1928.

Present : Drieberg A.J.

KANNANGARA *v.* PERIES.

119—P. C. Panadure, 13,017.

Obstructing Public Servant—Partition action—Writ of possession—Resistance—Notice of writ—Penal Code, s. 183.

The accused was charged with resisting a Fiscal's Officer in executing a writ of possession issued in pursuance of a decree entered in a partition action to which the accused was not a party.

Held, that it was no defence to the charge that the requirement of section 347 of the Civil Procedure Code with regard to the notice of execution was not complied with

Hadjiar v. Mohamadu[1] followed..

APPEAL from a conviction by the Police Magistrate, Panadure. The facts appear from the judgment.

J. S. Jayewardene, for 1st accused, appellant.

April 30, 1928. DRIEBERG A.J.—

In a partition action, D. C., Kalutara, 10,765, a decree for partition was entered on November 15, 1923, allotting an allotment B to the plaintiffs. On August 11, 1927, the plaintiffs applied for execution of the decree by being placed in possession of the portion allotted to them. Enforcement of the writ was asked for against the 1st, 2nd, and 3rd defendants in the action. On August 31, 1927, the court issued a writ of possession, no returnable date being stated on it. On September 24, the Fiscal's Officer went to the land to execute the writ but was unable to do so owing to the resistance offered by the appellant and two other accused. The

[1] *(1917) 4 C. W. R. 371.*

Fiscal's Officer charged them with resistance to a public officer. under section 183 of the Penal Code. They were convicted and each was sentenced to pay a fine of Rs. 10. The appeal is by the 1st accused alone.

The point of law certified in the petiton of appeal is that the writ was bad on the ground that no notice of the application for execution had been given as required by section 347 of the Civil Procedure Code, the application being made more than a year after the decree. I shall deal with this point later.

Mr. Jayewardene, for the appellant, contended that the writ was illegal, as no writ of possession could issue to place in possession a person to whom a portion in severalty had been allotted under a decree for partition. The case of *Hadjiar v. Mohamadu*,[1] which is a judgment of two Judges, is an express authority to the contrary, but Mr. Jayewardene argued that this judgment must be considered as overruled by the Full Bench decision in *Fernando et al. v. Cadiravelu*,[2] in which it was held that where in an action under the Partition Ordinance a sale has been decreed the Court cannot make an order for delivery of possession in favour of the purchaser. Of the two Judges who were of this opinion, Schneider J. recognized a distinction on this point between a decree for partition and one for sale, and was of opinion that a decree for partition allowed the construction given to it in *Hadjiar v. Mohamadu* (*supra*). Garvin J. said that it was unnecessary to consider whether *Hadjiar v. Mohamadu* was rightly decided. In these circumstances I must regard myself as bound by the ruling in *Hadjiar v. Mohamadu*. Whether the point of law certified in the petition of appeal was raised in the Court below is not clear on account of the unduly abbreviated and condensed record made by the Police Magistrate. The contention is recorded in these terms :—

> " Mr. Goonetilleke, for accused, states writ is bad—not re-issued after one year—and that decree does not bind accused.' '

The judgment disposes of the matter thus :—

> " Mr. Goonetilleke puts in a copy of the decree and states no notice served on the accused. I am of opinion that no notice is necessary in a case like this—decree in a partition action."

The Proctor for the appellant, in his application for the production of the record of the partition case, stated that it was required " to prove that the period of the writ had expired and also to prove that the accused are not the defendants in the partition action."

It will be seen that the only reference to a notice is that found in the judgment, but what notice is referred to is not clear , and if the notice required by section 347 of the Civil Procedure Code was

[1] *(1917) 4. C. W. R. 371.*

[2] *(1927) 28 N. L. R. 492.*

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meant, I cannot see how the Proctor for the accused sought to make a point of its not having been served on the accused, for that section only requires notice on the judgment-debtor, that is to say, the party or parties to the action against whom the decree is sought to be enforced.

There is nothing on the certified copy of the application to show that notice of it was served on the parties to the action; I see, however, that though the appliction is dated August 11, the order allowing it was not made until August 22. But assuming that the application was *ex parte*, I do not think that this will avail the appellant as a defence.

Mr. Jayewardene contended that the writ issued without the notice required by section 347 was void for want of jurisdiction and was therefore an illegal process which the appellant was justified in resisting. He referred me to the case of *Sahdeo v. Ghasiram* [1] where it was held that execution proceedings following on an application allowed without the notice required by section 248 of the Indian Code, which corresponds to section 347 of our Code, was void; but this was so held in an application by the judgment-debtor to have the execution proceedings including a sale of his property set aside on the ground that he had no notice of the application.

I have not been able to get the report of the Privy Council decision in *Ragunath Das v. Sundar Das*,[2] which is noted in Mulla's Civil Procedure Code as approving of the judgment in *Gopal Chander v. Gunamoni Dasi*.[3] In the latter case the objection to want of notice was taken by the legal representative of the judgment-debtor, who was himself entitled to notice.

Notice is required in the interests of parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable, but I do not think they can be regarded as void as against persons not parties to the action and who were not entitled to notice. In this case the accused, so long as the partition decree stood, could have raised no objection to execution of the writ of possession; in fact, it was stated by their Proctor that they relied on the question of law only.

The writ of possession was not put in evidence and I called for this. It was not sent to me until after the Court had closed for the vacation.

I dismiss the appeal.

Appeal dismissed.

[1] *(1894) 21 Cal. 19.*

[2] *(1914) 41 I. A. 251; 42 Cal. 72.*

[3] *(1982) 20 Cal. 370.*