

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

1908.
June 17.

BANDARANAIKE *v.* BANDARANAIKE.

Ex parte DIAS *et al.*, Appellants.

D. C., Colombo, 24,441.

Partition suit—Order for sale—Intervention of third parties before actual sale—Ordinance No. 10 of 1863, s. 4.

Where after an order for sale had been made in a partition suit under section 4 of Ordinance No. 10 of 1863, but before such sale was carried out, certain persons claiming to be entitled to shares in the land, the subject of the action, applied to intervene in the action, and the District Judge refused their application—

Held (reversing the order of the District Judge), that they were so entitled.

*Catherinahami et al. v. Babahamy et al.*¹ followed.

THIS was a partition suit. On November 5, 1907, the Court entered decree allotting certain shares to the plaintiffs and the defendants, and ordered a sale under section 4 of the Partition Ordinance (No. 10 of 1863). Before the sale took place, the petitioners, alleging that they were entitled to certain shares in the property sought to be partitioned, applied that they be allowed to intervene in the action.

The District Judge (J. Grenier, Esq.) made the following order dismissing the application (January 31, 1908):—

“ I am clearly of opinion that the proposed intervenients cannot be allowed to come into the case at the present stage. There has been a decree of sale already entered, and the final and conclusive judgment under section 9 is undoubtedly the decree under section 4, whereby the shares of the parties are ascertained, a sale ordered, and the proceeds of sale distributed according to the shares ascertained. There can be no doubt as to the meaning of the words employed in both these sections. They are free from any doubt or ambiguity, and it is the duty of the Court to give effect to them whatever the consequence may be. I cannot read into these two sections words which are not there, or which are opposed to their plain meaning and intent.

“ Mr. Jayewardene pressed upon me a dictum of Lawrie J. in a case reported in *Lux Reports*, p. 13, where he held that the final judgment in the case of a sale is the certificate of sale under the hand of the Court; but I can only regard what he said in the light of a

¹ (1908) 11 N. L. R. 20.

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pious opinion, because I do not find that he was followed on the point by any other Judge of the Supreme Court. The learned author of the Law of Partition in Ceylon appears to me to have fully discussed the question regarding the conclusive nature of a decree under section 4 in case of a sale at pages 53-57 of his work, citing all the available authorities relating to the question, and being identical with the counsel who, by the accident of his appearing for the proposed intervenients, was obliged to support the contrary view before me, I can quite understand that his task was a laborious and uphill one, and that he failed to convince me that his clients were entitled to come into the case. From the case of *Abdul Ally v. Kelaart*, D. C., Colombo, 11,747,¹ it may be gathered, although it was not expressly held, that the two learned Judges who decided the appeal were of opinion that in a partition suit where the decree directs a sale the final judgment is the decree under section 4.

“ I mention that in practice the decree under section 4 in case of a sale has always been regarded as conclusive, and that any party who has not been joined in the action has his remedy for damages only. I disallow the application with costs. ”

The petitioners appealed.

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H. Jayewardene (with him *A. St. V. Jayewardene*), for the appellants, cited *Catherinahami et al. v. Babahami et al.*²

F. M. de Saram, for the respondent, relied on D. C., Colombo, 11,747.¹

Bawa, for the plaintiffs, did not oppose the application of the appellants.

The Court allowed the appeal on the authority of *Catherinahami et al. v. Babahami et al.*, and permitted the appellants to intervene in the action.

Appeal allowed.

¹ *S. C. Min.*, Aug. 4, 1904.

² (1908) 11 N. L. R. 20.