1966 *Present :* **H. N. G. Fernando, S.P.J., and Alles, J.**

VIVEKASIRENMANY and another, Appellants, *and* V. RAMASAMY and 7 others, Respondents

S. C. 407/63—D. C. Point Pedro, 6836

Res judicata—*Decree of Supreme Court in appeal—Incapacity of the trial Court to amend it even with consent of parties—Minor unrepresented by guardian—Effect of decree entered against him—Civil Procedure Code, ss. 189, 480.*

A District Court does not have jurisdiction under section 189 of the Civil Procedure Code to amend a decree which has been confirmed by a decree of the Supreme Court in appeal. If a minor was a party to the action, it is not open to him, even with the consent of the parties, to move the District Court under section 480 of the Civil Procedure Code to set aside the decree of the Supreme Court on the ground that he was not represented by a guardian.

A partition decree is not a nullity *ab initio* if one of the defendants in the action was a minor who was not duly represented by a guardian *ad litem ;* it is only voidable at the instance of the minor. Accordingly, another party to the action is not entitled to invoke the aid of section 480 of the Civil Procedure Code in order to challenge the validity of that decree in a subsequent action, more especially when the final decree has in fact allotted a portion of the corpus to the unrepresented minor. The decree binds all the parties who were properly before the Court and will operate as *res judicata* in a subsequent partition action between the same parties or their successors in title in respect of the same land.

APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, Q.C., with *K. Thevarajah*, for the Plaintiffs-Appellants.

S. Sharvananda, for the Defendants-Respondents.

Cur. adv. vult.

July 21, 1966. H. N. G. FERNANDO, S.P.J.—

In this action for partition, the defendants pleaded as *res judicata* a decree of partition in respect of the same land entered in 1947 in action No. 2550 of the same Court, and affirmed in a decree of the Supreme Court in 1948. The 3rd defendant in that action was undoubtedly a minor both during the pendency of the action and at the time when the final decree was entered. Having attained majority, the 3rd defendant in 1957 moved the District Court to set aside that decree on two grounds : (*a*) her minority and (*b*) the want of due registration of the *lis pendens* of the action. The two plaintiffs in that action thereupon conceded the second ground and moved to withdraw the action. The District Judge then dismissed the action No. 2550.

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Even if that order of dismissal is referable to the fact of the minority of the 3rd defendant, it was made without jurisdiction—in *Sinno Appu v. Andris*[1], which has been subsequently followed, it was held that a District Court does not have jurisdiction under section 189 of the Civil Procedure Code to amend a decree which has been confirmed by a decree of the Supreme Court in appeal. The *ratio decidendi* of that case is in my opinion applicable in relation to section 480 of the Code—and I am not disposed in this case to review the correctness of that decision. I must hold therefore that the District Judge who tried the present action rightly held that the decree in action No. 2550 is still effective, despite the purported dismissal of that action.

The plaintiffs in the present case were parties to action No. 2550, and the defendants are persons who were either such parties or their successors in title. Nevertheless, Mr. Ranganathan has argued, the plea of *res judicata* must fail.

His principal contention is that the decree in action No. 2550 was a nullity, because the 3rd defendant to that action was a minor during its pendency. He concedes that there has apparently been no decision of this Court holding that a partition decree is null *ab initio* if a minor defendant is not duly represented by a guardian *ad litem*. But he relies on certain observations in two fairly recent judgments.

In the judgment of a Divisional Bench rendered by L. M. D. de Silva, J. (*Kanagasabai v. Velupillai*)[2], the question arose whether a decree of partition is null or else only voidable, if there had not been due registration of the *lis pendens*. The objection to the decree was taken in that case by a person who had not been a party to the action. What the judgment did decide was that the conclusive effect under section 9 of the former Partition Ordinance does not attach to a decree in so far as it concerns a person who was not a party. In effect therefore, the judgment did not directly decide that the decree was a nullity for want of due registration of the *lis*, nor even that the decree was voidable at the instance of a person who had been a party to the action. It was based on the different ground that section 9 did not have the full conclusive effect *in rem* declared in the very early cases under the Ordinance. It emphasised also that the Courts in England had not attempted to lay down a decisive test for determining whether a judgment or order is a nullity, or else only voidable, on the ground of irregularity. It only approved the opinion expressed by Lord Goddard in *Marsh v. Marsh*[3], that one test of nullity which may be applied is whether an irregularity has caused a failure of natural justice.

The other decision on which Mr. Ranganathan has relied is one of a single Judge (*Setun Bibee v. Marikar*[4]). This was a case where, in a partition action, summons had been served on minor defendants without a guardian *ad litem* having been appointed. The minors subsequently

[1] *(1910) 13 N. L. R. 297.*
[2] *(1952) 54 N. L. R. 241.*
[3] *1945 A. C. 271.*
[4] *(1953) 55 N. L. R. 236.*

made an application under section 480 of the Code to set aside the partition decree, and this Court held that the decree should be set aside. No pronouncement was made that the decree was a nullity, although it was observed that service of summons on a minor was no service at all, and that therefore no valid decree could have been entered. It is not clear to me that this observation amounted to a decision that the decree was a complete nullity, but even if the observation can be construed in that sense, it was made without reference to the then recent judgment of the Divisional Bench, which had hesitated to lay down any decisive test of the distinction between null decrees and those which are merely voidable.

In the instant case, it is not the former minor defendant that claims the former decree in the action No. 2550 to have been a nullity. That claim is now put forward by the two plaintiffs in the present action, both of whom were parties to action No. 2550 and were content to obtain a decree of Court despite the fact that one party to that action was an unrepresented minor. Moreover, the final decree of partition in action No. 2550 did in fact allot a portion of the corpus to the unrepresented minor, whose interests have now passed to the present plaintiffs. In these circumstances, there is no fear of any failure of natural justice.

I must therefore hold, in accordance with the trend of former decisions, that the decree in action No. 2550 was not a nullity, but only voidable at the instance of the unrepresented 3rd defendant in that action, and that it is binding on the parties to the present action.

But there is yet Mr. Ranganathan's further contention that the principle of *res judicata* does not, in the circumstances of this case, apply as against the plaintiffs notwithstanding that they were parties bound by the decree in action No. 2550. This contention is based on the fact that the plaintiffs are entitled, not only to the interests which they claimed in action No. 2550, but also to additional interests which they have derived as heirs of the former minor 3rd defendant, now deceased. Because, it is claimed, the plaintiffs are the successors in title to the interests of the former minor defendant, the decree in action No. 2550 which bound them as parties thereto, nevertheless does not bind them because they now have a new and additional capacity as heirs of the former minor defendant.

Let me first examine the practical consequences of this contention. One of the present plaintiffs, who was also a plaintiff in action No. 2550, was directly responsible for the situation that the 3rd defendant in that action was not duly represented therein; the other was indirectly responsible because he acquiesced in that situation. Both these parties, who were virtual plaintiffs in action No. 2550 (that being an action for partition), invited the Court in that action to determine their respective rights and also the rights of the minor defendant. The Court accordingly

didadjudicate upon the rights of the three parties, and the adjudication which became embodied in the decree for partition was that the present two plaintiffs were entitled to certain defined allotments of land, and also that the 3rd (minor) defendant in action No. 2550 was also entitled to a defined allotment. As between all the parties to that action except the 3rd defendant, the adjudication was binding, and it is not now open to the present plaintiffs to claim that the former 3rd defendant is entitled to any interest different to that allotted in the decree for partition. The adjudication determined also the interests of the present contesting defendants or their predecessor in title. If the present plaintiffs can now claim that the interest of the former 3rd defendant is different to that allotted in the decree, the result can be that the present contesting defendants have an interest different from that declared in the adjudication. That result would mean that the adjudication of the interest of the contesting defendants is not now binding on any one.

Mr. Ranganathan invited us to consider a situation which is not uncommon. Suppose that A sues B for a declaration of title to land, and his action is dismissed. A thereafter acquires an interest in the land from C. The earlier decree does not then preclude A from proving in a subsequent action that C in fact had title all along, and that C's interest passed to A upon his acquisition of that interest. The essential difference between that situation and the present one is that there the Court does not, in the first action, adjudicate upon C's title ; whereas in the present situation, the earlier partition decree did declare the minor defendant's interest, and that declaration bound all the parties who were properly before the Court.

In *de Zoysa v. Gunasekera* [1], X, who was the administrator of the estate of Y, was in that capacity the 5th defendant in a partition action. After entry of the preliminary decree, X applied to be added as a party in his personal capacity, claiming 4 acres of the land on a deed executed by the original owner. Because his application for intervention was in his personal capacity, it was held that X could be entitled to intervene before the final decree. The Court did not consider the question whether, if the final decree had been entered without X's intervention, that decree would or would not have been binding on X, either as being *res judicata*, or in terms of section 9 of the Partition Ordinance. Instead, the very brief judgment indicates that the Court exercised a discretion in his favour on the ground that his intervention was not dubious or belated and that he had given some explanation for his delay in making a claim.

I hold for these reasons that the decree in action No. 2550 is in terms of section 9 good and conclusive against all the parties to the present action, who were all persons properly before the Court in action No. 2550. The decree dismissing the present action is affirmed with costs.

ALLES, J.—I agree.

Appeal dismissed.

[1] *(1946) 47 N. L. R. 439.*