to in *Jayawardene v. Weerasekere* (*supra*) that the notice required by the proviso to section 5 was merely a notice to the parties and not to the public generally. In *Dewattee Umma v. Sellappu* (*supra*) Garvin and Lyall Grant JJ. also dissented from *Jayawardene v. Weerasekere* (*supra*). Apart from these two authorities, there are also earlier expressions of opinion on this point contrary to the conclusion that the notice required by section 5 is merely a notice to the parties, namely, in *Sanchi Appu v. Marthelis* (*supra*), where Lascelles C.J. and Pereira J. refer to it as a notice to

the public, and in *Catherinahamy v. Babahamy* (*supra*), where Hutchinson C.J. expresses the same opinion. It may be added also that in his *Law of Partition, at p. 149*, Jayawardene J. expresses the opinion that the nature of the notice required seems to indicate that it is meant for persons besides the parties to the suit. With these authorities and with this opinion I entirely concur. The wording of the proviso in section 5 seems to me to be quite clear and beyond any doubt.

The purport and meaning of the words " given as hereinbefore provided " have however given me much more difficulty, but here again there are continuous expressions of opinion and decisions of this Court as to what they mean. Even in *Jayawardene v. Weerasekere* (*supra*) the *ratio decidendi* appears to have been that inasmuch as the notice had regard only to the parties to the action who had already been declared entitled to shares by the preliminary decree, this provision as to notice was merely directory and was not a condition precedent of the conclusive character of the final decree under section 9. If the conclusion as to the nature of the notice had been other than that it was a notice to the parties only, the Court would apparently have held that the decree was not " given as hereinbefore provided." In all the cases to which I have referred above on the question as to the nature of the notice the further question as to the meaning of the words in section 9 has been fully dealt with. Pereira J. in *Sanchi Appu v. Marthelis* (*supra*) says that the reason for giving a conclusive effect to the final decree under section 9 is largely referable to the procedure laid down for notice to the public under section 5. Branch C.J. in *Paulu v. Rengishamy* (*supra*) is of opinion that when such a very important matter as the notice has been omitted altogether, it cannot be said that the decree for partition has been given " as hereinbefore provided." In *Dewatte Umma v. Sellappu* (*supra*) Garvin J. says:—

> " In my opinion the language which the Legislature has thought fit to use in providing for this notice, a general consideration of the provisions of the Ordinance, and the effect given to a final decree under section 9 strongly indicate that this is intended to be a notice to the public and is an imperative provision of the Ordinance."

The decision in the earlier case of *Perera v. Fernando* (*supra*) is to the same effect. *Neelakutty v. Alvar* (*supra*), also relied upon, does not, however, help on this point, as all the Court held there was that the decree, to be conclusive against the world, must be granted by a Court of competent jurisdiction.

The effect then is that, to take an extreme case, a decree obtained by gross fraud cannot be set aside, the only remedy being one of damages, whereas if the Commissioner gives only twenty-nine days'

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notice of partition instead of thirty, the decree is not conclusive again the whole world, but is effective between the parties only. I am doubtful whether the Legislature ever had any such intention, as they even go so far as to take an extreme case and clearly state that the decree shall be conclusive " although all persons concerned are not named in any of the proceedings, nor the title of the owners nor of any of them truly set forth." The purport of section 9, although as I have stated the language used is difficult of interpretation. seems to me to be to make the decree, when it has once been given by a Court competent to make it. conclusive evidence of the partition or sale and title, and leaving the only remedy to anyone whose rights have been prejudiced in damages. This Court, it is true, has consistently refused to recognize as a partition decree within the meaning of section 9 a decree by consent in which there has been no inquiry into title, but the reason for that, in some cases at any rate, seems to be that the nature of the proceedings as partition proceedings are regarded as having been changed. At any rate, on a strict interpretation of section 4, and so far as the requirements of that section are concerned, if the defendants appear and do not dispute the title of plaintiffs, there appears to be no necessity for an examination of the titles of the parties. This may be an omission in the Ordinance, which has been supplied by judicial decision—a decision which Wood Renton C.J. in *Jayawardene v. Weerasekere* (*supra*) says is perfectly intelligent and correct.

To sum up on this latter point, although I am unable to say that my mind is wholly free from doubts as to whether the words " given as hereinbefore provided " in section 9 mean anything more than " as provided for by this Ordinance " and as to whether it was not intended that any prejudice caused to anyone by any act or omission in the proceedings was to be covered by damages only, there is ample, strong, and consistent opinion to the contrary. However unsettling the result may be as regards the value of partition decrees, and it seems to me it must have that result, it can be corrected by the Legislature if it is thought desirable.

I accordingly concur in the conclusion come to that the learned trial judge was wrong in his decision that on the facts before him the decree was one to which the conclusive effect of section 9 of the Partition Ordinance could be given. I would so answer the question reserved for this Court.

PRINTED AT THE GOVERNMENT PRESS, CEYLON