1916.

Present : Ennis J. and Schneider A.J.

DINGIRI MAHATMAYA *v.* APPUHAMY *et al.*

276—D. C. Kegalla, 3,278.

Arbitration—Entering judgment in terms of award without notice—Appeal.

No notice of filing award was given to any of the parties, nor was notice given by Court of the day fixed for entering judgment. The defendant appealed. Objection was raised to the appeal being heard on the ground that the defendants should have moved the District Court to set aside the order declaring the decree absolute (as the order was not made *inter partes*) before appealing.

Held, that the appeal was in order.

THE facts are set out in the judgment.

Cooray, for defendants, appellants.

E. W. Jayewardene, for plaintiff, respondent.

Balasingham, for second defendant, respondent.

Cur. adv. vult.

July 21, 1916. ENNIS J.—

In this case the plaintiff brought an action for declaration of title, and all matters in dispute were ultimately referred to arbitration. The arbitrators filed their award on March 15. No notice of that filing was given to any of the parties. The Court proceeded to give judgment on the award, but failed to notify the parties of the day upon which it would act. Thereafter the Court declared the award absolute on March 29. The defendants-appellants appeal from this order, on the ground that they had no notice of the filing of the award, and no notice of the day fixed by the Court for judgment as required by section 692 of the Code.

A preliminary objection was taken on the appeal, on the ground that the defendants should have moved the District Court to set aside its order declaring the decree absolute, as that order was not made *inter partes*. In this case it would seem that a decree has been entered, and by section 207 of the Code decrees are final, subject to appeal, and a Court has no power to set aside its decree or to vacate its orders unless provision has been specially made by the Code itself. Those provisions are found in certain cases in chapter XII. and in sections 707 and 823, and are limited to cases where decree has been entered in default of appearance of the parties or in filing pleadings.

In cases where the matter has been referred to arbitration, the award of the arbitrator is practically a decision after hearing, and is *primâ facie* outside the case dealt with in chapter XII. It may be that a Court would have power on an interlocutory order made *ex parte* to apply the provisions of chapter XII in cases of default by deeming the application to be an action within the meaning of section 6 of the Code, but in this case the procedure on arbitration is specifically laid down in the Code. When an award has been filed, section 692 provides that if the Court sees no cause to remit the award, or any of the matters referred to arbitration, for reconsideration, and if no application has been made to set aside the award, or if it has been made and the Court has refused such application, then the Court shall, after the time for making such application has expired, on a day of which notice shall be given to the parties, proceed to give judgment according to the award. The section then proceeds that upon a judgment "so given" a decree shall be framed, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award. In the present case it would seem that the decree entered has not been entered upon a judgment "so given," inasmuch as the appellants received no notice of the filing of the award, and, therefore, their time for making application cannot be said to have started, much less to have expired, and, further, the Court gave them no notice of the date upon which it would proceed to give judgment. In these circumstances, in my opinion, an appeal would lie, and that seems to be the basis of the decision in the case of *Thepanisa v. Allisa*,[1] *Pitche Tamby v. Fernando*,[2] and *Seenchi v. Karonissa*.[3] There is also a case, *Aitken, Spence & Co. v. Fernando*, [4] where an appeal was allowed in somewhat similar circumstances. The cases cited by the learned counsel for the respondents, namely, *The Ceylon Gemming and Mining Company v. Symons*,[5] *Gargial v. Somasundram Chetty*, [6] *Carolis Appuhamy v. Sinho Appu*, [7] and *Habibu Lebbe v. Punchi Ettana*,[8] all appear to be cases in circumstances to which the provisions of chapter XII of the Civil Procedure Code would apply. The case of *Ghulam Khan v. Muhammad Hassan* [9] appears to be a case where judgment was entered in accordance with the provisions of the Indian Law equivalent to our section 692, and therefore it is not a case on all fours with the present one, which, as I have shown, is a case where judgment has been entered without a compliance with the provisions of section 692.

For the reasons I have given, I am of opinion that the appeal is in order. I would set aside the order declaring the award absolute and the decree, and send the case back for further proceedings in

[1] *(1911) 14 N. L. R. 222.*
[2] *(1910) 14 N. L. R. 73.*
[3] *7 Tamb. 126.*
[4] *(1900) 4 N. L. R. 35.*
[5] *(1896) 2 N. L. R. 226.*
[6] *(1905) 9 N. L. R. 26.*
[7] *(1901) 5 N. L. R. 75.*
[8] *3 C. L. R. 84.*
[9] *I. L. R. 29 Cal. 167.*

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due course; that is to say, within sixteen days from the receipt of the record in the lower Court the appellants may formulate their objections to the award, and thereafter the Court will proceed as laid down in section 687 and the subsequent sections. The appellants should have the costs of the appeal.

SCHNEIDER J.—I agree.

Sent back.