1904.
August 30.

SILINDU *v.* AKURA.

D. C., Kegalla, 383 and 1,491.

Restitutio in integrum—Ex parte *application to the Supreme Court for—Civil Procedure Code, s. 377 (b)—Form of order.*

On proper materials laid before the Supreme Court by a party who desires to be relieved of a decree which had been improperly obtained against him, it will, upon an *ex parte* application by such party, direct the Court which passed the decree to hear all necessary parties and determine whether the petitioner is entitled to be relieved from the said decree and to be restored to his rights as existing prior to the said decree.

THIS was an application to the Supreme Court for *restitutio in integrum* of the rights of the applicants as they stood prior to the decree passed in D. C., Kegalla, 393, on 19th October, 1893.

The first applicant, Silindu, wife of the second applicant, was the daughter of Happua and his wife Amalu, and was born in 1878.

Happua died on 9th March, 1881, entitled to paraveni and acquired lands which his widow gave out in *ande* cultivation till her death in 1890. Her brother Kiri Ukku then applied to be appointed next friend of Silindu in order to institute an action to evict (1) Happua's brother Laminduwa and (2) Akura, the son of the latter. Kiri Ukku's proxy to her proctor authorized legal proceedings "for me and in my name," &c., throughout, and made no mention of the minor, and when the appointment was made the same proxy was utilized to support the plaint of the minor by her next friend Akura. In this suit bearing No. 343, the second defendant pleaded he was a son of Happua, and both defendants pleaded title by prescriptive possession.

On the trial day, 19th October, 1893, a consent decree was recorded: "It is agreed between the parties that judgment be entered up as follows: for the plaintiff, for lands Nos. 4 and 9 and half of Nos. 1, 2, 3, 5, 6, and 7; for first defendant, for land No. 10; and for second defendant, for the other half of Nos. 1 and 2."

In April, 1896, the applicants were married, and in May, 1896, Laminduwa died, and Akura, claiming to be his son, was granted administration to his estate. The applicants asserted they entered into possession of all the lands in October, 1899, and held possession till April, 1902, when Akura, claiming title by inheritance and by virtue of the decree in 383, D. C., Kegalla, to the moiety of the lands decreed to him, instituted the action No. 1,491 to recover possession, asserting he had possessed them until ousted in January, 1902. The applicants as defendants pleaded that the decree in No. 383 had been fraudulently and collusively obtained, and that first applicant as sole child and heiress of Happua was solely entitled, and they claimed in reconvention that the decree in No. 383 should be set aside.

The District Judge held that the decree in No. 383 was not valid or binding on the applicants, because the Court had not expressly sanctioned the agreement, and on issues framed held that Akura was not a son of Happua, and so gave judgment on 23rd October, 1902, for the applicants, defendants in case No. 1,491.

In appeal before Layard, C.J., and Grenier, A.J., it was held on 30th April, 1903, that the plaintiff Akura was entitled to the lands under the decree in No. 383, and that it could not be set aside in another suit, but only by *restitutio in integrum* in the manner pointed out in the cases reported in *4 N. L. R. 249 and 7 N. L. R. 139.*

For this relief the applicants now filed their application supported by affidavit and by copies of the proceedings in cases Nos. 383 and 1,491, D. C., Kegalla.

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D. F. Browne, for applicants.—The decree in 383, D. C., did not bind the minor (1) when there was no proxy by the next friend, and (2) when the Court did not inquire whether the settlement was for the benefit of the minor and expressly sanction it for that reason. *O'Kinealy* on the Indian Civil Procedure Code, section 462; Ceylon Civil Procedure Code, section 500. Laminduwa was not an heir of Happua, and the grant of a land to him by settlement is averred by the applicants to have been made because he was a headman of influence. Akura's administration shows he was not a son of Happua, but of Laminduwa, and the Court so found in D. C. No. 1,491 on issue framed. The applicants have named as respondents Akura, personally and as administrator of Laminduwa, and Laminduwa's heirs. We ask now for an interlocutory order under section 377 (*b*), which appears to be the proper order to make on a non-summary petition when the Civil Procedure Code does not prescribe what the procedure thereon should be. [Wendt, J.—Are you not entitled to an *ex parte* order?] It was so held in 7 *N. L. R.*, *142*, but if there be doubt as to our right, order *nisi* might be first issued. We submit, however, that the grounds we advance for relief are only those which were held in our favour in 1,491, D. C., by the District Judge. [Middleton, J.—Is there no other form of action open to you, as for fraud in the obtaining of the decree in 383, D. C.?] This Court in its judgment in 1,491, D. C., indicated we should apply in this manner, and we have done so on the lines laid down in its previous decisions therein cited. [Wendt, J.—Is the position of affairs still the same?] We aver Akura has, since the appeal decision against us in 1,491, D. C., been put in possession of the lands, and we do not know of any assignment by him of his rights. During the pendency of this application writs have, we are informed, been applied for, apparently to recover the costs in 1,491, D. C. [Wendt, J.—Does your affidavit quote the passages in the records of the two actions on which you have commented?] No. We have attached to our affidavit certified copies of the records themselves, and narrated their effect in one affidavit summarizing the facts.

30th August, 1904. WENDT, J.—

Upon reading the petition of Silindu and her husband Siriya, and the affidavit of the said Silindu, and the decree of the District Court of Kegalla in action No. 383, dated 19th October, 1893, and the order of the said District Court of Kegalla in action No. 1,491 dated 13th October, 1902, and the judgment and decree of the said Court in the said last-mentioned action dated 23rd

October, 1902, and the judgment and decree of this Court in the last-mentioned action dated 30th October, 1903, and upon hearing counsel for the petitioners, it is ordered that the matter of the said petition be referred to the District Court of Kegalla, in order that the said District Court may, after hearing all necessary parties, determine whether the petitioners are entitled to be relieved from the aforesaid judgments and decrees and to be restored to their rights as existing prior to the said decree of the 19th Ocober, 1893; and if so, that the said District Court may investigate and declare, the rights of the petitioners in the lands, the subject of the said actions, with power to the said District Court to dispose of the costs of the proceedings before it as to it may seem right and proper.

MIDDLETON, J.—I agree.