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1933 *Present :* **Dalton A.C.J. and Drieberg J.**

KANNANGARA *v.* SILVA *et al.*

203—D. C. Matara, 5,098.

Partition—Decree entered without trial—No notice to parties—Application by person, who is no party, to set aside the decree—Powers of District Court—Revision by Supreme Court.

Where a partition decree was entered without a trial and without notice to the parties on the record, and an application was made by a person who was no party to the action to set aside the decree and to allow him to intervene,—

Held, that the District Court had no power to vacate the decree.

The Supreme Court would in the exercise of its powers of revision set aside a decree entered under such circumstances and direct proceedings to be taken *de novo.*

THIS was an appeal from an order of the District Judge of Matara, refusing to set aside the decree entered in a partition action. The appellant who was not a party to the action moved to set aside the decree on the ground that it had been irregularly entered. He applied that he should be allowed to intervene and to prove his claim to an interest in the land.

N. E. Weerasooria, for appellant.—A Judge can vacate a final decree which is not as provided for in the Partition Ordinance. Any party interested in the land can move the Court to vacate final decree even though he was not a party to the action. Plaintiff when he got his decree did not prove the title of the defendants. See section 4. Shares are left unallotted. The Ordinance requires full investigation into title. (*Gooneratne v. Bishop of Colombo.*[1]) A decree "not as hereinbefore provided," is bad. (*Siwanadian Chetty v. Talavasingham.*[2]) Parties, for example, may intervene after the preliminary decree up to the final decree. But the final decree must be as hereinbefore provided. Otherwise there is no valid final decree and parties may intervene even thereafter.

H. V. Perera, for fifth defendant, respondent.—The question is merely this : Can a Court at the instance of a person who was no party to the action vacate a final decree, whether regularly or irregularly entered. A distinction must be drawn between cases where a person can allege that a partition decree in another action is not binding on him because it was

[1] *32 N. L. R. 337.* [2] *28 N. L. R. 502.*

irregularly entered and cases where a person comes into the partition action which has been concluded by the entry of a final decree to have that decree vacated on the ground of irregularity. A Judge is *functus officio* after he has passed the decree whether it is regular or irregular. The default which makes a decree irregular is a default of the Court, *i.e.*, a failure to observe some imperative provision of the Ordinance. The effect is not to enable parties to intervene thereafter but to avoid the binding nature of the decree under section 9. (*See 9 N. L. R. 237.*) Where a partition decree is not as hereinbefore provided, a person who was no party to it cannot ask that the decree is void, but only that it is not binding on him. A person who intervenes in the partition action itself cannot ask that the decree be vacated as far as he is concerned. It must be vacated *in toto*. There is no procedure laid down in the Ordinance to show what is to happen if a decree is irregularly entered. The vacating of a decree, if possible, may go on indefinitely, time after time. A party affected by an irregular decree is not without a remedy. The principle of law is that a Judge cannot set aside his own order. He can however try an action to set it aside because he is given fresh jurisdiction by the filing of the plaint.

N. E. Weerasooria, in reply.

C. T. Olegasekeram (with him *Mahroof*), for eighth defendant, respondent.

July 4, 1933. DALTON A.C.J.—

This appeal arises out of a partition action started in the year 1911, D. C., Matara, No. 5,098.

By his plaint of that year plaintiff sought to partition a land allotting one-sixth share to himself, one-sixth each to the second and third defendants and the remaining three-sixth to the third, fourth, and fifth defendants. The defendants were absent at the trial and the matter was heard *ex parte*. As a result interlocutory decree was entered on July 11, 1911, allotting the one-sixth share claimed to the plaintiff, and leaving the remaining five-sixth share unallotted. Commission was issued in June 1912, to partition off this one-sixth share, but considerable difficulty seems to have arisen in respect of the service of notices. The original plaintiff appears also to have died in 1912, and two others were substituted in his place. Eventually on November 9, 1915, the Commissioner made a return of his commission with a plan of partition and a scheme of appraisement. Difficulties again arose with regard to the service of notices, and on April 16, 1916, the District Judge directed that the matter "lay by". After a reasonable interval of time, if no action was taken by either party, of course the District Judge should of his own motion have directed that the action do abate, but he did not do so.

On July 5, 1929, after the case lay dormant for thirteen years, an application was made to the then District Judge by the fifth defendant in the action in somewhat extraordinary terms. He moved for a notice on the plaintiffs to show cause why he should not be allowed to take further steps in the case "if the plaintiffs do not work up this case". The terms of the motion are not intelligible, and, further, no explanation

is offered by the fifth defendant for his previous failure to take any part in the proceedings, but the District Judge nevertheless directed notice to be given to the plaintiffs. He should, in my opinion, have refused the application altogether, if for no other reason (and there were other reasons also), on the ground that ever since the action was started in 1911, the fifth defendant had never taken any interest or part in it. After such a lapse of time, difficulties arose in finding the plaintiffs who were stated to be in Hatton. They could not be found but a notice for one of them is stated to have been affixed to the land. Eventually on December 6, 1929, no plaintiffs being present, an order was made that the motion of July 5 be allowed.

On January 9, 1930, the fifth defendant then filed a document purporting to be a statement of rights to the unallotted five-sixth of the land and he moved that this five-sixth share be allotted to him and others in the manner set out in the statement, and that the interlocutory decree of 1911 be amended. On the same day the then District Judge granted this application, without notice to anybody and without any inquiry as to or proof of the rights of the fifth defendant and the others as claimed in the statement filed. The interlocutory decree of July 11, 1911, was thereupon amended by which the unallotted five-sixth share was, so it states, reallotted as follows: one-sixth to first defendant, thirteen-eighty-fourth to third defendant, nineteenth-eighty-fourth to fifth defendant, and three-fourteenth in equal shares to the seventh, eighth, and ninth defendants together. Even here an error seems to have been made since one-fourteenth of the five-sixth still appears to remain unallotted. None of these parties, except the fifth defendant, seems to have taken any part in these proceedings of July 5 or December 6, 1929, or January 9, 1930. It is certainly amazing that such an order could be made by any court without inquiry, and no doubt emboldened by the success of his application the fifth defendant made a further move. On January 28 he moved the Court by his proctor for a further amendment of the interlocutory decree whereby he should be declared entitled to two unallotted rooms, three boutiques, an embankment bordering the road, and to a half share of all the plantations on the land. The motion makes reference to a deed filed in another case, District Court No. 1,502, and states the fifth defendant is entitled to the boutiques under that deed. I refer to case No. 1,502 in more detail later. It is sufficient at this point to say that by agreement in District Court No. 1,502, the land comprising the five-sixth share that fifth defendant now seeks to partition here was excluded from the partition in District Court No. 1,502. This motion was allowed on the same day, January 28, again without notice to anyone or with no attempt at any inquiry, and the interlocutory decree was further amended accordingly, and all he asked for in his motion was allotted to him.

Thereafter a commission for partition issued, and a further plan was filed on May 16, 1930. Notices were asked for by fifth defendant to be served on the second and third plaintiffs at Galle and Kandy, respectively, and on the remaining defendants at Matara. On July 16 it was reported, according to the journal entries, that the second, sixth, seventh, ninth, and tenth defendants were dead, that the second and third plaintiffs,

and third, fourth, and fifth defendants could not be found. The latter reference to the fifth defendant must be a mistake as he was the person asking for the notices to be served, and may be an error for the first defendant who is not otherwise mentioned. The only person on whom the notice is stated to have been served is the eighth defendant. Even he, however, did not appear, and the District Judge thereupon made an order that the unserved notices be affixed to the land. Some attempt seems to have been made to have representatives substituted for the deceased seventh, ninth, and tenth defendants, but these representatives never received any notice of the partition. The journal entry of September 12, 1930, shows that the unserved notices as ordered on July 16 had been affixed to the land. Fifth defendant alone was again present on that day, and, in the absence of any objection to the partition decree and appraisement, final decree was entered. This decree under the provisions of section 9 of the Partition Ordinance is good and conclusive against all persons whomsoever, but the statement of facts set out shows how irregularly it had been obtained, and how the most elementary principles governing the administration of justice have been disregarded.

Up to this point the present appellant has not come into these proceedings at all. In the course, however, of the fifth defendant's attempts to recover his costs, he seems to have become aware of what had been done in respect of the land and the buildings on it. He thereupon on July 17, 1931, petitioned the Court to set aside the final decree and to allow him to intervene. The grounds alleged in support of this petition were that the final decree was not entered in accordance with law, that the fifth defendant had been guilty of fraud in getting the boutique allotted to him, and that petitioner was entitled to four boutiques on the land together with a two-third share of the land by right of Fiscal's transfer No. 15,259, dated September 15, 1920. Since that date petitioner stated he had sold half his rights to one L. G. Covis Appu and that neither of them had received any notice of the proceedings. After notice to the fifth defendant, and after hearing argument on behalf of the petitioner and fifth defendant, the District Judge, by order dated November 23, 1932, held that final decree had been entered and he had no power to set it aside and reopen the case. From this order the petitioner appeals.

On the appeal before us, petitioner brought further material to supplement his application setting out what he alleged to be the fraud of the fifth defendant in obtaining the final decree without his knowledge. There was no counter affidavit by the fifth defendant contradicting these allegations nor is there any suggestion that the irregularities I have detailed did not take place, although his counsel stated he denied any fraud on his, the fifth defendant's part. The further allegations which petitioner makes are as follows: The third defendant in the action No. 5,098, was Mohamedu Lebbe Marikar Abdul Samadu. His interests, with the boutiques put up by him, passed to petitioner by Fiscal's transfer No. 15,259 of September 16, 1920, on a sale under a writ against Abdul Samadu. The boutiques were subsequently demolished by petitioner, and the present masonry and tiled boutiques were erected by him. In November, 1924, the fifth defendant (respondent to the appeal) who is a brother of Abdul Samadu, instituted partition action No. 1,502 in the

District Court, Matara. The land that he sought to partition is the land the subject of this action (No. 5,098) and the land adjoining it on the north. In this action (1,502) the fifth defendant, who was plaintiff, made the present petitioner-appellant the first defendant and allotted to him the rights that had belonged to Abdul Samadu. The present petitioner-appellant however filed answer setting out that the subject-matter of case No. 1,502 consisted of two distinct lands and he claimed rights in both. At the trial this contention seems to have been accepted by the plaintiff (fifth defendant here) and by settlement dated June 21, 1928, the southern portion of the *corpus* there sought to be partitioned, which southern portion is the *corpus* in this case No. 5,098, was excluded. Case No. 1,502 then proceeded in respect of the land to the north only, and final decree was entered therein on February 28, 1930. In that decree the petitioner-appellant was declared entitled to certain interests.

From these allegations, it appears that the fifth defendant was well aware of the claims of the petitioner-appellant to portion of the land and to buildings he was seeking to obtain for himself in this case No. 5,098. He agreed to the exclusion of this land from his action No. 1,502 on June 21, 1928. On July 5, 1929, however, he made his first move in case No. 5,098 without disclosing to the Court at any time petitioner-appellant's claim to the land and boutiques. On the facts this would appear to be nothing but an attempt to circumvent the petitioner-appellant who had resisted his claim in case No. 1,502, an attempt which was greatly facilitated by the failure of the Court to hold any investigation or inquiry into his title. He obtained his amendments to the interlocutory decree in case No. 5,098 in January, 1930, and he obtained his final decree in case No. 1,502 the following month. For all practical purposes he obtained in case No. 5,098 what he had failed to obtain from the petitioner-appellant in case No. 1,502. There is no reason to doubt petitioner's statement that he was not aware of the existence of case No. 5,098 until after the final decree had been entered. The fifth defendant acted in the two cases by different proctors. There is nothing to suggest that his proctors in case No. 1,502 were aware of what was being done by him in case No. 5,098, but an examination by his proctor in case No. 5,098 of the proceedings in 1,502, referred to as it is in his motion of January 28, 1930, should have shown him that the land being partitioned in 5,098 had at that date been excluded from the land being partitioned in 1,502, and should certainly have put him on inquiry. The proctor must also share the blame for the failure to hold any inquiry or investigation of the fifth defendant's claim, since he must also have or should have known that the Partition Ordinance required this. A very large part of the civil work in the Matara District Court consists, I understand, of partition cases.

The first question that arises on this appeal is whether the District Judge was correct in refusing to allow the petitioner-appellant to intervene after the final decree had been entered. There is no doubt from the facts I have set out that the final decree was not "given as hereinbefore provided" under section 9 of the Partition Ordinance, but the District Judge held that he had no power to set aside the decree.

There is authority for the contention that the petitioner-appellant could have brought a vindicatory action impeaching the validity of the

decree (*Samarakoon v. Jayawardena*[1]; Jayewardene's *Law of Partition, p. 195* et seq.) Mr. Perera, for the respondent, was further not prepared to contest that petitioner might have himself instituted a partition action taking exception to such a decree if it had been pleaded by the defendant. He urged, however, that he could not reopen the proceedings in this case by seeking to intervene after final decree had been entered. He referred to the case of *Silva v. Silva*[2] in this connection.

No case where a party has been allowed to intervene after final decree has been cited to us, nor can Counsel say that it has ever been allowed. If, however, a person who was not a party to a partition action in which a final decree has been entered, can institute a separate partition action in the same Court as claiming an interest in the land, and seek to show the final decree is not binding upon him, it is difficult to understand why he should not be allowed to effect his purpose by intervening in the original action. The Appeal Court has held, however, that a Court has no inherent power to vacate its own decree or order in the same proceedings except under the provisions of the Civil Procedure Code. Cases to this effect are reviewed in *Arumugam Chetty v. Seeni Mohammado*.[3] There are other cases in which this conclusion would not seem to be always strictly followed, but the Partition Ordinance dates from 1863 and the absence of any authority for allowing intervention after a final decree is significant. In the absence of any known case in which a party has been allowed to intervene after final decree on the plea that the final decree is not a conclusive one against the whole world, I am not prepared to hold the District Judge was wrong in holding he was unable to vacate the decree already entered in the case, and therefore in refusing to allow the intervention.

The question then arises whether this Court has power to deal with the matter as it arises here in revision. There is no doubt as to the gross irregularities in the proceedings upon which the fifth defendant obtained his final decree in several respects, and the petitioner has shown it has not the effect of a final decree as provided for by section 9 of the Partition Ordinance. He is not, however, a party to the action. Does that debar him from seeking this remedy? de Sampayo J. in *Ibrahim v. Beebe*,[4] where a similar question is dealt with, does not hold this remedy is not available for a person who has not been a party to the action. Wood Renton C.J. also held in that case that the Court ought not on the facts to exercise its powers in the case of the intervenient there, not that the Court could not do so. In *Perera v. Fernando*[5] Moncreiff A.C.J. and Middleton J. granted relief to a person who came forward after final decree had been entered. The applicant there had been made defendant in the action, but never had notice of or knew of the proceedings. He was really in the position of a stranger to the action and asked to be allowed to intervene. The trial Judge refused leave to intervene at that stage, and on appeal the Court held that the proceedings were irregular, there being no partition trial as required by the Ordinance and therefore nothing that could be called a final decree in the action. Relief was granted, and the final decree entered was therefore set aside, proceedings

[1] *12 N. L. R. 316.*
[2] *13 N. L. R. 87.*
[3] *2 C. L. R. 15.*
[4] *19 N. L. R. 297.*
[5] *3 Browne's Reports 5.*

being ordered to be taken *de novo* in the manner provided by the Partition Ordinance. The judgments do not expressly say that Court was acting in revision, but I think it is clear it was so acting. It was not held that the District Judge was wrong in refusing to allow the intervention at that stage.

The case before us is a very much stronger one on the facts than *Perera v. Fernando* (*supra*), and it seems to me to be eminently a case in which this Court should interfere. The proceedings following on the fifth defendant's motion of July 5, 1929, are full of irregularities, there has been no attempt to ascertain who are the actual owners of the land or to have the proper parties before the Court, there has been no trial, and therefore there can be nothing that can be called a final decree. The power given by section 40 of the Courts Ordinance and by section 753 of the Civil Procedure Code is very wide. It must for that reason, however, be exercised with great care, although there seem to be no hard and fast rules governing the exercise of this power. The petitioner-appellant is in this case, in my opinion, entitled to the relief he asks for, and all proceedings in this action from and after July 5, 1929, must be set aside, including the order on respondents' application of that date.

The appeal is allowed and petitioner is entitled under the circumstances to costs in both Courts.

DRIEBERG J.—

There can be no question as to the irregularity of these proceedings and that the decree for partition was not entered in the manner provided by the Ordinance; though for this reason it is not binding on the appellant, he has the right to a judicial declaration that this is so, and the question has arisen in what manner he can obtain it. The appellant, who was not a party to the partition action and did not know of it until after the final decree, applied in the District Court that the decree be set aside and that he should be allowed to intervene and prove his claim to an interest in the land. The learned District Judge refused his application on the ground that he had no power to reopen the case. The appellant has appealed from this order. Mr. Perera, for the respondent, contended that the decree cannot be set aside in proceedings in this action, whether by the District Court itself or by this Court in the exercise of its powers of revision.

If the appellant brought an action for a declaration of title to his share and the defendant in it set up against him a title based on the partition decree, it would be open to him to plead and prove that the partition decree was not binding on him as it had been entered in the manner prescribed by the Partition Ordinance (*Gooneratne v. Bishop of Colombo*[1]); the same plea would be available to him if he was sued by a plaintiff who claimed on a title derived from the partition decree. The contention that he cannot move in the partition case is based on an observation of Layard C.J. in *Fernando v. Fernando.*[2] In that case a husband married in community of property claimed and obtained in a partition action title to a one-fifth share without disclosing the fact that his wife was dead and that he had children by her who were entitled to half of that share. These children, eighteen years after the decree, applied to have it set aside and

[1] (*1931*) *32 N. L. R. 337.* [2] (*1903*) *9 N. L. R. 237.*

that they be allowed to intervene and have their share allotted to them. Layard C.J., in agreeing with the judgment of Wendt J. which was the principal judgment, said that as it was contended that the decree did not bind the children, there was no adequate reason why they should be allowed to disturb it. When the application was made the father was dead, his estate had been administered and his one-fifth share had devolved on them. Their object was to get this share free of a mortgage effected by their father after the partition decree, and it was not clear that they had not derived benefit from the mortgage. The refusal of the application was on a consideration of its merits, and it cannot be regarded as an authority that the Supreme Court cannot, on an application in a partition action, set aside a final decree on the ground that it was irregularly entered.

There is authority that a final decree can be set aside in proceedings taken in the partition action; in *Perera v. Fernando*[1] final decree was set aside and intervention allowed of a person who, though named as a defendant, had no notice of the action. The decree was set aside and direction given for fresh proceedings on account of several irregularities, one of which was failure to give the necessary notice before making the partition. From the judgment of Middleton J., I gather that the main, if not the only, question considered in the District Court was whether the appellant has been served with summons. The District Judge held that he had been served. He appealed and the Supreme Court held that he had not been duly served. Middleton J. after so holding went on to say that there were other reasons for setting aside the decree, and he set out the several irregularities in the proceedings. The judgments do not expressly state whether the order was made in the appeal or by way of revision. It can however be taken that it was made in the exercise of the power of revision, for the District Court had no power to set aside its own judgment (*Arumugam Chetty v. Seeni Mohammado*[2]).

I agree with the order made by the Chief Justice.

Appeal allowed.