1912.

[FULL BENCH.]

Present: Lascelles C.J., Wood Renton and Grenier JJ.

SILVA *v.* SILVA *et al.*

188—D. C. (Inty.) Matara, 4,967.

Partition—Interlocutory decree for partition—Subsequent order to sell—Court of first instance has no power—Civil Procedure Code, s. 189.

Where there has been an interlocutory decree for partition, a Court of first instance has no power to set it aside and order a sale on the ground that a satisfactory partition is impracticable.

An interlocutory decree for partition is a decree within the meaning of section 207, and can only be modified in accordance with the provisions of section 189 of the Civil Procedure Code.

THE facts appear sufficiently from the judgment. The case was reserved for a Full Bench by Wood Renton and Grenier JJ.

V. Grenier, for the appellant.—The decree for partition is an interlocutory decree, which is binding on the parties. The Judge had no power to alter the decree which he had entered except for reasons stated in section 189. See *Silva v. Silva*[1], *De Silva v. Ponnasamy*[2].

[1] *(1910) 13 N. L. R. 87.*

[2] *(1909) 1 Cur. L. R. 226.*

Sampayo, K. C., for the respondent.—The order to partition is not an adjudication of any matter between the parties. It is only an expression of the intention of the Court in the matter. An interlocutory decree in a partition case is no doubt binding on the parties, as was held in *Silva v. Silva*[1]; but the order to partition is not a decree in that sense. There is a duty on the Court to partition the land if it can; and otherwise to sell it. The order to partition is an order to the Commissioner, who is an officer of Court.

Allan Drieberg, for the eighth defendant-respondent.

Cur. adv. vult.

February 28, 1912. LASCELLES C.J.—

This is a partition action. On December 8, 1910, the District Judge of Matara found that the land in question was owned by the persons in the shares shown in the plaintiff's pedigree, and an interlocutory order was entered accordingly. Difficulties then arose with regard to the scheme of partition, and it was ultimately found impossible to partition the land to the satisfaction of all parties. The District Judge, after inspecting the land and considering the different proposals for a partition, directed a sale of the land, and a decree was drawn up accordingly on October 23, 1911.

It is now contended by the appellants that it was not open to the District Judge to order a sale of the property, and thereby, in effect, to vary the earlier interlocutory order.

After the judgment of the Full Bench of this Court in *Silva v. Silva*[1], I do not think that it is possible to contend that it is open for a Judge, who has made a preliminary decree in an action, or for his successor, to alter or modify the preliminary decree, except subject to, and in accordance with, section 189 of the Civil Procedure Code.

In the present case it seems clear that the learned District Judge in directing a sale acted in the best interests of the shareholders as a whole. And in order to remove any technical objection to his carrying out a sale, if he still considers that a sale is to the advantage of all the shareholders, I would set aside both the final and interlocutory decrees and remit the case to the District Judge to make such interlocutory and final orders as he may consider advisable, after hearing in each case any further objection which any of the parties may put before him.

I would make no order with regard to the costs of this appeal, and would leave the other costs in the discretion of the District Judge.

GRENIER J.—

I agree to the order proposed.

[1] *(1910) 13 N. L. R. 87.*

1912.

Silva v. Silva

WOOD RENTON J.—

I quite agree that in this case a satisfactory partition is impracticable, and that the Supreme Court, on the terms proposed by my Lord the Chief Justice, should set aside the interlocutory decree for partition and direct a sale.

I desire, however, to say that, in my opinion, such an order can be made by the Supreme Court alone. I do not think that where, as here, there has been an interlocutory decree for a partition, the proviso to section 4 of Ordinance No. 10 of 1863 or any other section in that Ordinance enables a Court of first instance to set it aside and order a sale, however expedient on the evidence a sale might be. We are bound on this point by the decision in *Silva v. Silva* [1]. It is true, as Mr. de Sampayo pointed out, that the question of fact involved in that case was one of title and not of procedure. But the *ratio decidendi* clearly was that an interlocutory decree for a partition is a decree within the meaning of section 207, and therefore can only be modified in accordance with the provisions of section 189 of the Civil Procedure Code.

Set aside and sent back.