[IN THE PRIVY COUNCIL]

1950 *Present :* **Lord Simonds, Lord MacDermott, Lord Reid and Sir John Beaumont**

PIYARATANA UNNANSE *et al.*, Appellants, *and* WAHAREKE SONUTTARA UNNANSE *et al.*, Respondents

Privy Council Appeal No. 20 of 1948

S. C. 289—D. C. Kandy, 45,415

Amendment of decree—Power of District Court to amend its own decree—Narrow compass of such power—Civil Procedure Code, s. 189 (1).

Application under section 189 (1) of the Civil Procedure Code was made to a District Judge to amend a decree entered by his predecessor on the basis of an alleged variance between the judgment of the court and the decree based upon it. The contention of the petitioners, who were the plaintiffs, was that the decree omitted to give them the right to certain land edged green on a plan produced in the case, whereas, according to their contention, the judgment on which such decree was based, if it was read as a whole, had conceded such right.

Held, that unless the variance between the judgment and the decree appeared on a perusal of the judgment and decree the District Court had no power to amend its own decree. A matter involving the construction of the judgment could not fall within section 189 of the Civil Procedure Code.

APPEAL against a decree of the Supreme Court.

Stephen Chapman, for plaintiffs appellants.

Cecil Havers, K.C., with *R. K. Handoo*, for defendants respondents.

Cur. adv. vult.

April 18, 1950. [*Delivered by* SIR JOHN BEAUMONT]—

This is an appeal against a decree of the Supreme Court of Ceylon dated the 17th May, 1944, setting aside an Order of the District Court of Kandy, dated the 22nd March, 1943, whereby a decree of the said District Court, dated the 6th February, 1941, in favour of the appellants was directed to be amended in the manner specified.

The power of a court in Ceylon to amend its own Order is conferred by section 189 (1) of the Civil Procedure Code which is in the following terms :

" The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment."

J N. A 96950-1,042 (4/50)

In the application giving rise to this appeal the contention of the appellants was that the decree of the District Court dated the 6th February, 1941, omitted to give to the appellants the right to certain land edged green on "Spencer's Plan" hereinafter mentioned, whereas, according to the contention of the appellants, the judgment on which such decree was based had conceded such right. The learned District Judge before whom the said application came, who was not the same judge as the one who had passed the decree, accepted the contention of the appellants. and amended accordingly the decree passed by his predecessor. In appeal the Supreme Court held that the judgment upon which the decree of the 6th February, 1941, was based had decided against the title of the appellants to the said land, and that there was no case for amending the decree.

The first question which arises for decision by the Board is whether the learned District Judge had any power on the application before him to amend the decree of his predecessor. If this question be answered, as their Lordships think it must be, against the appellants, the appeal must fail, and it is unnecessary to determine any other question.

The facts giving rise to this appeal are not in dispute. The litigation started in the District Court of Kandy on the 4th July, 1934. The parties were all Buddhist priests and the question in issue related to the ownership and right to possession of a monastic building known as the "Meda Pansala" as appurtenant to a larger monastic temple known as Degaldoruwa Vihare. The plaint did not describe the property claimed by metes and bounds or by reference to any plan, as it should have done under section 41 of the Civil Procedure Code, nor did the defence raise any question as to the boundaries or area of the Meda Pansala. At the trial twelve issues were raised relating to (1) the title to the Meda Pansala of the plaintiffs, present appellants; (2) the claim of the defendants, present respondents, to have acquired a right to the said Meda Pansala by prescription; and (3) the claim of the defendants to the cost of improvements alleged to have been made by them to buildings comprised in the Meda Pansala and a consequent right to a *jus retentionis*. No issue as to area was raised.

On the 10th February, 1936, the District Judge gave judgment in the suit holding that the plaintiffs had proved their title to the Meda Pansala but that such title was barred by limitation. Accordingly he dismissed the action.

In appeal the Supreme Court agreed with the District Judge in thinking that the plaintiffs had proved their title but differed from him in thinking that such title was barred by limitation. Accordingly the decree of the District Judge was set aside and issues 9, 10 and 11 (which dealt with the claim of the defendants to the cost of improvements and the *jus retentionis*) were remanded to the lower court.

In dealing with the remanded issues it was agreed between the parties that it would be necessary to define the Meda Pansala, and accordingly a commission was issued to a surveyor named Spencer to make a plan of the Meda Pansala. Mr. Spencer duly prepared a plan (which is the plan hereinbefore referred to as "Spencer's Plan") in which he showed the

Meda Pansala as consisting of buildings, marked lots 1-10 inclusive, and some open land (presumably garden land) which was edged green on the plan. The present dispute relates to that piece of open land. The plaintiffs claimed that the Meda Pansala comprised the whole property shown on the plan, but informed the court that they raised no claim in the present action to lots 7-10 since rights of persons not parties to the action were involved. The learned judge thereupon raised a fresh issue, No. 13, in these terms :

> " Do the buildings marked 1, 2, 3, 4, 5 and 6 and the land shown in the inset edged green, in Mr. Spencer's plan, represent the Meda Pansala which is the subject-matter of this action ? "

At a subsequent date, namely on the 28th August, 1940, counsel for the plaintiffs informed the court that lots 3 and 6 were in the same position as lots 7-10 and that he did not propose to raise the title to those lots in the action. The learned judge thereupon stated that issue 13 would be modified by substituting in place of the lots referred to in that issue the following lots only : 1, 2, 4 and 5.

At the trial of the remanded issues it was common ground that lot 2 was comprised in the Meda Pansala and the dispute was as to lots 1, 4 and 5. The learned District Judge in his judgment delivered on 6th February, 1941, after noticing that the titles to lots 3 and 6-10 were not being investigated in the suit, stated that issue No. 13 had been modified so as to include in it only lots 1, 2, 4 and 5. Whether the learned judge was right in treating issue No. 13 as not embracing the land edged green may be open to question, but their Lordships think it clear that the learned judge, having treated the issue as so limited, confined his judgment to that issue. After considering the evidence submitted the learned judge said this :

> " Upon a consideration of the evidence placed before the Court by the parties, I have come to the conclusion on the issues submitted for adjudication that the Meda Pansala is comprised of lots 1, 2, 3, 4 and 5 and not merely of lot 2 as contended for the defendants."

The learned judge summed-up his conclusions at the end of the judgment in these words :—

> " In the result, I would hold on issue 13 as framed by me that the Meda Pansala which is claimed to be an appurtenant of the Degaldoruwa is comprised of lots 1, 2, 4 and 5 subject to the reservation as regards the further claims to the buildings which have been made in the course of the trial."

On this judgment the decree of the 6th February, 1941, was drawn up. It ordered and decreed that the 1st plaintiff be and he was thereby declared entitled to the possession of the Meda Pansala as an appurtenance and endowment of the Degaldoruwa Vihare as comprised of lots 1, 2, 4 and 5 in plan dated the 16th July, 1938, made by Mr. P. Spencer and filed on record in this case.

The respondents filed an appeal from this decree but on the 1st October, 1942, the Supreme Court dismissed the appeal on a preliminary objection.

It is common ground between the parties that as the Supreme Court did not enter upon the merits of the dispute its order in appeal has no relevance in these proceedings.

On the 11th January, 1943, the appellants presented a petition to the District Court of Kandy praying that the decree of the 6th February, 1941, be amended by including in the declaration of the plaintiffs' title the right to the land edged green in Spencer's plan. The basis of the petition was that there was a variance between the judgment and the decree. At the hearing of the petition the then District Judge of Kandy accepted the contention of the appellants and amended the decree of the 6th February, 1941, by the interpolation after the figure " 5 " of the words :

" and the land shown in the Inset edged green."

The learned judge was of opinion that reading the judgment of his predecessor as a whole it amounted to a finding in favour of the title of the plaintiff to the land edged green. In appeal the Supreme Court set aside the Order of the District Judge. The judges of the Supreme Court did not consider the question whether the District Judge had power to amend the decree made by his predecessor, but held that the judgment on which the decree of the 6th February, 1941, was founded had held against the plaintiffs' title to the land edged green. " It is obvious " said the learned Chief Justice in delivering the judgment of the court, " that he (the District Judge) held that the plaintiffs were not entitled to the land shown in what is described as the inset edged green."

Their Lordships find themselves in agreement with the conclusion reached by the Supreme Court but not with the reasons upon which such conclusion was founded. The general rule is clear that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is *functus officio* and cannot set aside or alter the Order however wrong it may appear to be. That can only be done on appeal. Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Order XXVIII, Rule 11 of the English Rules of the Supreme Court and the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. The section does not take away any right of appeal which the parties may possess ; it merely provides a simple and expeditious means of rectifying an obvious error. In the present case there was no clerical error or accidental omission in the decree and the case of the appellants is based on an alleged variance between the judgment of the court and the decree based upon it. In such a case the variation should appear on a perusal of the judgment and decree. No such variation is apparent in the present case. The decree embodies the declaration which the judge expressed himself as prepared to make. The argument of the appellants is that when the judgment is read as a whole the judge really decided more than he professed to decide. That involves the construction of the judgment, a matter open to serious doubt as is shown by the fact that the trial judge thought the decision to be in favour of the plaintiff, whilst the appeal court thought it to be

against the plaintiffs. In their Lordships' view that is not the type of case which falls within section 189 of the Civil Procedure Code, and that is sufficient to dispose of this appeal. Their Lordships would add, however, that, having carefully considered the terms of the judgment of the 6th February, 1941, and having heard an elaborate argument as to its meaning and effect, they do not find themselves in agreement with the view of either of the courts in Ceylon. They are satisfied that in his judgment of the 6th February, 1941, the learned judge did not decide, or intend to decide, upon the title to the land edged green. The highest the case can be put on behalf of the appellants is that there are passages in the judgment which suggest that if the judge had been minded to decide the question, he would have decided it in favour of the appellants. The judge may have had good reasons for not deciding the question. He may have thought it inappropriate to decide on the title to a piece of open land when he was dealing only with issues relating to the cost of improvements in buildings, or he may have thought that any such decision might be embarrassing to parties not before the court who had interests in the land. At any rate whatever his reasons may have been their Lordships are satisfied that the learned judge deliberately refrained from deciding the title to the land edged green and that matter is still at large.

For these reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs.

Appeal dismissed.

1950 *Present :* **Jayetileke S.P.J. and Gunasekara J.**

THEVCHANAMOORTHY *et al.*, Appellants, *and* APPAKUDDY *et al.*, Respondents

S. C. 393—D. C. Jaffna, 1,159

Partition Ordinance—Section 6—Commissioner's scheme of partition—Re-issue of commission to Commissioner to submit a fresh scheme—Return of commission—Duty of Court to issue notice to all parties again—Co-owner's right to be allotted portion which contains his improvements.

Where, in a partition action, a second scheme of partition is ordered notice should be given to the parties of the day on which the second scheme will be considered by the Court. The notice which the Court has to give to the parties in terms of section 6 of the Partition Ordinance cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner.

A co-owner should be allotted the portion which contains his improvements whenever it is possible to do so.