Present: Wood Renton C.J. and Ennis, Shaw, and De Sampayo JJ. **1916.**

IBRAHIM *v.* BEEBEE *et al.*

359 and 360—D. C. Colombo, 35,439.

Necessary parties not made respondents to an appeal—Notice of appeal not given to parties made respondents—Security for costs where there are several respondents—Secretary of Court appointed Commissioner for sale in partition cases—Practice condemned—Application for revision of a final decree in partition suit by third party claiming a share—Final decree not signed—Intervention after date of order.

[*Per* FULL BENCH.]—It is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and. unless they are, the petition of appeal should be rejected.

Notice of the appeal must be given to the respondents.

An appeal defective owing to non-joinder of necessary respondents can be remedied in a proper case by an order of Court under section 770 of the Civil Procedure Code, directing those parties to be added or noticed.

Per SHAW J.—Such order would seem to be entirely discretionary, and I should not myself be disposed to amend the proceedings when the appeal is actually before the Court for hearing, unless some good excuse was given for the non-joinder or notice, or unless it was not very apparent that the parties not joined might be affected by the appeal.

Where the appellant in a partition case furnished security for the costs of appeal of only the plaintiff-respondent, whose interests were not in conflict with those of the first defendant-respondent, *held*, that the provision of the Code as to giving security was complied with.

Per WOOD RENTON C.J. and DE SAMPAYO J.—The Supreme Court has no power to set aside the final decree in a partition suit acting in revision, on the ground that a person who had a share in the land was not made a party to the partition proceedings and was thus deprived of his share.

If a Judge intentionally defers signing a final decree in a partition suit pending the satisfaction of some further requisition, there would be no decree, and in the meantime an intervention is possible. But where the investigation is complete and the Judge intended to sign the decree at once, but only omitted to do so by inadvertence, intervention cannot be allowed thereafter. In such circumstances as these the signing of the decree is a ministerial act, which may be done at any time, and the decree when signed will be operative as from the date of the judgment.

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APPEAL from judgment of the Acting Additional District Judge of Colombo (W. Wadsworth, Esq.)

The facts are set out in judgment of Ennis J. as follows:—

This is a partition action. According to the plaint, the second defendant bought the property in 1889 and sold it in 1902 to A. L. Abdul Hamid, who sold it in 1906 to the first defendant, who, in 1912, sold an undivided one-fourth share to the plaintiff. It is asserted that the Court decreed a sale of the property, allotting one-fourth to the plaintiff and three-fourths to the first defendant. The added parties, twenty-four in number, intervened before the sale, and the Court ordered a stay of the sale pending the hearing of this claim. On the day fixed for the hearing (July 26, 1916) the Court (presided over by another Judge) held that a decree for sale had been made, and that it had no power to vacate it; it accordingly refused to inquire into the claims of the added parties. There are two appeals from this order. The fifth and sixth added defendants appeal in No. 359, and have made the plaintiff only respondent to the appeal. The first, second, third, and fourth added defendants appeal in No. 360, and have made the plaintiff, the first and second defendants, and the remaining added defendants (or most of them) respondents to the appeal, but they have given security only for the plaintiff's costs and have not served notice of the appeal on the other respondents.

On the appeal coming up for hearing, Mr. A. St. V. Jayawardene, counsel for the respondents in both appeals, took the preliminary objection that the appeals were not properly constituted, in that in No. 359 the first defendant, a person interested in the result of the appeal, had not been made a party, and in No. 360 the first defendant had not been given notice of the appeal, and no security for his costs had been given.

The case was referred to a Bench of four Judges for consideration of the preliminary objection.

Bawa, K.C., and *Bartholomeusz*, for appellants in No. 359.

F. M. de Saram, for appellants in No. 360

A. St. V. Jayawardene and *F. de Zoysa*, for respondents in both appeals.

Cur. adv. vult.

December 8, 1916. WOOD RENTON C.J.—

I referred these appeals, under the provisions of section 54A of the Courts Ordinance, 1889,[1] to a Bench of four Judges, for the consideration of a preliminary objection taken to the hearing of each of them.

The plaintiff brought this action against the first and second defendants for the partition of certain property, allotting a fourth

[1] *No. 1 of 1889.*

share to himself and a three-fourths share to the first defendant, who had purchased the property from a vendee of the second. The Court ordered a sale instead of a partition, and, in accordance with a practice, of which we have recently expressed strong disapproval, and which, it is to be hoped, will now be abandoned by Courts of first instance, the Secretary of the District Court was appointed Commissioner to carry out the sale. By inadvertence, however, the decree for sale was not signed by the District Judge. Before the date fixed for the sale the added defendants obtained leave to intervene, and the Court stayed the sale pending the determination of their claim. That order was dated as far back as April, 1913, and it was not appealed from. The added defendants prepared for trial, but the present Additional District Judge declined to proceed with the inquiry, on the ground that the District Judge who made the order of April, 1913, had no power to allow the intervention after he had decreed a sale. The fifth and sixth added defendants in case No. 359, and the first, second, third, and fourth added defendants in case No. 360, appeal. The former have not made the first defendant a respondent to their appeal. The latter made him a respondent to the appeal, but did not serve notice of the appeal upon him, or furnish separate security for his costs. It is urged that these are fatal irregularities, and that both appeals should be dismissed.

In case No. 359 the first defendant was, in my opinion, a necessary party to the appeal, as the share allotted to him in the plaint might be prejudicially affected by the result of the inquiry into the intervenients' claims. But the question remains whether, as a matter of discretion, we ought not to allow his name to be added under section 770 of the Civil Procedure Code. I have no doubt as to the power of the Supreme Court to dismiss an appeal, on the ground that it has not been properly constituted by the necessary parties being made respondents to it, and I am equally clear that that power should be exercised, unless the defect is not one of an obvious character, which could not reasonably have been foreseen and avoided. I agree entirely with the observations of my Brother Shaw on those points. But in the present case I am prepared to act under section 770, in view of the absence of any appeal from the order allowing the intervention, and of the possibility that the necessity of the first defendant being made a party respondent to this appeal may have been overlooked, inasmuch as the only question immediately involved was whether or not the inquiry should proceed.

Similar considerations apply to the failure of the first, second, third, and fourth added defendants to give notice of the appeal to the first defendant in case No. 360. That defect is equally curable under section 770 of the Civil Procedure Code. The appellants furnished security for the costs of appeal of the plaintiff-respondent,

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whose interests are not in conflict with those of the first defendant, and that is enough. We have already given formal judgment directing, in case No. 359, that the first defendant be made a respondent to the appeal, and have notice of that order served upon him; and, in case No. 360, that notice of the appeal be served upon the first defendant.

ENNIS J.—

[His Lordship set out the facts and continued:—]

The case was referred to a Bench of four Judges to enunciate, if possible, the principle by which the Appeal Court should be guided in dealing with objections to the constitution of an appeal. In my opinion three courses are open to the Court. It may (1) proceed to hear the appeal as it stands, or (2) add, and give notice to, parties under the provisions of section 770 of the Civil Procedure Code, or (3) dismiss the appeal for defect of parties.

The Full Court case of *Dias v. Arnolis*[1] decided that the Appeal Court could act under section 770 of the Civil Procedure Code, and that it was a question for the decision of a Judge who heard the appeal whether or not a respondent ought to be added in any particular case. In the Indian case, *Solna v. Khalak Singh* and *another*,[2] it was held that the power to add parties should be exercised whenever the necessity is made apparent. In the case of *Appuhamy v. Natchie*,[3] *Perera v. Nonohamy*,[4] *and Fernando v. Fernando* [5] the Supreme Court dismissed the appeals, and in the Indian case of *Bejoy Gopal v. Umesh Chandra* [6] an appeal was held to have been rightly dismissed, for defect of parties. Which of the three courses the Court will follow will depend on the circumstances of the particular case, and, as stated in *Dias v. Arnolis*,[1] is a matter for the decision of the Judge who hears the appeal.

As regards the appeal No. 360, it has been the practice in partition actions to allow one set of costs only where the title is derived from the same source, and the interest of the claimants are more or less identical. In such a case the provisions of section 756 of the Civil Procedure Code, with regard to giving security for costs, would be complied with by security for one set of costs being given. Any other course would unnecessarily swell the expense of a partition action—an expense which in most cases is very heavy.

For these reasons I agree with the order proposed by my Lord the Chief Justice.

DE SAMPAYO J.—

I agree, and have nothing to add.

[1] *(1913) 17 N. L. R. 200.*
[2] *13 All. 78.*
[3] *3 Bal. Notes of Cases 67.*
[4] *3 Bal. Notes of Cases 69.*
[5] *3 Bal. Notes of Cases 70.*
[6] *6 Cal. W. Notes 196.*

SHAW J.—

A preliminary objection to the hearing of these appeals was taken on behalf of the respondents, and has been referred for hearing to a Court of four Judges under the provisions of section 54A of the Courts Ordinance, 1889.

The objection to the first appeal is that a necessary party to the appeal has not been made a respondent; and that to the second appeal is that a necessary party to the appeal, although made a respondent, has not been noticed, or furnished with security for his costs.

I feel no doubt that, under the provisions of chapter LVIII. of the Civil Procedure Code, it is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and that, unless they are, the petition of appeal should be rejected.

It seems equally clear to me that notice must be given to the respondents, for it is useless making them respondents unless they are notified of the fact. An appeal, defective owing to non-joinder of necessary respondents, can be remedied, in a proper case, by an order of the Court under section 770 directing those parties to be added or noticed. Such order would seem to be entirely discretionary, and I should not myself be disposed to amend the proceedings when the appeal is actually before the Court for hearing, unless some good excuse was given for the non-joinder or notice, or unless it was not very apparent that the parties not joined might be affected by the appeal.

In the present case I think that it was not very obvious that the first defendant might be affected by the result of the appeal, and agree that the defect should be remedied under section 770.

Present: Wood Renton C.J. and De Sampayo J.

The appeals were subsequently argued on the merits before Wood Renton C.J. and De Sampayo J, and the following judgments were delivered:—

WOOD RENTON C.J.—

These appeals have already been before us on a preliminary objection, which was argued before, and was ultimately over-ruled by, a Bench consisting of all the Judges of the Supreme Court. They now come on for hearing on the merits. The circumstances disclose a case of great hardship to the appellants. The plaintiff brought this action for the partition of a certain property situated in Colombo street, Kandy. On January 27, 1913, the District Judge ordered a sale instead of a partition. A formal decree was drawn up in pursuance of this order, but, no doubt through

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inadvertance, it was never signed by the District Judge. In terms, however, of this unsigned decree, a commission was, on February 4, 1913, issued to the Secretary of the District Court to sell the property. The commission was made returnable on May 5, 1913. The conditions of sale were submitted to the District Court on February 19. The sale was fixed for April 14. On April 9, however, the first added defendant moved for leave to intervene in the action, and for a stay of the sale pending the hearing and determination of her claim. After notice to the plaintiff and the defendants, who showed cause against the application for intervention, the Court, on April 21, 1913, allowed the first added defendant to intervene, and made an order staying the sale pending the inquiry. On the same date other parties were also allowed to make their statements of claims. The plaintiff did not appeal against the order of April 21 allowing the intervention. In due course the first added defendant and the other added defendants filed their statements of claim. On May 21 the plaintiff was ordered to take steps to add to the proceedings fresh parties, whose names were disclosed in the statements of claim of the added defendants. In pursuance of this order notice was issued, on the plaintiff's motion, on eighteen individuals to show cause why they should not be made added defendants in the case. Some of these parties filed answer; some disclaimed title altogether; others agreed to abide by the answer filed by the first defendant. The case was ultimately fixed for trial on February 2, 1916, and after various postponements came on for hearing on July 26, 1916. The plaintiff's counsel then, for the first time, argued that the order for sale was a conclusive and binding order in view of the provisions of section 4 of the Partition Ordinance, 1863,[1] and that the order of April 21, 1913, allowing the intervention was *ultra vires* the District Court. The learned Additional District Judge, Mr. Wadsworth, with great reluctance gave effect to this objection, and held that he had no power to inquire into claims of any of the intervenients. The intervenients appeal.

In my opinion this decision is correct. Two points were pressed upon us on the intervenients' behalf, in the first place, that, as the decree for sale was never signed by the District Judge, it was not a "decree" at all within the meaning of section 4 of the Partition Ordinance;[1] and, in the second place, that, if not the District Court, the Supreme Court, acting in revision, has full power to set the decree, if it was a decree, for sale aside, and that this power should be exercised in the present case in view of the plaintiff's acquiescene in the order allowing the intervention.

I should be glad, if it were possible to do so, to give the present appellants relief. But there is clear authority that in ordinary actions the entering up of a decree is purely a ministerial act

[1] *No. 10 of 1863.*

(*Emalishamy v. Ego Appu*[1]), and that an application for the amendment of a clerical error in a decree may be made at any time (*Natchia v. Natchia*[2]). There does not appear to me to be any good reason why the principle of these decisions should not be applied to partition suits. It is unnecessary to go through the older decisions with regard to the question whether, where a sale of property held in common instead of its partition is directed, the order to which section 9 of the Partition Ordinance, 1863,[3] gives conclusive effect if the decree or the certificate of sale. The case of *Bandara v. Baba*[4] has conclusively decided that it is the former. I do not propose to discuss the abstract issue whether, in spite of section 9 of the Partition Ordinance, 1863,[3] the Supreme Court has or has not power to interfere with decrees in partition actions in revision. It clearly is empowered to set aside in an appeal by any party to such an action, or in revision on the application of such a party, any final decree for partition or decree for sale. But I do not think that the Supreme Court ought to exercise its powers of revision at the instance of litigants who, as is the case with the present intervenient, were not parties to the action at all when the order for sale was made. To do so would be to deprive the decree for sale of the conclusive and binding effect assigned to it by section 9 of the Partition Ordinance, 1863.[3] The District Judge by whom the order for sale was made is still in the judicial service of the Colony. I would direct the decree of January 27, 1913, to be entered up *nunc pro tunc* by him as of that date, and with this modification I would dismiss the appeals with costs.

The circumstances of these cases show, however, once again the urgent need for a drastic reconsideration by the Legislature of the provisions of the Partition Ordinance, 1863.[3] Fresh safeguards for giving adequate publicity to partition proceedings should be created, and an interlocutory as well as a final decree for sale might with advantage be provided for.

DE SAMPAY J.—

I am of the same opinion. It has, after some difference of judicial opinion on the subject, been finally decided in *Bandara v. Baba*,[4] by a Full Bench, that in the case of a sale under the Partition Ordinance[3] the final and conclusive decree is the decree for sale entered under section 4 of the Ordinance. Consequently in this case the appellants came in too late, if there was a recognizable decree made on January 27, 1913. Mr. Bawa, for the appellants, contends that there was no such decree, inasmuch as the form of decree, drawn up after the judgment was pronounced, had not been signed by the District Judge. On the assumption that the unsigned decree was no decree, Mr. A. St. V. Jayawardene, for the respondents,

[1] *(1903) 7 N. L. R. 38.*
[2] *(1912) 15 N. L. R. 319.*
[3] *No. 10 of 1863.*
[4] *(1916) 19 N. L. R. 1.*

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contends, on the other hand, that the judgment itself embodies a sufficiently formal decree, and cites my judgment in *Perera v. Fernando.* [1] I adhere to the opinion therein expressed that it is not essential for the purposes of a decree that it should be entered in a separate paper, and that it is sufficient if the judgment itself contains a definite order adjudicating upon the right claimed and granted the relief intended. But that principle can hardly be applied to this case. The part of the judgment depended on is as follows:—

"Let a decree be entered for the sale of the property and for the distribution of the proceeds realized between the plaintiff and the first defendant in the shares specified above. The costs will be borne by the parties *pro rata.*"

The difficulty in regarding this as a sufficient decree in a partition suit is that neither in that nor in any other part of the judgment is the *corpus* or the subject-matter of the suit described or ascertained, and this is essential in a decree for partition or sale. I think, therefore, that the question whether there is a decree in this case must be determined on other considerations. I may say at once that, if the form of decree was not signed by the District Judge because he had intentionally deferred signing it pending the satisfaction of some further requisite, there would, in my opinion, have been no decree, and in the meantime an intervention was possible. But where, as here, the investigation was complete, and the District Judge intended to sign the decree at once, but only omitted to do so by inadvertence, it is impossible to say that any intervention could be allowed thereafter. In such circumstances as these the signing of the decree is a ministerial act, which may be done at any time, and the decree when signed will be operative as from the date of the judgment. That the District Judge not only intended to sign the decree at the time, but believed that he had done so, is apparent from the fact that in the commission issued to the person appointed to carry out the sale the decree is recited, and that the conditions of sale were settled and all other things done on the basis of the decree. I think, therefore, that the existence of a decree must be postulated, and that the technical ground on which the appellants seek to justify their intervention cannot be sustained. The signature of the Judge may even now be affixed as suggested by my Lord the Chief Justice.

Mr. Bawa, however, pressed the appeal on the ground that, since the District Judge, as a matter of fact, allowed the intervention, and all the parties acted on the footing that the decree had been opened up, it was not open for the plaintiff at the last moment, when the case came on for trial afresh, to take any objection to the intervention. I confess that there is some inconsistency in the

[1] *(1914) 17 N. L. R. 300.*

District Judge's order on the appellants' application for intervention. He did not definitely vacate the decree, but simply ordered the appellants to file their claims and stayed the sale. If he intended to vacate the decree, he should distinctly have said so, and have recalled the commission altogether, and not merely suspended its execution; and I think there is good reason for the construction, placed upon the order by the Acting District Judge, before whom the case last came, to the effect that when the intervention was allowed, the District Judge meant to postpone the question of its legality for consideration at the trial which was to take place on the claims made. In any event the respondents, though they might, as in all other cases, waive any right which was vested in them, could not by any act or omission give to the Court a power to vacate its own decree which it had not under the law, nor could they of their own will set aside the provisions of the Ordinance, which has a larger object in view than the mere interests of private persons. I think that the Court, apart from any objection raised by the respondents, was bound to take note of the imperative nature of the provisions of the Ordinance and to recognize its own limitations thereunder.

The last point urged on behalf of the appellants is that we should set aside the decree in exercise of our powers of revision. I do not think that we can or ought to do so. Even if the remedy by way of revision is available to a person who has not been a party to the action, this Court, as much as the District Court, is precluded from setting side in that manner the final decree in a partition suit on the grounds put forward in this case. In a series of cases, of which I need only mention *Nono Hamy v. De Silva*,[1] it has been held that, even where a person having an interest in the property has been excluded by fraudulent collusion between the parties, the decree so obtained cannot be set aside, and that his remedy is an action for damages under the proviso to section 9 of the Ordinance. The case just referred to was an independent action brought to set aside the decree in the partition suit, but the *ratio decidendi* applies to any other form of legal proceeding. Similarly, and for the same reason, *restitutio in integrum* has been held not to be available to a party aggrieved (*Babun Appu v. Siman Appu*[2]). Mr. Bawa, however, cited the unreported case, 3—D. C. Kalutara, 1,782,[3] where Lawrie and Withers JJ. acting in revision set aside a decree for sale on the appeal of a person who had unsuccessfully applied to intervene after the decree but before the actual sale. But as to that case two remarks have to be made. It appears that the decree had been entered of consent, and not as the result of an investigation into title. It may well be considered that the decree, not being in accordance with the requirements of the Ordinance, was not, in fact, a binding decree, and was

[1] *(1891) 9 S. C. C. 199.* [2] *(1907) 11 N. L. R. 44.*

[3] *S. C. Min., Jan. 27, 1898.*

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liable to be revised when the true facts were disclosed. Moreover, the decision of the learned Judges was given at a time when judicial opinion was that, in the case of a sale under the Partition Ordinance, the binding decree was not the decree for sale under section 4, but the certificate of sale granted under section 8, and, since *Bandara v. Baba* (*supra*), it is no longer an authority on the point under consideration. The same remarks applies to *Bandaranaike v. Bandaranaike* [1] and the case which it followed. To set aside a decree in revision, on the ground that a person who had a share in the land was omitted and was thus deprived of it, would be to allow what is expressly prohibited by section 9. However large our powers of revision may be, they cannot be exercised in contravention of a statute. Mr. Bawa finally urged that this was an exceptional case, inasmuch as the appellants were deprived of the alternative remedy of an action for damages by operation of prescription. No doubt the appellants had fixed their hopes on the order of the District Judge allowing the intervention, and probably for that reason abstained from bringing an action in time. The act of the Court, however, cannot enlarge the rights of the appellants, nor can we recognize the fact for prescription having run out in deciding the present question of law. The dismissal of this appeal may be hard for the appellants, but such hardship, which undoubtedly occurs under the Ordinance in many a case, can only be provided against by legislation.

Appeal dismissed.