

1952 Present : Rose C.J., Gratiaen J. and L. M. D. de Silva J.

S. C. KANAGASABAI *et al.*, Appellants, and  
M. VELUPILLAI *et al.*, Respondents

S. C. 534 and 58—D. C. Point Pedro, 3,489 and 3,590

Partition action—*Lis pendens*—Registration in wrong folio—Conclusive effect of final decree—“As hereinbefore provided”—Jurisdiction of Court—Registration of Documents Ordinance (Cap. 101), s. 12 (1)—Partition Ordinance (Cap. 56), ss. 3, 9, 17.

Failure to register duly a *lis pendens* in a partition action as required by section 12 (1) of the Registration of Documents Ordinance deprives the decree entered in the action of the “conclusive effect” which it would otherwise have under section 9 of the Partition Ordinance by reason of the fact that it is a decree not entered “as hereinbefore provided”.

Plaintiffs in Appeal No. 534 claimed title to the land in dispute by virtue of a final decree entered in a partition action which, however, had been registered in the wrong folio as a *lis pendens*. Defendant, who was not a party to the partition action, contended that the decree for partition was not “good and conclusive” against him within the meaning of section 9 of the Partition Ordinance because the action had not been “duly registered” as a *lis pendens* as required by section 12 (1) of the Registration of Documents Ordinance.

Held, that the partition decree relied on by the plaintiffs did not possess the character of a decree which was “good and conclusive against all persons whomsoever” within the meaning of section 9 of the Partition Ordinance.

Quaere, whether the failure to register the *lis pendens* in a partition action as required by section 12 (1) of the Registration of Documents Ordinance renders the decree entered in the action void by reason of lack of jurisdiction in the court which entered it.

**A**PPEALS from two judgments of the District Court, Point Pedro. They were referred under the provisions of section 48A of the Courts Ordinance for decision by a Bench of Three Judges.

*E. B. Wikramanayake, Q.C.*, with *T. Arulananthan* and *O. M. de Alwis*, for the plaintiffs appellants in Appeal No. 534.—Plaintiffs brought this action for declaration of title to the land in dispute. Title to the land was based on a partition decree. Defendant pleaded firstly, that the partition decree was obtained by fraud and collusion, and secondly, that *lis pendens* was not correctly registered and that the decree was therefore void. Before the enactment of section 12 (1) of the Registration of Documents Ordinance (Chap. 101) *lis pendens* was not required to be registered but the decree was registered. For a statement of the law before the enactment of section 12 (1) see Jayewardene on Registration of Deeds, p. 172. Under the existing law it is necessary to consider section 12 (1) of the Registration of Documents Ordinance with reference to section 9 of the Partition Ordinance (Chap. 56). If the decree is given “as hereinbefore provided” then it is good and conclusive against the whole world. With regard to the significance of the words “decree given as hereinbefore provided” see *Samarakoon v. Jayawardene*<sup>1</sup> and

<sup>1</sup> (1909) 12 N. L. R. 316 at p. 319.

*Jayawardene v. Weerasakera* <sup>1</sup>. It is submitted that section 12 (1) is only directory. The object of section 12 (1) is to give notice that a partition action has been instituted in order to protect intending purchasers. If the object is defeated the remedy is given in section 9 of the Partition Ordinance. In the present case the *lis pendens* was registered in the wrong folio. There is no provision in the Registration Ordinance for dismissing a partition action where the *lis pendens* has not been properly registered—*Seneviratne v. Kanakarathne* <sup>2</sup>; *Tochina v. Daniel* <sup>3</sup>. Provided the defendant is summoned, there is no case, as far as the Partition Ordinance is concerned, which states that where *lis pendens* is not duly registered the decree is void. Section 12 (1) makes the judge the arbiter on the question whether *lis pendens* is duly registered. Once the summons is issued the decree entered is as “hereinbefore provided”. Mere non-compliance with section 12 (1) does not vitiate the partition proceedings.

*C. Thiagalingam, Q.C.*, with *K. Rajaratnam*, for the plaintiffs appellants in Appeal No. 58, adopted the arguments submitted on behalf of appellants in Appeal No. 534, and continued.—Section 12 (1) of the Registration Ordinance is purely directory. The Ordinance does not indicate what results flow from non-compliance with section 12 (1). Further, section 12 (1) does not affect the question of jurisdiction in the legal sense. Jurisdiction is dealt with in the Courts Ordinance. There is a fundamental distinction between inherent want of jurisdiction and mere irregularity in procedure. See *Spencer Bower*; *Res Judicata*, p. 69; *Spencer Bower: Estoppel by Representation*, p. 187. If any effect is to be given to section 12 (1) of the Registration Ordinance then it is only as a limitation to section 17 of the Partition Ordinance. [Counsel cited *Babyale v. Nando* <sup>4</sup>; *Bernard v. Fernando* <sup>5</sup>; *Meurling v. Gimarahamy* <sup>6</sup>.]

*H. W. Jayewardene*, with *M. L. de Silva*, for the defendant respondent in Appeal No. 534.—Section 12 (1) of the Registration Ordinance lays down a condition precedent to the issue of summons. The Court has no jurisdiction till summons has been issued as laid down in section 12. The Court will decide the question of due registration only if raised by the parties and its decision is only binding on the parties. The Court cannot by a wrong decision on a question collateral to the main issue vest itself with jurisdiction—*Halsbury (Hailsham ed.)*, Vol. 9, pp. 880, 881; *Bunbury v. Fuller* <sup>7</sup>; *Rex v. Income Tax Special Commissioners* <sup>8</sup>; *The King v. Woodhouse* <sup>9</sup>; *Rex v. Bradford* <sup>10</sup>; *R. v. Justices of the Peace for Weston-Super-Marl* <sup>11</sup>; *R. v. Fulham, Hammersmith and Kensington Rent Tribunal* <sup>12</sup>; *Rex v. City of London Rent Tribunal* <sup>13</sup>. There is a distinction between the existence of jurisdiction and the exercise of jurisdiction—see *Weerasooria v. Controller of Establishments* <sup>14</sup> and *Hriday*

<sup>1</sup> (1917) 4 C. W. R. 406.

<sup>2</sup> (1937) 39 N. L. R. 272.

<sup>3</sup> (1937) 39 N. L. R. 168.

<sup>4</sup> (1915) 18 N. L. R. 370.

<sup>5</sup> (1913) 16 N. L. R. 438.

<sup>6</sup> (1922) 25 N. L. R. 500.

<sup>7</sup> (1853) 9 Exch. Reps 111 at p. 140.

<sup>8</sup> (1888) 21 Q. B. D. 313.

<sup>9</sup> (1906) 2 K. B. 501.

<sup>10</sup> (1908) 98 L. T. 620.

<sup>11</sup> (1944) 1 A. E. R. 747.

<sup>12</sup> (1950) 2 A. E. R. 211 at p. 214, and

(1951) 1 A. E. R. 482 at p. 483.

<sup>13</sup> (1951) 1 A. E. R. 195.

<sup>14</sup> (1949) 51 N. L. R. 189.

*Nath Roy v. Ram Chandra Barna Sarna*<sup>1</sup>. With regard to the distinction between an imperative and directory provision of a statute see *Maxwell : Interpretation of Statutes*, 9th ed., p. 373. The whole purpose of the Registration of Documents Ordinance would be nullified if section 12 (1) is regarded merely as directory. It is therefore submitted that if the provisions of section 12 (1) are not complied with the partition proceedings are nullified. It is also submitted that as section 12 (1) of the Registration of Documents Ordinance deals with a step in partition proceedings, the Partition Ordinance and the Registration of Documents Ordinance must be read together. If there is a failure to comply with section 12 (1) of the Registration of Documents Ordinance then a decree entered under the Partition Ordinance is not given "as hereinbefore provided" and has no conclusive effect under section 9 of the Partition Ordinance. With regard to the failure to serve summons properly, see *Perera v. Fernando*<sup>2</sup>; *Caldera v. Santiagopillai*<sup>3</sup>; *Hadden & Co. v. Ibrahim*<sup>4</sup>; *Pabilis v. Euginahamy*<sup>5</sup>; *Menchinahamy v. Munawira*<sup>6</sup>; *Sanchi Appu v. Marthelis*<sup>7</sup>. *Jayawardene v. Weerasekera* (*supra*) cited for the appellants has been overruled in *Siwandian Chetty v. Talawasingham*<sup>8</sup>.

*S. J. V. Chelvanayakam, Q.C.*, with *H. W. Tambiah* and *V. Ratnasabapathy*, for the defendants respondents in Appeal No. 58 adopted the arguments submitted on behalf of respondents in Appeal No. 534, and, on the question of jurisdiction, cited *Malkarjan v. Narhari*<sup>9</sup>, *Raghunath Das v. Sunde Das Khetri*<sup>10</sup>, and *Khijarajmal v. Daim*<sup>11</sup>.

*E. B. Wikramanayake, Q.C.*, in reply.—Section 12 (1) lays down a rule of procedure only. Failure to comply with a rule of procedure can never affect jurisdiction. It is only an irregularity which cannot be open to collateral attack. See *Silva v. Kavanihamy*<sup>12</sup> and *Hukm Chand : Res Judicata*, pp. 449, 461.

The English cases on the Rent Restriction Acts cited for appellant deal with *ad hoc* bodies created with a special jurisdiction. In the present case the District Court has a plenary jurisdiction with no limitations. It is also submitted that the words "as hereinbefore provided" mean "as provided by this Ordinance".

*C. Thiagalingam, Q.C.*, replied.

*Cur. adv. vult.*

[The following judgment was delivered in respect of Appeal No. 534 :—]

December 15, 1952. L. M. D. DE SILVA J.—

The question arising for decision in this appeal turns on the legal consequences of non-compliance with the provisions of sub-section 12 (1) of the Registration of Documents Ordinance (Cap. 101) which lays down

<sup>1</sup> (1921) A. I. R. Calcutta 34.

<sup>2</sup> (1902) 3 Br. 5.

<sup>3</sup> (1920) 22 N. L. R. 155.

<sup>4</sup> (1925) 36 N. L. R. 441.

<sup>5</sup> (1948) 50 N. L. R. 346.

<sup>6</sup> (1950) 52 N. L. R. 409.

<sup>7</sup> (1914) 17 N. L. R. 297.

<sup>8</sup> (1927) 28 N. L. R. 502.

<sup>9</sup> (1900) L. R. 27 I. A. 216 at p. 224.

<sup>10</sup> (1914) L. R. 41 I. A. 251 at p. 257.

<sup>11</sup> (1904) L. R. 32 I. A. 23 at p. 35.

<sup>12</sup> (1948) 50 N. L. R. 52.

that "a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens*". X

The 2nd plaintiff who is the wife of the 1st plaintiff claimed title to the land in dispute by virtue of a final decree for partition entered in her favour in D. C. Point Pedro, No. 2,284. The defendant, who was not a party to this action, contended, *inter alia*, that the decree for partition was not "good and conclusive" against him within the meaning of section 9 of the Partition Ordinance (Cap. 56) because the action has not been "duly registered" as a *lis pendens* as required by the sub-section quoted. *Lis pendens* had in fact, as the learned District Judge has held, been registered in the wrong folio.

The learned District Judge upheld the defendant's contention on a preliminary issue of law, and dismissed the plaintiff's action with costs. The present appeal is from this decision.

The object of section 12 of the Registration of Documents Ordinance is without doubt to protect purchasers of interests of land from being affected adversely by section 17 of the Partition Ordinance which enacts that alienation by co-owners of their interests while a partition action is pending are void. A prospective purchaser can always examine the register and make sure that no partition action is pending in respect of the interests he is proposing to purchase. It also in some degree gives notice generally to the world that such an action is pending.

Once a certificate of registration is produced the court has to act on it and is not in a position to decide whether the registration has been made in the correct folio without an investigation which would take it outside its normal functions. The duty is clearly on the plaintiff who institutes the action to ensure that the *lis pendens* is registered in the proper folio.

The two points which arise for consideration are :—

- (1) whether failure to comply with this section renders the decree entered in a partition action void by reason of lack of jurisdiction in the court which entered it; and
- ✓ (2) whether, independent of the point just mentioned, such a failure deprives the decree of the conclusive effect which it would otherwise have under section 9 by reason of the fact that it is a decree not entered "as hereinbefore provided" as required by the section.

Upon the first question it has been argued that section 12(1) of the Registration of Documents Ordinance is merely directory and that failure to observe its provisions does not lead to any fatal results. It was further contended that even if the section be regarded as being imperative, nevertheless, the partition decree was valid, the argument being that the breach of any procedural provision of the law whether directory or imperative would not render the decree a nullity. To this last argument we are unable to assent. In the case of *Marsh v. Marsh*<sup>1</sup> the Privy Council dealt with a case in which the Supreme Court of Jamaica by an error in computation made an order, which under a Rule of Court could have been made only after a certain period before

<sup>1</sup> (1945) A. C. 271.

that period had elapsed. In the course of his judgment Lord Goddard said, "But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius*<sup>1</sup>, and *Smurthwaite v. Hannay*<sup>2</sup> are leading examples of the former, while *Fry v. Moore*<sup>3</sup> may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it is voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v. Moore* (supra) there has been a defect in the service but the writ had come to the knowledge of the defendant".

Under the procedure prescribed by section 12 (1) the court had after acceptance of the plaint on the material placed before it *prima facie* to satisfy itself that the action was duly registered as a *lis pendens* before ordering summons to issue. It is clear that the court had jurisdiction to accept the plaint and to assume jurisdiction for that purpose so that the real question which arises is whether jurisdiction for the further progress of the case was arrested until the *lis pendens* was duly registered. If so the failure to comply with the provisions of section 12 was such a fatal irregularity as would by itself have rendered the decree void.

The one clear instance of a failure of jurisdiction laid down by the Privy Council is where the breach of a procedural provision results in the violation of natural justice. In the case before us there is no such violation. Beyond this as observed by Lord Goddard "no court has ever attempted to lay down a decisive test" which would help us. We find in consequence that a court can answer the question whether there has been a failure of jurisdiction in the case before us only with much less certainty than the second question referred to above. As the view we have formed on the second question concludes this case it is not necessary to pursue the question of jurisdiction any further.

✓ Does the failure to register a *lis pendens* in a partition action as required by sub-section 12 (1) of the Registration of Documents Ordinance deprive the decree entered in the action of the "conclusive effect" which it would otherwise have under section 9 by reason of the fact that it is a decree not entered "as hereinbefore provided" as required by that section? The conclusive effect of section 9 is so drastic that in a long series of cases it has been insisted that before a decree can have such an effect the provisions of the Partition Ordinance prescribing the various steps that have to precede the decree must be strictly complied with.

<sup>1</sup>(1888) 20 Q. B. D. 764.

<sup>2</sup>(1894) A. C. 494.

<sup>3</sup>(1889) 23 Q. B. D. 395.

Garvin J. in the case of *Siwanadian Chetty v. Talawasingham*<sup>1</sup> said, "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". One of the imperative provisions of the Ordinance relates to the issue of summons and is to be found in section 3. There can be no proper compliance with this provision unless sub-section 12 (1) of the Registration of Documents Ordinance has been complied with. Consequently in this case the decree relied on by the plaintiffs does not possess the character of a decree which is "good and conclusive against all persons whomsoever" within the meaning of section 9 of the Ordinance.

✓ For the reasons we have given the judgment of the learned District Judge must be upheld and the appeal is dismissed with costs.

ROSE C.J.—I agree.

GRATIAEN J.—I agree.

[Appeal No. 58 was dismissed for the reasons which appear in the judgment published above.]

*Appeals dismissed.*

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