

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

Revision Application No. 116/06

Lalith Kumara Vithana

D.C.Homagama 259/P

154 Magamma Homagama

Plaintiff

Vs

Sunil Vithana

No. 154, Magamma

Homagama and 8 others

Defendants

1. K.Saranapala, 159 Magamma,
Homagama
2. G.C. Kotalawala
No. 306/97, Magamma,
Homagama

Petitioners

AND BETWEEN

Lalith Kumara Vithana

154, Magamma, Homagama

Plaintiff-Respondent

Sunil Vithana and 8 others

Defendant Respondents

AND

- 1. K. Saranapala
159, Magamma, Homagama**

- 2. G.C.Kotalawala
306/97 Magamma, Homagama**

Petitioner-Petitioners

Vs

Sunil Vithana and 8 others

**Defendant-Respondents-
Respondents**

**BEFORE: Deepali Wijesundera J., and
M. M. A. Gaffoor, J.,**

**COUNSEL: Ranjan Suwandarathne with Anil Rajakaruna for the Petitioner
S.N.Vijithsinghe for the Plaintiff-Respondent and 2nd and 3rd
Defendants Respondents**

ARGUED ON: 20.12.2014

DECIDED ON : 11.6.2015



M.M.A. Gaffoor J.,

This is an application inviting this Court, in exercising its power of Revision, to set aside the interlocutory decree and judgment entered in the partition action on 13.01.2004 in the District Court of Homagama in case No 259/P and to allow the Petitioner to enter to the said case.

The action was instituted in July 1988 upon a commission for survey being issued, the Commissioner N.J. Sethunga, Licensed Surveyor submitted his Plan No. 3424 dated 31st August , 1995. His return to the commission contains the names of the Petitioners and their addresses as new claimants to the corpus that was surveyed.

The Petitioner alleged that although the Commissioner has mentioned the names of the Petitioners in his Report, he has not mentioned that he has handed over the copies of the Notices given to him under Section 16(3) and (4) of the Partition Law No. 21 of 1977, as amended by Act No. 32 of 1987. As such, it appears that the Petitioner were not served with notices.

Sub-sections (4) and (5) of Section 16 of the Partition Law clearly states that the Commissioner shall serve on any person (not being a party to the action) or his agent a copy of the Notice mentioned in Sub-section (3) and shall obtain from the person on whom a notice is served under sub-section (4) an acknowledgement of the receipt of such notice. (The Form of Notice appears in the second schedule as amended by Act No. 32 of 1987).

Sub-section (6) of Section 16 of the Partition Law states that, "*where any person on whom a notice is served under sub-section (4) of this section*

subsequently added as a party Defendant to the action, the notice served on such person or his agent by the Surveyor under sub-section (4) of this Section shall be deemed to be a summons served on such person in such action under the provisions of this law and no further service of summons on such person shall be necessary."

Thus sub-section (6) of Section 16 of the Partition Law imposes the importance of the service of notice on a person who is not a party to the action (but appears as a new party or claimant). It is elementary that once a person becomes a party to the action as a Defendant he is entitled to be served with summons but, under the above sub-section (6) the service of notice shall be deemed to be service of summons and no further summons shall be issued. It is mandatory that the person who is served with a notice shall be added as a party Defendant to the case . But if no notice is served on him, the court must issue a fresh notice. In the instant case, the Plaintiff has failed to take steps to add the Petitioners as parties to the action. The form of notice mentioned in the second schedule request the person on whom the notice was served as follows :

"If you claim any interest in the land/lands you are hereby required to move to be added as a party to the aforesaid action on or before the and file your statement of claim, and to comply with the requirements of Section 19." These wordings appear to be equal to the wordings in a normal summons. But if the party is not served with a notice, it is tantamount to no service of summons on him, and thereby he is denied his right of filing a statement of claim and participating at the trial.

Section 69 of the Partition Law has provides for the addition of parties in two cases:

- a) When the court is of opinion that a parson should be, or should have been, made a party to the action, after issuing to such person, a notice substantially in the Form set out in the second schedule to this law, requiring him to make an application to be added as 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 Section 69(1) confers a discretionary power on the Judge to add as a party at any time upon judgment is delivered.

Section 20(1)(a) also states that the court shall order notice of a partition action to be sent by registered post to every claimant (not being a party to the action) who is mentioned in the report of the Surveyor under sub-section (1).

Considering the wording of Section 20(1)(a) and Section 69(1)(a), it is the duty of the court to issue a notice on the person who appeared before the Surveyor to be added as a party Defendant though the court will not ordinarily add a claimant as a party until he applies to be so added. But in a partition action the law requires that if the Surveyor's Report discloses a claimant, such claimant should be noticed; and if such notice is not served, it will be deemed that the claimant has not been served with summons in terms of sub-section (6) of Section 16 of the Partition Law, because this subsection says that the notice served on the

person by the Surveyor *“shall be deemed to be a summons and no further service of summons on such person shall be necessary.”*

In a partition action the court must bear in mind the effect of a decree which it enters and therefore should be careful to bring in parties who appears to have an interest. The fact that a person had appeared before a Surveyor and whose name is reported as a new party to court, two courses are open to the court. (1) The court may either act under Section 20(1(a) or it may add him under Section 69(1) as a party Defendant and issue summons on him.

In the instant case, the Plaintiff has failed to take steps either to file the necessary notices or the summons to enable the court to issue on the Petitioners, who were not served with notices by the Surveyor.

It is a fundamental requirement of the law that service of summons on the Claimant or Defendant must be done and if not, a judgment entered is null and void and cannot be executed against a person who is not served with summons. The application of this principle by English Courts is seen in the case of Craig vs Kanseen (1943) 1 A.E.R. 108. It was held in this case that “failure to serve summons upon which the order in that case is made was not a mere irregularity, but a defect which made the order is a nullity.”

Thus it is very clear that if a judgment is entered without service of summons on a necessary party, that judgment is a nullity and has no force in law.”.

In the case of Leelawathie vs Weeraman 68 NLR 313, Sansoni C.J., held (which was a Full Bench decision) that, "In a action instituted under the Partition Act, the Court has power under Section 70(1) to add as Defendant, 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)." This case was decided under the old Partition Act) and the present Partition Law provides similar provisions which are mentioned above.

In the case of Sivanandan vs Sinnapillai 77 NLR 300 (which was also decided under the old Partition Act) Walpita J., held that, "*wherein a partition action, a claimant (not being a party to the action) is mentioned in the Surveyor's Report, the court has no power to dispense with the service of notice on the person who is alleged to be a claimant. In such a case, the action is imperative of section 77 and 79 should be observed and Section 356 of the Civil Procedure Code followed in serving the notices, where these sections have not been strictly followed, the Supreme Court has power to set aside, in revision, the Interlocutory Decree entered in the absence of a claimant*".

If summons is not served on a claimant, he is deprived of an opportunity to establish his rights to the corpus. It is the duty of the court to investigate the title of the parties. If a claimant is not added as a party, his title to the corpus cannot be established before court. The learned District Judge is therefore wrong when he dispensed with the service of notices on the Petitioners whose names were disclosed in the Surveyor's Report.

For the reasons stated above, I would hold that the interlocutory decree already entered should be set aside . This case will be sent back to the District Court for the court to issue summons on the Petitioners to add them as parties to file their statement of claim and the trial to proceed with de novo.

~~JUDGE OF THE COURT OF APPEAL~~

WIJESUNDERA J.,

I agree.

JUDGE OF THE COURT OF APPEAL