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

MENCHINAHAMY, Petitioner, *and* MUNIWEERA *et al.*, Respondents

Application 101—Application for revision or in the alternative for Restitutio in integrum in S. C. 127-129 (D. C. Tangalle 4,445)

Partition action—Effect of order nisi being made absolute—Heirs of deceased party not added as parties—Restitutio in integrum—Circumstances when it will be granted—Proctor—Irregularity of acting in dual role of litigant and proctor.

In a partition action an intervenient disclosed the name of another necessary party, one N. In fact that party at that date was dead. When this fact was brought to the notice of the Court, notices issued on N's heirs to be added in her place. The Court issued an order *nisi* on N's son S and four other children of N to show cause why they should not be added. The order *nisi* was reported served and on the returnable date, they being absent, the Court made the order *nisi* absolute.

Held, that the effect of the order *nisi* being made absolute was that S and the other children of N were added as parties to the partition action.

Subsequently S died, but no steps were taken to have his heirs, namely his widow and children, substituted in his place. The case proceeded to interlocutory decree which was upheld by the Supreme Court in appeal. Thereafter, S's heirs moved the Supreme Court by way of *restitutio in integrum*.

Held, that the interlocutory decree was irregularly entered and that the case should be sent back for S's heirs to be added and for investigation of the claims of S and the children of N.

The remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances. It is only a party to a contract or to legal proceedings who can ask for this relief. The remedy must be sought for with the utmost promptitude. It is not available if the applicant has any other remedy open to him.

It is irregular for a proctor who is a party to a partition action to file proxy on behalf of one of the other suitors and appear in the case as proctor.

APPLICATION by way of *restitutio in integrum*, or, in the alternative, application to revise the proceedings in a partition case in the District Court, Tangalle.

H. V. Perera, K.C., with *G. T. Samarawickreme* and *W. D. Gunasekara*, for the petitioner.

S. J. V. Chelvanayakam, K.C., with *A. L. Jayasuriya*, for the 1st-4th respondents (parties substituted in place of the plaintiff).

E. B. Wikramanayake, K.C., with *Christie Seneviratne*, for the 4th defendant respondent.

H. W. Tambiah, with *S. Sharvananda*, for the 146th defendant respondent.

C. Seneviratne, for the 3rd defendant respondent.

M. H. A. Aziz, with *A. M. Ameen*, for the 27th and 77th defendants respondents.

Cur. adv. vult.

December 13, 1950. DIAS S.P.J.—

This is an application by way of *restitutio in integrum* or in the alternative an application to revise the proceedings in D. C. Tangalle Partition Case No. 4,445.

In this case the plaintiff through his proctor, Mr. D. A. Jayawickreme, who is also the 4th defendant to this action, sought to partition a land called Lot C of Punchihenayagama in extent 586½ acres.

It is clear from the proceedings that the person who carried this action through the Court was the 4th defendant. Six years after the action was filed the impropriety of a litigant being also the proctor for the plaintiff appears to have struck Mr. D. A. Jayawickreme who on February 28, 1945, revoked his proxy, and Proctor Mr. F. Dissanayake filed the plaintiff's proxy. Nevertheless it is clear from the subsequent proceedings that although Mr. Dissanayake was the plaintiff's proctor, it was the 4th defendant who was really acting for the plaintiff. For example, on May 1, 1945, Mr. Jayawickreme for the plaintiff moved that the unserved notices lying in the case be re-issued for service. Again on July 26, 1945, Mr. Jayawickreme for the plaintiff had no objection to a party being added. On November 13, 1945, Mr. Jayawickreme for the plaintiff received certain notices on behalf of the plaintiff, and on January 15, 1946, he again took notice on behalf of the plaintiff of an intervention. There are other journal entries showing that although Mr. Dissanayake was the proctor for the plaintiff, it was the 4th defendant who was really acting as the plaintiff's proctor. To make confusion worse confounded, on February 2, 1946, Mr. Jayawickreme, the 4th defendant, filed the proxy of the 133rd to the 136th defendant, &c. I, therefore, agree with Mr. H. V. Perera not only that all this is extremely improper, but that it also shows that an important person in this case was the 4th defendant in his dual role of party-litigant and proctor.

The plaintiff having filed this action on June 16, 1939, the case was called on September 5, 1945, "to see whether the case was ready for trial". The learned District Judge having been told that the case was ready for trial, it was fixed for two days in December, 1945. The trial took place on those dates and further hearing was adjourned for two dates in February, 1946. Judgment was delivered on September 6, 1946, and the interlocutory decree, 1R8, was entered on that date.

Thereafter three appeals were filed against this decree by the 20th, 22nd, 23rd, 24th, 26th and 29th defendants. The appeals were argued on February 16, 1949, before my brother Canekeratne and myself when this Court dismissed the appeals with a small modification. The present petitioner filed her present application on March 23, 1949.

The caption of this action shows that in March, 1949, there were 146 defendants to the action which commenced with 18 defendants. The petitioner in her petition discloses in paragraphs 7 and 8 that various

parties have died without steps having been taken to have their heirs substituted. Therefore, even after the present dispute has terminated it may well be that finality will not even then be reached.

This case, therefore, is a melancholy example of the workings of our antiquated and cumbersome Partition Ordinance. This case forcibly reminds one of the famous though mythical case of *Jarndyce v. Jarndyce* immortalized by Charles Dickens in " Bleak House " of which it was said—" And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends ". And now, at the end of 1950, if the contention of the petitioner is right, the work of twelve long years will be of no effect, because the dispute which was settled by the interlocutory decree of the District Judge and the judgment in appeal of the Supreme Court will have to be ignored, and the matter dealt with anew.

The following facts will serve as an introduction to the dispute which has now arisen in this case:

March 4, 1941. Proctor Attapattu filed proxy of one T. Wattuhamy, an intervenient who disclosed other persons, including a lady named Nangi. As a matter of fact Nangi had died on November 5, 1938—*see* death certificate 1R1. This fact was not known at the time.

March 18, 1941. Mr. D. A. Jayawickreme, proctor for the plaintiff, (i.e., 4th defendant), moved that Mr. Attapattu be ordered to issue notices on the parties disclosed by Wattuhamy. Mr. Attapattu, however, refused to do so stating that " notices are not necessary if the intervenient does not want them ".

I believe it is the practice in most Courts that, while it is the duty of the plaintiff in a partition case to see that all the parties necessary for the adjudication of the case are before the Court, in the case of an intervenient who comes in contesting the claims made by the plaintiff and the defendants, it is for the intervenient to bring before the Court all the parties disclosed by the intervenient. Mr. Attapattu does not appear to have contested this point. His view was that if the intervenient did not want Nangi or her heirs added, there was no duty cast on the intervenient to notice her or them. If that was Mr. Attapattu's view, I must dissent from it. He, however, eventually issued notices.

May 21, 1941. The exhibit 1R2 shows that notice of Wattuhamy's intervention was issued on 19 persons. No. 5 is Nangi whose death was then probably still not known. 1R2 required Nangi to appear before the District Court on June 16, 1941, and file her statement of claim by becoming an added party to the case " if so advised ".

June 11, 1941. By his return 1R3 the Fiscal reported that Nangi was said to be dead.

Pausing at that point, it is clear that a necessary party, Nangi, was dead. Therefore, the next step which had to be taken was to notice Nangi's heirs to be added in her place.

November 21, 1941. Mr. Attapattu by his motion 1R4 naming Saineris (the son of Nangi) and four other children of Nangi and other persons as respondents, moved the Court in the following terms:—" It is necessary to get the aforesaid heirs substituted in the room of the deceased 5th (Nangi), 6th and 10th co-owners in order to enable his client to issue notices on them ". Mr. Attapattu, therefore, moved that an order *nisi* be entered " directing the 1st to the 5th named respondents be substituted in the room of the deceased Nangi ".

November 25, 1941. The order *nisi* which issued is the exhibit 1R6 and is the important document in this case. The operative part of the order *nisi* reads as follows :—" It is ordered that the said substitutions be made unless sufficient cause be shown to the contrary on the 10th day of December, 1941 ". 1R6 is the order of the Court whatever Mr. Attapattu's intentions may have been. The plain meaning of the words used in the order *nisi* indicates that unless the respondents show cause to the contrary on December 10, 1941, they would be substituted as parties-defendants.

January 21, 1942. The relevant journal entry reads:—" Order Nisi reported served on 1st to 11th respondents, i.e., including Saineris and the other children of Nangi. 12th defendant and 17th defendant are absent. They are added as parties. 6th respondent is present and has no cause to show. Others absent (i.e., Saineris and his group of respondents). Enter order absolute (i.e., order *nisi* 1R6 was made absolute) ".

The procedure which the learned District Judge adopted in this case is sanctioned by the decisions in *Loos v. Scharenguivel* [1] and *Banda v. Dharmaratne* [2].

The main questions arise for decision in this case : (*a*) Was Saineris (the son of Nangi) added or substituted as the 50th defendant in this case? (*b*) If so, are the widow and children of Saineris entitled to make the present application? A third and vitally important question in this case is as to what the order *nisi* 1R6 and the order absolute precisely mean and effected.

According to the respondents the effect of the order absolute was to substitute Saineris and the other children of Nangi in order that notices may issue on them to show cause why they should not be added. It is argued for the respondents that 1R6 when it was made absolute did not substitute the children of Nangi as defendants to this action. It is contended that the only effect of the order absolute was that the persons were substituted in place of a party not on the record (i.e., Nangi). Therefore it is argued that 1R6 and the order absolute amount to a nullity.

Counsel for the petitioner, on the other hand, has argued strenuously that the order *nisi* 1R6 is clear and specific in its terms and that when the order *nisi* was served and the respondents having shown no cause, the order absolute substituted Saineris and his group as defendants to this action.

[1] *(1891) 9 S. C. C. 143.*

[2] *(1922) 24 N. L. R. at P. 211.*

To my mind the position is clear. The order *nisi* 1R6 declared in unequivocal terms that the respondents would be substituted in the room of the deceased Nangi *unless* sufficient cause was shown to the contrary on the returnable date. The order *nisi* having been duly served and no cause having been shown, the effect of making the order *nisi* absolute was to substitute Saineris and his group as substituted or added defendants (it matters not what they are called) to this action.

That everybody, including the plaintiff and the 4th defendant, believed that Saineris was added as the 50th defendant to this action cannot be disputed. Mr. H. V. Perera for the petitioner was at pains to show from various subsequent journal entries in the case that the respondents to the present application held that view. I do not think Mr. Perera need have taken so much trouble because in the statement of objections to the present application, dated August 21, 1950, it is clearly admitted that Saineris was added as the 50th defendant. I draw attention to paragraph 3 of the statement of objections where it is clearly stated: " Thus the 50th defendant (the said Saineris) was brought into the case ". Again in paragraph 4 of the statement of objections it is stated: " No statement of claim was filed by the said Nangi (35th defendant) or by her heir the said 50th defendant under whom the petitioner now claims as his widow ". In the light of these admissions, I think it is futile to argue, as the respondent tried to do, that the effect of the order absolute in 1R6 was not to add Saineris as a party-defendant to these proceedings. The case of *In Re Warnasuriya* [1] shows that parties who knowing that an irregularity has been committed (if it is so in fact) and thereafter co-operate by inviting the Court to decide the case despite such irregularity, will not be allowed to question the irregularity. In my opinion there was no irregularity up to the time the order *nisi* was passed.

The irregularity arose when Saineris, the 50th defendant, died on February 19, 1943 (*vide* death certificate marked A), i.e., three years before the interlocutory decree had been entered. It is therefore beyond all question and dispute that an interlocutory decree has been entered in a partition action in a contest which arose between the intervenients (including Saineris) and the rest of the parties to the action in which one of the contesting intervenients was dead, and without steps having been taken to add his heirs, namely, the present petitioners. Final decree has not been entered and cannot be entered if what the petitioner states in her petition is true, namely that various other parties have also died and their heirs have not been substituted yet.

The remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances. The respondents have submitted that if Saineris had not in fact been added as the 50th defendant to this action the remedy of his widow, the petitioner, would be not to move the Supreme Court for *restitutio in integrum* or in revision, but to intervene in the District Court. The respondents, however, concede that if Saineris was in fact added as the 50th defendant, then the petitioner would have status to move this Court for relief. I have already given my reasons fully for holding that Saineris was added. Therefore, on the

[1] *(1896) 2 N. L. R. at p. 146.*

argument as presented by the respondents, the petitioner has status to move this Court for relief. This answers the first question which we have to decide.

The only outstanding question therefore is whether we should grant relief to the petitioner?

It is only a party to a contract or to legal proceedings who can ask for relief by way of *restitutio in integrum*—see *Perera v. Wijewickreme* [1] and *Perera v. Simeon Appuhamy* [2]. I have already held that the present petitioner has status to make this application.

It has also been laid down that relief by way of *restitutio in integrum* should be sought for with the utmost promptitude—see *Babun Appu v. Simeon Appu* [3]. It has been argued that an examination of the relevant dates will show not only that the petitioner has been guilty of unreasonable delay in seeking her remedy, but that the facts seem to indicate that she is acting in collusion with the appellants whose appeal against the interlocutory decree was dismissed by this Court. It is pointed out that the judgment in appeal was delivered on February 16, 1949; that thereafter there was some abortive attempt to appeal to the Privy Council; and when that failed this petitioner on March 10, 1949, moved this Court and is in effect seeking to over-rule the interlocutory decree and the judgment of the Supreme Court in appeal. The explanation given by the petitioner in her affidavit is that she sought her relief as soon as she heard what had happened, and she submits that the course this trial took has gravely prejudiced her, and she is asking for relief. I am unable on the materials before me to hold that her statements are false. After all she is a village woman living in a remote part of this Island, and it may well be that she was in total ignorance of what was happening. Furthermore, there is no evidence which would justify me in holding that she is acting in collusion with the defeated appellants.

Restitutio in integrum is not available if the petitioner has another remedy open to her. It was conceded at the Bar that if Saineris had in fact been added as the 50th defendant the petitioner's remedy would be to seek relief in the Supreme Court and that she could not intervene. I hold that Saineris having been added as the 50th defendant, there is no other remedy open to the petitioner except to move this Court for relief.

We now come to the substantial point which has been urged in this case, namely, that not only are there no merits in the present application of the petitioner, but also that if we grant her the relief she seeks we will in effect be sitting in judgment on a two-Judge decision of this Court in the earlier appeal and which is now embodied in a decree of the Supreme Court which has passed the Seal of the Court. It was argued that the Supreme Court by means of *restitutio in integrum* cannot vary its own decrees, especially after they have passed the Seal of the Supreme Court. It is pointed out that the powers of this Court are not unlimited. It is urged that s. 36 of the Courts Ordinance (*Chapter VI*) defines the jurisdiction of this Court, while s. 37 only permits this Court to interfere with the judgments of an original Court and it cannot interfere with the orders of the Supreme Court. It is pointed out that s. 776 of the Civil Procedure

[1] *(1912) 15 N. L. R. at p. 413.* [2] *(1923) 2 T. L. R. at p. 119.*
[3] *(1907) 11 N. L. R. at p. 45.*

Code deals with the sealing of decrees of the Supreme Court, and that once a decree has been sealed, such decree, if it is a judgment of two Judges of this Court, cannot be varied by another bench of two Judges.

The question, however, is whether such arguments can prevail in a case of this kind. Let me take one example. P files a partition action against A, B and C. A and B appear and file answer. C does not. There is a contest and a trial. The District Judge enters an interlocutory decree. There is an appeal to the Supreme Court which affirms the judgment and decree of the District Court. The Supreme Court judgment is sealed. Thereafter, before final decree is entered, C comes forward and satisfies the Court by proof that there was, in fact, no service of summons on him. It is everyday practice in a case like that for this Court to hold that all the earlier proceedings are abortive and of no effect. If authority is needed this is supplied by the following cases:—*Caldera v. Santiagopillai* [1] *Juan Perera v. Stephen Fernando* [2] and *Thambiraja v. Sinnamma* [3]. The last case on this point is that of *Publis v. Eugena Hamy* [4] which laid down that where a summons in a partition action is not properly served on a party, such party is not bound by the final decree in the case and it can be vacated even where the irregularity has been discovered after final decree was entered. It is to be noted that in the present case final decree has not yet been entered.

The situation which emerges in the present case is that Saineris was a party. He died before the trial without steps having been taken to substitute his heirs who were, therefore, not bound by all the subsequent proceedings. In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. In my opinion, therefore, the order of this Court should be that the petitioner and the other heirs of Saineris should be forthwith added as parties to this action, and that after she has filed her statement of claim, the District Judge should proceed to adjudicate on the merits of her application. It will also be the duty of the plaintiff to see that all the necessary parties are before the Court before any further adjudication is made. I would go further and say that in view of the irregularity in not joining Saineris' heirs, in my opinion both the interlocutory decree in this action and the subsequent judgment of this Court in appeal are of no effect, because by reason of the non-observance of the steps in procedure no proper interlocutory decree was, in fact, entered in this case.

The contesting respondents will pay to the petitioner the cost of these proceedings.

GUNASEKARA J.—I agree.

Application allowed.

[1] *(1920) 22 N. L. R. 155.*
[2] *(1902) 3 Br. 5.*
[3] *(1935) 36 N. L. R. 442.*
[4] *(1948) 50 N. L. R. 346.*