1958 *Present:* Sansoni, J., and T. S. Fernando, J.

H. L. SIRIWARDENE *et al.*, Appellants, *and* M. A. T. JAYASUMANA, Respondent

S. C. 557—D. C. Kalutara, 30,327

Partition action—Interlocutory decree—Scope of its "final and conclusive" nature—Summons not duly served on a party—Effect—Partition Act, No. 16 of 1951, ss. 14, 48 (1).

Where one of the defendants in a partition action sought to have the interlocutory decree, which was entered in his absence, set aside on the ground that substituted service had been ordered on him although there was no sworn evidence before the Court that he was within Ceylon and was evading service—

Held, that the "final and conclusive" effect given to an interlocutory or final decree by section 48 (1) of the Partition Act, No. 16 of 1951, was not intended to deprive a party who had not been duly served with summons of the right to claim that the decree had not been properly entered, and should therefore be vacated, in order that his claim might be investigated.

APPEAL from a judgment of the District Court, Kalutara.

Frederick W. Obeyesekere, with *G. L. L. de Silva*, for the 8th and 9th defendants-appellants.

M. L. de Silva, for the plaintiff-respondent.

Cur. adv. vult.

April 2, 1958. SANSONI, J.—

The question that arises for decision in this appeal is the effect that should be given to certain words in section 48 (1) of the Partition Act, No. 16 of 1951. The relevant part of that section reads :

"Save as provided in sub-section (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action ; and the right share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

It is not necessary to quote the rest of the section for the purpose of this judgment.

The 8th defendant-appellant who was a party to this action complains that the summons was not duly served on him. It happened that upon a report being made by the Fiscal that the summons could not be served on him because he could not be found, the District Judge ordered that the summons on him should be re-issued to be affixed to the land. On the next date the Fiscal reported that the summons had been served by being so affixed, but the 8th defendant was absent when the case was called in Court. Thereafter the trial took place and interlocutory decree was entered in the absence of the 8th defendant.

Now section 14 of the Act reads : " The provisions of the Civil Procedure Code relating to the service of summons shall apply in relation to the service of summons in a partition action ". It is quite clear from the decisions of this Court that where personal service of summons cannot be effected on a defendant, there must be sworn evidence before the Court that the particular defendant is within the Island and is evading service, before substituted service is ordered. There was no such evidence before the Judge in this case, and the order that summons should be affixed to the land was therefore bad. At the inquiry which was held into the application of the 8th defendant that the decree be set aside and he be allowed to file answer, the learned Judge correctly held that summons had not been duly served : but he also held that section 48 (1) did not help the 8th defendant because the section provided that the interlocutory decree shall be final and conclusive " notwithstanding any omission or defect of procedure ", and it is the latter finding that is attacked by the 8th defendant.

The question is whether these words apply to a case where summons has not been duly served on a defendant. It is hardly necessary to draw attention to the conclusive effect of a decree entered in a partition action, and to the decisions of this Court under the Partition Ordinance which held that a final decree can be set aside where there has been an irregular service of summons. I find it impossible to hold that section 48 (1) was intended to deprive a party who had not been duly served with summons of the right to claim that the decree had not been properly entered, and should therefore be vacated, in order that his claim might be investigated.

In *Craig v. Kanseen* [1] Lord Greene, M. R., considered the question whether a failure to serve summons was a mere irregularity, or whether it was something worse which would give the defendant the right to have the order set aside. He said it was beyond question that " failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has no intimation of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained ".

The matter has also been dealt with by the Privy Council in *Marsh v. Marsh* [2] where Lord Goddard dealt with the question of what

[1] *(1943) 1 A. E. R. 108.* [2] *(1945) 62 T. L. R. 20.*

irregularities will render a judgment or order void or only voidable. He said : "No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities . . . . One test that may be applied is to inquire whether the irregularity has caused a failure of natural justice."

I think the principles enunciated in these cases show beyond doubt that due service of summons on a party is an essential step, and does not come within the term "omission or defect of procedure". Those words should be confined to omissions or defects of a much more venial character which it is not necessary for me to categorise here.

I therefore hold that the 8th defendant was entitled to have the interlocutory decree set aside in order that he might file his answer and prove his claim. His appeal is allowed with costs in both Courts.

The appeal of the 9th defendant was not pressed and I therefore need not consider it. His appeal is dismissed with costs.

T. S. FERNANDO, J.—I agree.

Appeal of 8th defendant allowed.

Appeal of 9th defendant dismissed.