1958 *Present :* **Weerasooriya, J., and Sansoni, J.**

T. SIRIMALIE *et al.*, Petitioners, *and* D. T. PINCHI UKKU, Respondent

S. C. 51—Application in Revision in D. C. Kandy, 4,380/P

Partition action—Interlocutory decree—Legality challenged—Right of Supreme Court to exercise revisionary power—Duty of Court to examine the title and share of each party—Civil Procedure Code, s. 753—Partition Act, No. 16 of 1951, s. 25.

The Supreme Court has sufficient powers under the Courts Ordinance and under section 753 of the Civil Procedure Code to examine, by way of revision, the legality and propriety of the interlocutory decree which has been entered in a partition action and the regularity of the proceedings at the trial.

The 9th defendant in the present partition action appeared even before summons was served on her and was present in Court on the date of trial. She was not represented by a lawyer and had not filed a statement. At the trial a new position was taken up by the plaintiff who had pleaded differently.

Held, that it was the duty of the Court to have asked the 9th defendant whether she wished to give evidence or to cross-examine the plaintiff whose evidence was directly against her interests. Section 25 of the Partition Act requires the Court to examine, and hear and receive evidence of, the title and interest of *each party*.

APPEAL from a judgment of the District Court, Kandy.

H. D. Tambiah, for the 8th, 9th and 10th defendants-petitioners.

C. R. Gunaratne, for the plaintiff-respondent.

Cur. adv. vult.

August 7, 1958. SANSONI, J.—

The petitioners, who are the 8th, 9th and 10th defendants, have applied to revise the interlocutory decree entered in this partition action. They allege that the plaintiff's husband has given false evidence at the trial in order to deprive the petitioners of their share in the land sought to be partitioned.

According to the pedigree set out in the plaint Tennewattegedera Dingiriya was the former owner of the land. He died leaving six children : Rankira, Menika, Kiriya, Subaddara, Appuwa and Howkenda. Rankira's 1/6 share was claimed by the plaintiff upon a series of deeds. Menika, owner of 1/6 share, died leaving as her sole heir her daughter Rankiri, who died leaving as her heirs, according to the plaint, her six children Rana, Hatana, Dingiriya (1st defendant), Sirimalie (8th defendant), Ukku (9th defendant) and Anagi (10th defendant), each of whom became entitled therefore to 1/36 share ; Rana died leaving his daughter the plaintiff as his sole heir. The plaintiff thus claimed 1/6 plus 1/36 or 7/36 share of the land. It is not necessary to set out the devolution of the shares of the other four children of Dingiriya for the purposes of this judgment.

The 1st, 2nd and 3rd defendants filed a joint answer in which they admitted (in paragraph 5) the averment in the plaint that Rankiri died leaving as her heirs the six children already mentioned, but when they set out the shares of the parties in paragraph 10 of the answer they did not concede any shares to the 8th, 9th and 10th defendants. There was an obvious contradiction, which was left unexplained, between paragraphs 5 and 10 of the answer.

According to the journal entries the 9th defendant appeared in Court on 26th August, 1954, and the 10th defendant appeared on 24th October, 1955, although summons had not been served on them. The 8th defendant did not appear at all, although summons had been served on her. The trial was heard on 29th June, 1956, when the parties present were the plaintiff and 7th and 9th defendants. The only parties represented by lawyers at the trial or at any previous stage were the plaintiff and the 1st, 2nd and 3rd defendants.

The proceedings at the trial appear to have commenced with a statement by the plaintiff's proctor that there was no dispute as to the share claimed by the plaintiff. One would ordinarily understand from that statement that 7/36 share claimed in the plaint was still being claimed by the plaintiff. There is no mention of any contest regarding the 1/36 share allotted in the plaint to each of the 8th, 9th and 10th defendants. The trial Judge was not informed that evidence would be led which would not only differ materially from the pleadings filed, but would also deprive those defendants of any share of the land and increase the share which the plaintiff had claimed in the plaint.

The only witness called on behalf of the plaintiff was her husband who, in giving evidence, stated that when Rankiri the daughter of Menika died her share devolved on Kiribaiya, whereas according to the plaint

and the answer of the 1st, 2nd and 3rd defendants Rankiri's share devolved on her six children Rana (the plaintiff's father), Hatana and 1st, 8th, 9th and 10th defendants. The witness further stated that these six persons were the children of Kiribaiya. There was a further departure from the pleadings when the witness went on to say that of these six children of Kiribaiya the 8th, 9th and 10th defendants went out in diga and forfeited their rights to inherit any share of this land. Thus the plaintiff, instead of inheriting 1/36 share from her father Rana, inherited 2/36; the 1st defendant also inherited 2/36 share instead of 1/36; and the 8th, 9th and 10th defendants got no shares at all.

It does seem strange that both the plaintiff and the 1st defendant in their pleadings should have made the same mistake as to who the child or children of Rankiri were; as to whose children Rana, Hatana, 1st, 8th, 9th and 10th defendants were; and as to the rights which the 8th, 9th and 10th defendants had in this land. No marriage certificates to prove the alleged diga marriages were produced, nor was any attempt made to explain how the mistakes came to be made in the pleadings. I have no doubt that if the learned Judge's attention had been drawn to these matters he would have made a more careful investigation than he did. If he had been told, for instance, that the 8th, 9th and 10th defendants had been brought into court as co-owners but that they were to get nothing in the land in view of later discoveries with regard to their parentage and diga marriages, he is not likely to have accepted the evidence of the plaintiff's husband without close scrutiny.

But I think the more serious objection to the manner in which this trial was conducted is the fact that the 9th defendant, who was present in Court, seems to have been totally ignored. She appeared even before summons was served on her. It is true that she filed no statement, but her presence at the trial surely indicated that she had come to watch her interests. She does not seem to have been asked whether she accepted the new position taken up by parties who had pleaded differently, nor whether she wished to give evidence, or even to cross-examine the plaintiff's husband whose evidence was directly against her interests.

It seems to me that the trial was of an entirely unsatisfactory nature and the interlocutory decree based on the evidence led at such a trial should not be allowed to stand. The 8th, 9th and 10th defendants plead that they were unaware that the judgment deprived them of their shares until a surveyor partitioned the land. They then took steps to have the interlocutory decree vacated, and when the matter came up for inquiry in the lower Court the proctor for the 1st, 2nd and 3rd defendants said that he had no objection to such a course being taken but the plaintiff's proctor objected that the Court had no jurisdiction to act in the matter. The judge then dismissed the application on the ground that he had no jurisdiction, and the present application was thereupon filed.

The petitioners have filed what they claim are certified copies of the death certificate of Rana (the plaintiff's father), according to which his parents were Rankiri and Kiri Puncha, and of the birth certificate of the

8th defendant, according to which her parents were the same two persons. These documents prima facie support their claim that the evidence led at the trial is not strictly true.

The final decree has not been entered yet in this case and I have no doubt that this court has sufficient powers under the Courts Ordinance and under Section 753 of the Civil Procedure Code to examine the legality and propriety of the interlocutory decree which has been entered and the regularity of the proceedings at the trial. I am supported in this view by the recent judgment of Gunasekara, J. (with whom Pulle, J. agreed) in *H. W. Amarasuriya Estates Ltd. v. Ratnayake* [1]. If the allegations in the petition and affidavit are true, manifest injustice has been done to the petitioners. The present situation need not have arisen if the Court had been fully apprised of the departure from the pleadings as far as the 8th, 9th and 10th defendants were concerned, and if the 9th defendant who was present at the trial had been given a hearing. It should be remembered that section 25 of the Partition Act, No. 16 of 1951, requires the Court to " examine the title of *each party* and hear and receive evidence in support thereof, and try and determine all questions of law and fact arising in regard to the right, share and interst of *each party* ". In this case the trial judge has failed to perform these duties and it is not too late for us to require him to perform them at another trial.

I would therefore set aside the interlocutory decree and remit the case for a fresh trial upon such points of contest as the parties might raise. The plaintiff must pay the petitioners their costs in the proceedings before this court.

WEERASOORIYA, J.—I agree.

Decree set aside.