

# Leelawathie V. Weeraman

313/1966

**Present: Sansoni, C. J., Tambiah J., Silva, J., Manicavasagar, J. and Alles, J.**

**LEELAWATHIE, Appellant and WEERAMAN and others, Respondents**

**S. C. 78/64 (Inty.)—D. C. Matara, 3729/P**

*Partition action—Surveyor's report—Disclosure of names of claimants—Power of Court, before the trial stage, to add the claimants as defendants—Requirement of issue of summons on the added defendants—Notice not a substitute for summons—Failure to issue summons—Effect on interlocutory decree—Partition Act (Cap. 69), ss. 12, 13, 18 (1), 22, 70 (1).*

In an action instituted under the Partition Act, the Court has power under section 70 (1) to add as defendants, even before the trial stage of the action, the claimants whose names are disclosed in the report made by a Surveyor in terms of section 18(1).

Once the order to add has been made, the next step should be to order summonses to be issued on the added defendants. The interlocutory decree entered in the action is liable to be set aside at the instance of an added defendant if the Court, instead of issuing summons on him when he was added, caused only a notice to be served on him. Section 22 provides for notice to be issued only on a person who is not a party, while sections 12 and 13 require summonses to be issued on defendants—and this rule would apply to added defendants also.

**APPEAL** from an order of the District Court, Matara.

*G. Ranganathan, Q. C. with W. D. Gunasekera and M. T. M. Sivardeen, for the 11th Defendant-Appellant.*

*A. C. Gunaratne, Q. C., with R. G. Gunaratne, for Plaintiff-Respondent.*

*Cur. adv. vult.*

March 30, 1966. **SANSONI, C.J.—**

This partition action was instituted against six defendants. In execution of the commission issued to him, the Surveyor sent a report, verified by affidavit, in the course of which he disclosed the names and addresses of seven claimants who claimed the land surveyed. On 19th June 1963 when the case was called in Court, the Additional District Judge who had the Surveyor's report before him made the order " Add and issue notice on fresh claimants for 24.7.63. " They were added as 7 to 13 defendants.

Clearly, the Judge was wrong when he ordered notice to be issued instead of summons. It is elementary that once a person becomes a party to an action as a defendant, he is entitled to be served with summons.

Under the Partition Act Cap. 69 a notice is issued only on a claimant who is not a party to the action. Section 22 of the Act provides for notice to be issued on a person who is not a party, while sections 12 and 13 require summonses to be issued on defendants—and this rule would apply to added defendants also. The very form of notice in the Second Schedule to the Act, and that is the notice which was served on the added defendants, shows that it is merely to give them notice of an action without requiring them to appear in Court. A summons, on the other hand, as the form of summons in the second Schedule demonstrates, summons the party to appear in Court either in person or by Proctor and to state whether he disputes the accuracy of the share allotted to him or to any other party. Indeed, it was not seriously argued that once a person is made a party the correct procedure is to issue summons on him.

Mr. Gunaratne, however, submitted that the Judge had no power to add as defendants the claimants who were disclosed by the Surveyor. He argued that section 70 (1) of the Act does not apply

before the trial stage of the action, even though the section reads :  
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"70 (1). The court may at any time before interlocutory decree is entered in a partition action add as a party to the action, .... (a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or (b) any person who, claiming an interest in the land, applies to be added as a party to the action."  
"

It is obvious that this section confers a discretionary power on the Judge to add a party at any time ; and once the order to add has been made, the next step should be to order summons to issue. To issue a notice on such an added party is wrong and is not justified by any provision of the Act. It was open to the added defendants, once they were served with the notices issued by the Court, to apply to be added as parties to the action under section 70 (1) (b) which has just been quoted, but that again was left to their discretion. It surely cannot be argued that the stage at which section 70 (1) (b) can be applied is only the trial stage. Why then should the application of section 70 (1) (a) be confined to the trial stage ?

A party to an action can, of course, waive the service of summons and enter an appearance even before summons has been issued. That is because the rule that service of summons is necessary has been laid down in the interest of the party, and to prevent orders being made behind his back. If he appears before the Court and is permitted to take part in the proceedings, he may be said to have dispensed with the need for complying with the rule.

There seems to have been some misconception in the mind of the Additional District Judge as to the effect of the notice which was served on the defendants. In his order refusing the application of the 11th defendant to set aside the interlocutory decree, he has said that the 11th defendant should have appeared in Court when notice was served on her. He seems to have thought that a notice was a substitute for a summons. If he had not made that mistake, and if he had realised that it was his duty to issue summons on the 11th

defendant, he would undoubtedly have set aside the interlocutory decree. Even Counsel who appeared for the 11th defendant seems to have made the same mistake with regard to the effect of the notice, for he pleaded that the 11th defendant could not appear in Court in obedience to the notice because she was ill.

For these reasons I would hold that the interlocutory decree already entered should be set aside. All steps taken since the addition of the 7th to 13th defendants are also set aside. Summonses must be issued on the added defendants before any other steps are taken in the action. The 11th defendant-appellant is entitled to the costs of the enquiry held on 27th May 1964 and of this appeal from the plaintiff-respondent.

**TAMBIAH, J.**—I agree.

**SILVA, J.**—I agree.

**ALLES, J.**—I agree.

**MANICAVASAGAR, J.**—I agree with the opinion of My Lord, the Chief Justice, and the Order proposed by him, but I desire to state my views as well.

The submission of Counsel for the respondent that where a claim is made before a surveyor, the procedure which the Court should follow is confined only to section 22 (1) of the Partition Act, and that section 70 (1) has no application at all, except when in the opinion of the Court formed at the trial stage, a party should be added, appears to me to ignore completely the words "at any time before interlocutory decree" in section 70 (1). The submission that the Court can form no opinion as to whether any person should be added as a party or not, except at the trial stage, does not commend itself to me. In a partition suit the Court must bear in mind the effect of a decree which it enters and therefore should be careful to bring in parties who appear to have an interest. The fact that a person has made a claim before a surveyor commissioned to survey a land, and the data appearing on his plan and report, are sufficient to enable the Court to form an opinion ; if the Court be of

opinion that the claim made to the surveyor should also be inquired into, two courses are open : the Court may either act under section 22 (1) (a) or it may add him under section 70 (1) as a party defendant and issue summons on him.

*Interlocutory decree set aside.*