1929.

*Present:* Dalton and Drieberg JJ.

DOLOSWELA RUBBER & TEA ESTATE CO. *v.* SWARIS APPU *et al.*

*358—D. C. Ratnapura, 4,519.*

*Appeal—Respondent's objection to decree in favour of other respondents—Identity of interest between appellant and respondent—Civil Procedure Code, s. 772.*

Section 772 of the Civil Procedure Code is not available to a respondent, who desires to question the decree in favour of another respondent.

An exception may be allowed in cases where there is an identity of interest between the appellant and the respondent against whom the statement of objections is directed.

APPEAL from a judgment of the District Judge of Ratnapura. The facts appear from the judgment of Drieberg J.

*H. V. Perera* (with him *Deraniyagala*), for defendant, appellant.

*N. E. Weerasooria*, for plaintiff, respondent.

*Soertsz*, for first intervenient respondent.

*Amarasekere*, for second intervenient respondent.

July 16, 1929. DRIEBERG J.—

The plaintiff-respondent claimed an undivided ¼ share of Halkandaliyawatta and damages against the defendant company, appellant, which he said was in possession of a larger share than it was entitled to.

It is admitted that Dines and Bandulahamy were the owners of this land and that the latter died intestate and without issue. Dines had issue, Loku Ettana and Mituruhamy who died intestate and without issue. Loku Ettana had four children, Mudalihamy, Rankira Hamy, Malhamy, and Yahapath Hamy. It was not agreed whether they were all children by one marriage or whether Mudalihamy was the issue of her first marriage and the other three by a subsequent marriage; arising out of this was a question whether in the latter case. Mudalihamy would be entitled to a ½ share, and the children of the second marriage to the other ½ share, or each to a 1/6 share, or whether all the children took equally.

On the first day of the trial the second intervenient respondent claimed that Jotihamy had been adopted by Dines, and an issue on this point was framed.

The learned District Judge says that this action as it was instituted was a simple one; it has become complicated by a change of attitude of some of the parties. The judgment, in my opinion, is right and it is only necessary to examine the claims in detail for the purpose of a question which arose at the argument before us, viz., whether the statement of objections under section 772 of the Civil Procedure Code filed by the plaintiff and the first intervenient respondent could be admitted and considered.

The plaintiff-respondent claimed a ¼ share on the ground that the four children of Loku Ettana were equally entitled to the land and that he had bought the ¼ share of Rankira Hamy. He admitted that the appellant company was entitled to a ¼ share from Malhamy. The appellant company in its answer claimed title to a ¼ share. but said that the plaintiff-respondent was not entitled to more than 1/6; why it said so is not clear, for Rankira Hamy and Malhamy were entitled to similar shares. The answer admits that the four persons named in the plaint were the owners of the land but denied that they owned it equally; no reason was stated for this. On the plaint and answer the only real issue, therefore, was one of damages.

The first intervenient respondent then filed a statement of claim and asked to be allowed to intervene. He took up the same position as the plaintiff-respondent that each of the four children of Loku Ettana was entitled to a ¼ share. He claimed the ¼ share of Malhamy against the appellant company on an earlier transfer.

Later the second intervenient respondent claimed to intervene on the ground that he was entitled to a ½ share. In his petition he said that Jotihamy, who was a son of Loku Ettana by Mudalihamy, her first husband, was by inheritance and long possession entitled to a ½ share and that Rankira Hamy, Malhamy, and Yahapath Hamy were entitled to the remaining half share, each owning a 1/6 share. He claimed Jotihamy's ½ share on a deed of gift from him. On the first day of the trial his position was stated more definitely, viz., that "Jotihamy's mother was an adopted child of her father, the original owner of this land"; this is a mistake, for what the second intervenient respondent claimed at the hearing was that Jotihamy was adopted by Dines.

After the hearing had continued for two days the first intervenient respondent was allowed to amend his statement of claim by alleging that Yahapath Hamy had married in *diga* and forfeited her inheritance and that Mudalihamy, Rankira Hamy, and Malhamy became entitled to the land. He did not, however, claim a ¼ share, for his deed gave him title to a ¼ only.

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I think the Court should not have allowed the second intervenient respondent to intervene. The dispute up to this stage, between the plaintiff-defendant and the first intervenient, was limited to themselves and proceeded on a common basis of the four children of Loku Ettana being entitled to the land equally. Once the *diga* marriage of Yahapath Hamy was brought in, the Court should have made her a party so as to enable it " effectually and completely to adjudicate upon and settle all the questions involved in the action "—section 18, Civil Procedure Code.

The trial Judge held (1) that Yahapath Hamy was not married in *diga;* (2) that Jotihamy was entitled to a ½ share for two reasons; that it was proved that he was the only son of the first marriage and that as such he would inherit a ½ share and not take equally with the other children; but he also held that the adoption of Jotihamy was proved and that on that footing he would be entitled to more than a ½ share, but that by agreement his possession was limited to a ½ share; (3) that as between the first intervenient respondent and the defendant company the former was entitled to Malhamy's interest save her life interest, to which the defendant company was entitled.

On this basis the Judge found that the plaintiff-respondent was entitled to a ⅛ share, the first intervenient defendant to a ⅛ share, subject to the defendant company's right to Malhamy's life interest in this share; the second intervenient respondent was declared entitled to a ½ share. The plaintiff-respondent was allowed Rs. 125 as damages. No order was made as to costs, and I think this right as all the parties desired an adjudication on their rights.

The defendant company appealed on the grounds set out in paragraph (8) of the petition of appeal. Of these, (*b*) and (*d*) concern only the first intervenient respondent and relate to the conflict in their titles derived from Malhamy; (*c*) is a statement that the appellant company had made out a title by prescriptive possession to a ¼ share. and (*e*) that the Judge should have held on the evidence that Malhamy was entitled to ¼ share and not to a ⅛. The petition of appeal does not deal specifically with the grounds on which the judgment was based. and I can only assume that the appellant accepted the position originally taken up by the plaintiff-respondent, viz., that all the children of Loku Ettana took equally, Yahapath Hamy not having forfeited her rights. It should be noted that this is consistent with the position that Loku Ettana was twice married, if it be the law that the children of both marriages take equally, but this is not so (*Siriya v. Kalua (Full Bench)* [1]).

The plaintiff-respondent has filed a statement of objections under section 772 of the Civil Procedure Code on these grounds: (1) Loku Ettana was not married twice, and even if she was all her children

[1] *(1899) 9 S. C. C. 45.*

took equally ; (2) there was no proof of adoption of Jotihamy; (3) the plaintiff-respondent had not been allotted the shares that should have come to him from Bandulahamy; (4) the plaintiff-respondent was entitled to a ¼ share by prescriptive possession; (5) the damages awarded were not sufficient; (6) the plaintiff-respondent was entitled to his costs against the defendant and the second intervenient respondent.

So far as these affect the appellant, grounds (1), (2), and (3) do not do so adversely but are directed to secure for him a larger share than the ⅙ share awarded to him and the plaintiff, for, apart from the considerations of prescriptive possession those claiming from Rankira Hamy and Malhamy must get the same share. This is not a case in which the plaintiff-respondent is seeking to support the decree on grounds decided against him, and if section 772 is available to him it must be for the purpose of his objecting to the decree in favour of the appellant; this is clear from the condition that notice of the objections should be given to the appellant. These objections are really directed to reducing the ½ share given to the second intervenient respondent. Grounds (1) and (2) are clearly so intended, and if the plaintiff succeeds on these it would affect the decree so far as the appellant is concerned, not adversely but by enlarging his share to ¼; these grounds cannot, therefore, be regarded as those on which the plaintiff objects to the decree in favour of the appellant, but they are grounds on which the plaintiff-respondents says that the second intervenient respondent should have got less and he and the appellant company should have got more.

It has been held that section 772 is not available to a respondent who wishes to question the decree in favour of other respondents; if he wishes to do so he must appeal (*Croos v. Fernando* [1], *Noordeen v. Chandrasekere*, [2] *Paldano v. Horatala* [3],) in which the possibility of certain exceptions was recognized; an exception may be allowed in cases where there is an identity of interests between the appellant and the respondent against whom the statement of objections is directed, but in this case there is no such identity of interests, for the second intervenient respondent claims his ½ share adversely to the appellant and the plaintiff-respondent.

The third ground of objection is not very clear, but it is undoubtedly directed to reducing the ½ share given to the second intervenient respondent.

The fourth ground, viz., that the plaintiff-respondent was entitled to a ¼ share by prescriptive possession, is one that affects the other parties, and should have been put forward in an appeal to which they were respondents: if the objection on this point is allowed so far as the appellant alone is concerned it cannot be

[1] (*1913*) *1 Bal. Notes 84.* [2] (*1913*) *Wijewardene's Reports 24.*
[3] (*1925*) *3 Times of Ceylon Reports 58.*

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considered apart from the others against whom the objection cannot be allowed. The only objections which can be allowed are those relating to damages and to costs between the plaintiff-respondent and the appellant company; the claim for costs against the second intervenient respondent is based on grounds which cannot be allowed and must therefore fail.

The first intervenient respondent also filed objections in which he denies the adoption of Jotihamy, the two marriages of Loku Ettana, the possession for the prescriptive period of a ½ share by the second intervenient respondent, and he contends that Jotihamy could not have inherited the shares of Bandulahamy and Mituruhamy. These are all objections to the decree in favour of the second intervenient respondent and cannot be considered. He also objects to the finding that Yahapath Hamy was not married in *diga;* the position here is somewhat different, but this contention is scarcely tenable; all parties went on the footing that Yahapath Hamy had rights in the land, stating so expressly in their pleadings, and it was after two days' trial that the first intervenient respondent raised this point. There is strong evidence that she was not married in *diga* and the trial Judge says that the contention that she was is not worth serious consideration.

Regarding the plaintiff-respondent's complaint that the damages awarded are inadequate, I see no reason to doubt the correctness of the judgment on this point.

The appeal is dismissed. The appellant will pay the costs of the appeal of the plaintiff-respondent and the first and second intervenient respondents.

DALTON J.—I agree.

*Appeal dismissed.*