1954 *Present :* Pulle, J., and Swan, J.

G. G. HENDRICK *et al.*, Appellants, *and* M. PODINONA, Respondent

S. C. 101 and Inty. 44—D. C. Balapitiya, 218

Partition action—Summons not duly served on a party defendant—Waiver of irregularity —Effect on final decree.

In a partition action the appellant, who was not mentioned as a defendant in the plaint, was ordered by Court to be made a party. His name thereafter appeared as one of the defendants and he took part in the proceedings between interlocutory decree and final decree. He admitted that the share allotted to him in the interlocutory decree was correct.

Held, that the failure to give the appellant notice of the action and/or to call upon him to file a statement of claim was not an irregularity that could entitle him to challenge the validity of the interlocutory decree. He was therefore bound by the final decree.

APPEALS from a judgment of the District Court, Balapitiya.

T. P. P. Goonetilleke, with *B. E. de Silva*, for the defendants appellants.

C. V. Ranawake, for the plaintiff respondent.

Cur. adv. vult.

[1] *22 N. L. R. 57.* [2] *39 N. L. R. 514.*

[3] *(1917) A. D. 292.*

February 12, 1954. SWAN, J.—

There are two independent appeals in this case. The appeal of the 1st defendant is numbered 101/1953 (F) and that of the 2nd defendant 44/1953 (Inty). They have been argued together. In fact the same counsel appeared for both appellants. For the sake of convenience and in order to avoid confusion I shall refer to the appellant in the final appeal as the 1st appellant and to the appellant in the interlocutory appeal as the 2nd appellant.

The appellants were sued by the respondent for declaration of title to a certain allotment of land, for ejectment and for damages. After trial the learned District Judge gave judgment against the 1st appellant and as the 2nd appellant was in default ordered decree *nisi* against her.

I shall first dispose of the appeal of the 2nd appellant. When decree *nisi* was served on her she appeared and took time to show cause. The ultimate result of her application was that the decree *nisi* was vacated and she was allowed to file answer and contest the case. In these circumstances I cannot see what cause she has for complaint. In my opinion there is no merit in her appeal and I would dismiss it with costs.

I shall now deal with the appeal of the 1st appellant. The respondent claimed to be entitled to the land in question under and by virtue of the Final Decree dated 10.5.1939 entered in partition suit No. 28019 of the District Court of Galle. The 1st appellant's main defence was that he was not bound by that decree because, though ordered to be made a party and named in the caption, he was not served with summons. He also pleaded a title by prescription. The learned District Judge held against the 1st appellant on both these issues and gave judgment for the respondent as prayed for but with damages at Rs. 5 per mensem from date of decree till restoration of possession and half costs of action.

Admittedly the 1st appellant had been in occupation of the lot in dispute after the Final Decree and, as this action was instituted on 19.8.49, he had more than ten years' possession. But the learned District Judge came to the conclusion that his possession was not adverse to the respondent. In the Final Decree the respondent had been ordered to pay the 1st appellant compensation. This amount was deposited in Court only on 10.2.49. In these circumstances the learned District Judge held on the authority of *Sediris v. Dingirimenika* [1] that the 1st appellant could not claim a prescriptive title.

Mr. Goonetilleke who appeared for the appellants does not challenge the proposition that possession under a *jus retentionis* is not adverse possession. He based his whole argument on the invalidity of the Final Decree as against the 1st appellant. Undoubtedly, if the 1st appellant was not bound by the decree, it could hardly be contended that he was in occupation on the strength of his *jus retentionis*. But the learned District Judge has said in his judgment, " I am satisfied that the defendants had continued to occupy these premises with her leave and licence as they had no place to go to on the understanding that they were to pay the taxes. " I shall ignore this finding and decide this appeal on the issue whether or not the Final Decree was binding on the 1st appellant.

[1] *(1948) 51 N.L.R. 6.*

That the name of the 1st appellant appears in the Final Decree there can be no question. He is the 156th defendant. That he took part in the proceedings between interlocutory decree and final decree also cannot be denied. He was, however, not a defendant mentioned in the plaint. There were only 106 defendants at that stage. But his name was disclosed by the 91st defendant and the learned District Judge who heard the partition action ordered that he be made a party. His name thereafter appears as the 156th defendant. It was contended in the lower court that he must have been present when he was added a party defendant and therefore had sufficient notice of the action. But the learned District Judge who heard this case very rightly refused to accept that contention in the absence of proof of the 1st appellant's presence on that occasion. After interlocutory decree was entered the 1st appellant submitted a petition (P5) complaining that a surveyor had come to the land and "partitioned it in such a way that the portion on which the petitioner's residing house stands was allotted to another person while the petitioner was given a portion less than a perch in extent from a corner." He stated that he objected to the scheme and prayed that he should be noticed before the partition was confirmed.

This petition is dated 15.3.1938. Thereafter on 8.9.38 the 1st appellant gave a proxy (P6) to Mr. H. de S. Kularatne authorizing him to appear for him and "*to file all necessary papers in case No. 28,019 D. C. Galle.*"

The point I want to emphasize is that the 1st appellant did not in his petition complain that the share allotted to him in the Interlocutory Decree was incorrect. He only objected to the scheme of partition. Could it then be seriously contended that the failure to give him notice of the action and/or to call upon him to file a statement of claim upon his being disclosed as a necessary party by the 91st defendant in consequence of which he was made the 156th defendant is an irregularity that invalidates as against him the final decree entered in the case? I certainly do not think so.

In spite of the fact that he sent the petition and gave a proxy to Mr. Kularatne "to file all necessary papers" I find that no further steps were taken in that behalf either by the 1st appellant or by Mr. Kularatne. He was given due notice (see Journal Entry P9 of 8.9.38) of the confirmation of the scheme but did not choose to appear in person or by proctor to support the objection he had taken in P5. The learned District Judge in accepting the scheme said :—"The 1st defendant has filed no objections. He is only entitled to a very small share and it would not be possible to give him his house which stands on lot 1". That was the lot to which the respondent was declared entitled. There was an appeal from the Final Decree to which he was a party. The journal entries P10 and P11 show that he was served with notice of appeal and with notice of security. "In these circumstances," observed the learned District Judge, "it is futile for him to challenge the validity of the Final Decree."

With that observation I am in complete agreement. Learned counsel for the appellant, however, sought to support his argument on the authority of *Pablis v. Euginahamy*[1] in which Dias J. held (Nagalingam J. agreeing) that where summons was not properly served on a party in a

[1] *(1918) 50 N.L.R. 316.*

partition case the court had the power to vacate the decree even where the irregularity was discovered after the final decree. It is true that in the course of his judgment Dias J. remarked that " the final decree derives its regularity from the interlocutory decree, which in turn depends upon proper service of summons on the various parties to make it a binding decree. " But the *ratio decidendi* of *Pablis vs. Euginahamy* [2] was that a court of first instance had the power to vacate a final decree upon proof that summons was not duly served upon a party to the action.

The case of *Pablis v. Euginahamy* [1] is in my opinion distinguishable on material points. There the appellant was the 5th defendant upon whom summons could not be personally served. Substituted service was ordered but was not properly served, and the case proceeded to trial on the footing that the substituted service was in order. After interlocutory decree was entered he appeared in court through a firm of proctors to whom he had given a proxy. He was allowed time to file objection but failed to do so. One member of the firm of proctors he had retained stated to court that the 5th defendant did not admit the correctness of the share allotted to him in the interlocutory decree. The learned District Judge stated, " the 5th defendant is bound by the interlocutory decree and I am unable to interfere in this matter now. " Dias J. observed that at that date it was not known to anybody that the service of summons on the 5th defendant was irregular. In the circumstances he held that the final decree entered was not binding on the defendant.

In this case, however, the appellant did not complain in his petition P5 that he was given a smaller share in the interlocutory decree than he was entitled to. Even in the course of this trial it was not suggested that the 1st appellant was prejudiced because the interlocutory decree did not allot to him his correct share or interests in the land sought to be partitioned. Both in the lower court and here the interlocutory decree was attacked on the ground that the 1st appellant was not served with summons.

Non-service or improper service of summons is undoubtedly an irregularity, but I do not think that every such irregularity is necessarily fatal to the decree subsequently entered. It was pointed out in *Senanayake v. Appu and others* [2] that a defendant who is not duly served with summons need not appear but if he does appear his appearance cures the irregularity. In the words of Withers J., " The issue of summons unauthorised by the judge's signature and entry of date was no doubt irregular but, in my opinion, this irregularity was waived. The defendants applied for time to file answer." Browne J. considering the same matter remarked :— " The object of any summons that could have been regularly issued had been attained by all the defendants . . . . having caused appearance to be entered for them in the action as they might always voluntarily do before service on them of summons. "

I do not think any judgment entered for default of appearance could be vacated merely on the ground of non-service or irregular service of summons if in point of fact the defendant admits the plaintiff's claim. And that is how I interpret the 1st appellant's application in P5 to be

[1] *(1948) 50 N. L. R. 346.* [2] *2 S. C. R. 137.*

allowed to object to the scheme of partition. In my opinion it is a tacit admission that the share allotted to him in the interlocutory decree is correct. He entered an appearance thereafter, and was given an opportunity of objecting to the confirmation of the scheme. In those circumstances I would hold that he cannot be allowed to question the validity of the interlocutory decree. On the assumption that the interlocutory decree is in order there can be no doubt that he is bound by the Final Decree. I would therefore dismiss the appeal of the 1st appellant with costs.

PULLE, J.—I agree.

Appeals dismissed.