[FULL BENCH] *Mar. 22, 1910*

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

SILVA *v.* SILVA *et al.*

D. C., Galle, 7,879.

Preliminary decree in a partition action—Binding on parties to the action—Res judicata—Third parties may intervene before final decree.

A preliminary decree made in a partition action in accordance with the judgment is binding on the parties to it, subject to an appeal, and the power given by section 189, Civil Procedure Code, to correct or modify any clerical or arithmetical error. The Judge who made the preliminary decree or his successor in office has no power to modify the preliminary decree, even if he be of opinion that the former decision was mistaken in fact or law.

But before the final decree is made, persons who were not parties to the preliminary decree can come in and have their claims adjudicated upon, as the preliminary decree would not bind such persons.

APPEAL from a judgment of the District Judge of Galle (W. E. Thorpe, Esq.). In this case Mr. McLeod, District Judge, by his judgment of January 13, 1908, held that the added defendant (respondent) was not entitled to a one-sixteenth share which he claimed, and that the plaintiff (appellant) was entitled to it, and preliminary decree was entered accordingly. There was no appeal against the decree. Subsequently, in August, 1909, when the Commissioner's report came for consideration, the added defendant re-asserted his claim. Mr. W. E. Thorpe, District Judge (who succeeded Mr. McLeod), held that the one-sixteenth share had been

Mar. 22, 1910
Silva v. Silva

erroneously awarded to the plaintiff. He made an order amending the preliminary decree by taking away the one-sixteenth share from the plaintiff, and adding it to the added defendant's share.

The plaintiff appealed.

Bawa, for appellant.

Van Langenberg, for respondent.

Cur. adv. vult.

March 22, 1910. HUTCHINSON C.J.—

In this partition action the District Judge gave judgment on January 13, 1908, and the preliminary decree for partition was drawn up in accordance with the judgment. One of the points decided in the judgment was that the present respondent was not entitled to a one-sixteenth share which he claimed, but that the appellant was entitled to it; and the decree allotted that share to the appellant. There was no appeal against the decree.

In pursuance of the decree a commission was issued; the Commissioner made his return, and the case came on for hearing before another Judge on an application to confirm the return. The application was heard in August, 1909, when the present respondent re-asserted the claim which had been decided against him; and on August 4, 1909, the Judge allowed the claim. He held that he had power to correct a clear error in his predecessor's judgment and decree; he found that there was such an error; and he made an order amending the preliminary decree by taking away the one-sixteenth from the appellant, and adding it to the respondent's share. This is an appeal against that order; and we are asked to hold that there was no power to make that order.

The preliminary decree was in accordance with the judgment and carried out the intention of the Judge, and the error alleged was not an arithmetical or clerical error. It was alleged that the Judge made an error in deciding that the appellant had proved that the share in question had devolved on him, overlooking the fact that the appellant's title to it was really only that of an usufructuary mortgagee and not an absolute title, which fact the Judge who made the order of August, 1909, says is absolutely plain, so that the preliminary decree ought to have allotted that share to the appellant as mortgagee merely.

The final decree in a partition action is binding on every one, whether party to the action or not. Unless there is some authority to the contrary which we must follow, I would hold that a preliminary decree made in accordance with the judgment of the Court is binding on the parties to it, subject to appeal and to the power given by section 189 of the Civil Procedure Code to correct any clerical or arithmetical error. Before the final decree is made,

persons who were not parties to the preliminary decree can come in and have their claims adjudicated upon, the reason being that there is not yet any decree binding on them. That was, I think, the intention of the enactment, and it is the practice. But the respondent contends that we are bound by authority to hold that any party to the preliminary decree may, at any time before the final decree, re-open any question of law or fact which has been already decided against him by the preliminary decree, and that the Judge who made the preliminary decree, or his successor in office, is not only entitled but is bound to reconsider the question, either on the same evidence or with additional evidence, and to reverse the former decision if he is of opinion that it was either in law or in fact mistaken. The party who complains of the first decision has therefore two remedies: he can either appeal against it, or he can wait until the case comes on for final decree, and then take his chance of getting the first decision reversed by the same or another Judge, and then, if necessary, appeal against the final decree.

In my opinion this right which the respondent claims is inconsistent with section 207 of the Civil Procedure Code. And I can see no hardship or absurdity in holding that a party to a decree, who has placed his evidence and his view of the law before the Court, is bound by its decision, if he does not appeal against it. It is more important that decisions between parties, if not appealed against, should be final and conclusive than that they should be right.

It often happens that in an action to administer the estate of a deceased person or to wind up a partnership, the sole or the principal question is one between two parties who have conflicting claims; the question is fought; both parties produce their evidence and urge their claims, and the Court gives a decision between them, and makes a preliminary decree declaring their rights. Both parties acquiesce in the decision, and no appeal is taken. Could one of them be allowed afterwards, when the accounts of the estate or of the partnership have been taken and the case comes on again for a final decree for distribution of the estate or of the partnership assets, to require the Judge to re-open the case and reconsider, and if he thinks fit reverse his former decision, not on any allegation of fraud or the discovery of new evidence, but on an allegation that on the materials then before the Court the former decision was erroneous in fact or in law? Certainly not. And I see no good reason why the same rule should not apply in a partition action; nor do I see how the point is affected by the fact that the final decree will be binding on persons who are not parties to the action; for it can make no difference to them.

In *Baronis v. Hedo*[1] Bonser C.J. said: "It seems to me that until the final decree is passed it is open to the Judge, and not only open, but it is incumbent on him, to rectify any mistake made in

[1] *(1902) 2 Browne 320.*

Mar. 22, 1910

HUTCHINSON C.J.

Silva v. Silva

the course of the proceedings." Wendt J. concurred, and the Court sent the case back to the District Judge to investigate a claim made by one of the parties who swore that he had not understood what was taking place when the preliminary decree was made. The case may, perhaps, have been one in which the Appeal Court might properly exercise the power of revision; but the statement of the law which I have quoted seems to me to be plainly opposed to the enactment of section 207 of the Code, to which no reference was made.

In *Ismail v. Silva*[1] the District Court assented to the application of one of the parties to a partition action to re-open the preliminary decree on the ground that he was not aware of the extent of the share assigned to him; but it imposed the condition that he should give security for costs; and he appealed against this condition. For some reason which does not appear the appeal was argued before three Judges; and they dismissed it. The judgment was delivered by Moncreiff J., and the other two Judges concurred. I infer from it that the appellant's contention was that the District Judge had exceeded his powers in requiring security for costs; and the only point decided seems to have been that he had power to require security. But Moncreiff J. says: "It is true that, so long as he has the power to do so, the Judge should not refuse to remedy a mistake of this description"—a statement to which no one could possibly object. He seems to have thought that the Judge in the case before him had power to re-open the decree; but the question whether he had or not did not arise and does not seem to have been discussed, and was not and could not have been decided on that appeal.

In my opinion section 207 of the Code, which makes a decree "final between the parties," subject to appeal when an appeal is allowed, debars a Judge from re-trying, as between the parties to it, a question which he has already tried and decided between those parties, when he has already embodied his decision in a decree. There is no authority binding us to hold otherwise; and I think that this appeal should be allowed.

MIDDLETON J.—

This was an appeal from an order of Mr. Thorpe varying an order of his predecessor, Mr. McLeod, made in a partition action. The order made by Mr. McLeod was what is known as the preliminary order of partition of settling the shares or fractions to which the parties were entitled previous to their apportionment and allotment made by the Commissioner required under the Partition Ordinance.

The order appealed against purports to rectify the orignal order by giving one-sixteenth of the land to the added defendant-respondent Andris, and taking that fraction, which Mr. Thorpe held had been

[1] *(1904) 7 N. L. R. 245.*

erroneously awarded to the plaintiffs by Mr. McLeod, for the plaintiff's share. The order made by Mr. McLeod had been made *inter partes*. There was no evidence of any irregularity preceding or in the making of it, and it was not appealed against. The question is, whether a District Judge has power to re-open and amend a preliminary order made by himself or a predecessor in office in a partition action under such circumstances, or whether the respondent's remedy, if dissatisfied, was not by appeal to this Court. The authorities relied on by the respondent in support of Mr. Thorpe's action were the decisions of this Court in *Baronis v. Hedo*,[1] which was alleged to have been tacitly affirmed and followed by the Full Court in *Ismail v. Silva*,[2] and subsequently *Doraiswamy v. Kandiah* [3] was brought to our notice. For the appellant the case reported at page 298, *12 New Law Reports* (*1 Cur. L. R. 226*), and a case from *2 Weerakoon's Reports 95*, were relied on as showing that a Court had no power to amend its own order in such a case as this, which was outside the terms of section 189 of the Civil Procedure Code. In my opinion there is a considerable difference between the scope and form of the inquiry upon a partition action and that in an ordinary action.

In a partition action the court has to see that the plaintiff's title is proved, and to examine the defendant's title and take care that it is proved (section 4) if he disputes the plaintiff's title. It is not open to the Court to accept admissions from the other side on the question of title as in an ordinary action. The Partition Ordinance provides for a preliminary decree, section 5, and subsequently for a final judgment under section 6.

The decree under this final judgment is good and conclusive against all persons whomsoever (section 9), whatever right or title they have or claim to have in the said property. The fact that there is a preliminary decree in every partition action, which in the ordinary course must be confirmed by a final one, has always seemed to me to imply that until final confirmation the preliminary decree was liable to be re-opened for good and sufficient cause, *i.e.*, for a patent error of law or fact, and I do not think it is legislation on the part of this Court to hold this to be so. I quite agree that this power should not be lightly exercised or be entirely without restriction, but I think it should be permitted to correct irregularities and obvious errors of fact or law. Considering the fact that partition cases come before Commissioners of Requests, that they are frequently and obligatorily for want of funds supported by the parties in person, I think there is every reason on the ground of convenience, and in the interests of justice also, why those preliminary decrees should be open to revision by the Court which makes them, for good

[1] *(1902) 2 Browne 320.*
[2] *(1904) 7 N. L. R. 245.*
[3] *(1908) 5 A. C. R. 1.*

Mar. 22, 1910

MIDDLETON J.

Silva v. Silva

and sufficient ground, until finally confirmed under the Ordinance. It is admitted that interventions may occur by an interested party who has had no notice of the proceedings till after the preliminary decree. It is true that in the present case the decision of Mr. McLeod on the point was given *inter partes*, and on what he thought was the evidence that supported his ruling; but it seems to me that if he himself had discovered a patent mistake as to a right inference on his part embodied in a preliminary decree when about to make the final decree, it would be absurd, while there was still *locus penitentiæ*, to oblige him to perpetuate his error in the final decree, and I therefore see no reason why his successor should not do the same. I am quite in accord, if I may be allowed to say so, with the judgment reported at page 226 of the *Current Law Reports*, but I think that in cases under the Partition Ordinance it may be inferred that a different order of things prevails, from the fact of the provision for final and preliminary orders, and I think that the terms of section 6 are sufficiently wide to enable the Court to amend its preliminary order in the way it has been done here. The view I have enunciated was, I believe, the opinion of all the Judges taking part in the decisions in *Baronis v. Hedo*, *ubi supra*, and *Ismail v. Silva*, *ubi supra*, and I venture to think is to be inferred from the judgment of my Lord to be that of the Court in *Doraiswamy v. Kandiah*, *ubi supra*.

I would therefore affirm the decision of Mr. Thorpe, assuming that it is manifestly clear upon the evidence before him that he was entitled to deduct the one-sixteenth in question from the share of the plaintiff and to award the same to the added defendant-respondent.

I have not gone into this question, nor indeed has it been argued, but it is admitted in the petition of appeal that the one-sixteenth in question was possessed under an usufructuary mortgage, and that this right was apparently mistaken by Mr. McLeod for a title to the *dominium*. If this be so, I presume the order of Mr. Thorpe was right as to his disposal of it, but if further argument on the question were desired, I see no objection to hearing it. If not, I would dismiss the appeal with costs.

The case was, however, presented to us almost in the light of an admitted error made by the first District Judge, and I think that in any case the matter ought to be dealt with in revision.

WOOD RENTON J.—

In my opinion this appeal must be allowed. A Court of Law has no inherent power to modify or set aside its own decrees, except within the limits indicated in the recent case of *De Silva v. Ponnasamy Pulle*.[1] I do not think that there is any provision in Ordinance No. 10 of 1863 which creates such a power in partition cases. It occurred to me during the argument that the course adopted by

[1] *(1909) 1 Cur. L. R. 226 ; 12 N. L. R. 298.*

the learned District Judge in the present case might, perhaps, be justified by section 6 of Ordinance No. 10 of 1863, which enables the Court, on the receipt of the Commissioner's return, to correct or modify the partition proposed. But on full consideration, I think that this clause must be restricted to the proceedings before the Commissioner, and cannot be held to extend to the preliminary decree, which has been held to be conclusive *inter partes*, so long as it stands unreversed (see *Jayewardene v. Attapattu*,[1] and *Appu Hamy v. Martina Hamy*[2]). I concur in the criticisms of His Lordship the Chief Justice on the cases of *Baronis v. Hedo* [3] and *Ismail v. Silva*.[4] I find that in the case of *Doraiswamy v. Kandiah*[5] His Lordship the Chief Justice held that, where an interlocutory decree had been made without proper investigation, it was open to the Judge who made it, or, for that matter, to his successor, to set it aside, and that I myself concurred in the judgment in that case without giving my reasons for doing so. The Supreme Court set aside the order of the District Judge, who had held that he had no power to interfere with the interlocutory decree, and sent the case back to the District Court for trial. There was no appearance on behalf of the respondent in that case, and the point now before the Full Court does not appear to have been brought under our notice. It may be, although I do not express a positive opinion on the point, that the Supreme Court had the power to deal with the matter in revision, but I think, now that we have had the advantage of full argument upon the point, that the dictum above referred to, in which I concurred, cannot be supported. It was suggested at the argument before the Full Court that it had been the *cursus curiæ* to allow interlocutory decrees in partition cases to be re-opened, not only at the instance of intervenients, but *inter partes*. It was thought desirable, accordingly, that the Judges of the principal District Courts in the Island should be consulted on this point, and, accordingly, the Registrar was instructed to address to them the following series of questions:—

(1) What is the practice of the Court as to re-opening a preliminary decree in a partition action?

(2) How long, if so, has any such practice been in force? How is the practice limited?

(3) Does it extend to a re-opening as between parties of a formal decision on a matter of law or fact which has been given after full trial and discussion where the parties were fully heard and where no one else is alleged to be interested?

The replies received have been filed in the record. One or two of the District Judges have misapprehended the questions put to them, but it appears from the answers of the rest that, except in the

[1] *(1907) 2 A. C. R. sup. 15.*
[2] *(1909) 2 Weerakoon 95.*
[3] *(1902) 2 Browne 320.*
[4] *(1904) 7 N. L. R. 245.*
[5] *(1908) 5 A. C. R. 1.*

Mar. 22, 1910

WOOD RENTON J.

Silva v. Silva

District Court of Colombo, where a decision has been given after full trial and discussion in the presence of all parties, it is not the practice to allow the interlocutory decree to be re-opened. On the material furnished by these replies, I do not think that any such *cursus curiæ* has been established as to require us in any way to modify the decision at which we have arrived independent of them. I agree with His Lordship the Chief Justice that the present appeal should be allowed. I would set aside the order of Mr. Thorpe, the learned District Judge of Galle, dated August 5, 1909, and would remit the case to the District Court to be dealt with on the basis of the order of Mr. McLeod dated January 13, and of the original preliminary decree of the same date. The appellants are entitled to the costs of this appeal, and also of the proceedings upon the point raised by it as against the first added defendant-respondent.

Appeal allowed.