1947 *Present:* **Dias J.**

LOKU MENIKA, Appellant, *and* SELENDUHAMY, Respondent.

S. C. 192—C. R. Ratnapura, 1,528.

Civil Procedure—Mortgage Ordinance—Application for appointment of legal representative—Notice not served on respondents—Decree entered—Application to set aside decree—Procedure.

Where an order is made *ex parte* the proper procedure to be adopted by the person against whom that order has been made is, in the first instance, to move the Court which made the order to set it aside. Such an application would not be in terms of the Civil Procedure Code but in accordance with a rule of practice which has become deeply ingrained in the legal system of Ceylon.

APPEAL from a judgment of the Commissioner of Requests, Ratnapura.

H. V. Perera, K.C. (with him *S. R. Wijayatilake*), for the second defendant, appellant.

N. E. Weerasooria, K.C. (with him *P. Navaratnarajah*), for the petitioners, respondents.

Cur. adv. vult.

June 10, 1947. DIAS J.—

The plaintiff B. A. Abraham Singho instituted this mortgage action, and as the mortgagors were dead, he moved to have a "legal representative" appointed in place of the deceased mortgagors under section 7 of the Mortgage Ordinance. The respondents named to that application were the present five respondents and E. P. Punchimenika who is also a respondent to this appeal.

The Court ordered notices to issue on the respondents. On May 25, 1943, the Court clerk journalled that all the respondents had been reported to have been served with notice, and as they were absent, M. K. Silinduhamy (the first respondent to this appeal) was appointed legal representative of the deceased mortgagors. Thereafter summons in the main action were issued on her. On the returnable date summons having been reported to have been served on her, and she being absent, a decree absolute was entered in the action on July 13, 1943.

Thereafter order to sell was issued, and at the sale the appellant, who is the wife of the plaintiff mortgagee, purchased the land.

On February 22, 1945, the present respondents came before the court alleging that the original notices for the appointment of a legal representative had not been served on them, that they were unaware of the institution of the action until January, 1945, and that the summons in the main action had not been served on Silinduhamy, the first respondent. They, therefore, moved the Court to vacate all the proceedings.

An inquiry was held by the Commissioner and he has found as a fact that the original notices for the appointment of the legal representative were not served by the Fiscal's Officer on persons known to him, but on being pointed out to him. This important fact had not been entered in

the journal of the case. Had it been, the Judge before taking any further action would have directed what is called an affidavit of identity to be produced by the person who pointed out the persons to the process server identifying them as the persons wanted. There was thus no proof whatever that the correct persons had been pointed out. The appointment of Silinduhamy as the legal representative was, therefore, bad *ab initio*. The Judge has also accepted the evidence of Silinduhamy that she was never served with the summons in the main action. He, therefore, held that the proceedings culminating in the decree and thereafter were void, and he set aside all the proceedings in the case. From that order the purchaser at the mortgage sale, who is the wife of the plaintiff, appeals.

In her petition of appeal she has stated "that it was not stated at the hearing under what provision of the law this application was made: but presumably it was made under section 344 of the Civil Procedure Code. If so, it is submitted that that section cannot in law be invoked in view of the wording of the section itself". The proceedings show that counsel from Colombo appeared for the parties at the inquiry. No reference whatever was made to section 344 by either counsel at the inquiry.

It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system—namely, that if an *ex parte* order has been made behind the back of any party, that party should first move the Court which made that *ex parte* order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition it is to be found in the following cases: In *Habibu Lebbe v. Punchi Ettena*[1] Bonser C.J. said "I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this Court, that in cases like the present one, application should be made in the first instance to the Court which pronounced the judgment; and if the Court which pronounced the judgment refuses to set it aside, then, and then only, should there be an appeal from that refusal. This course appears to me to be the most convenient one; and furthermore, it is in accordance with the practice of the Appeal Court in England. It has been laid down that although the Court of Appeal may have jurisdiction to hear appeals from judgments given by default, yet, that it is not desirable to exercise that power, and to encourage appeals to be brought before the case had been tried . . . . . Therefore, if the judgment was given in the absence of one of the parties, I think that under the practice laid down by this Court, it was competent for the District Judge to deal with the case, and that the plaintiff adopted the proper course in applying first to the District Judge before coming to this Court." In *Gargial v. Somasundram Chetty*[2] the case of *Habibu Lebbe v. Punchi Ettena* (*supra*) was followed. Layard C.J. said that the practice referred to had been in existence for the last thirty years at least and "I believe that it existed prior to that date". In the Badulla case which was cited, and which is reported under the name of *Weeraratne v. Secretary, D. C., Badulla*[3] Bertram C.J. followed the two earlier cases.

[1] *(1894) 3 C. L. R. at p. 85* and see *Craig v. Kanesen (1943) 1 K. B. 256.*
[2] *(1905) 9 N. L. R. 26.*
[3] *(1920) 2 C. L. Rec. 180, 8 C. W. R. 95.*

In *Caldera v. Santiagopulle*[1] Bertram C.J. following *Weeraratne v. Secretary, D. C., Badulla (supra)* said " The order was made *ex parte* behind the back of the defendant, and in accordance with the authorities cited in a very recent case . . . . a person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an *ex parte* order of this description ". In *Sayadoo Mohamadu v. Maula Abubaker*[2] Jayewardene J. said : " An *ex parte* order under these sections should, I think, be treated as any other *ex parte* order made by the Court, and any party affected by it should be entitled to apply to vacate it on notice to the party in whose favour it was made ". In *Tambirajah v. Sinnamma*[3] it was laid down that the final decree in a partition action can be set aside upon proof that summons had not been served upon a party to the action.

The appellant has cited the case of *Allis Appu v. Ran Menika*[4], the facts of which bear a similarity to the facts of the present case. What that case decided was that section 344 of the Civil Procedure Code relates to the execution of decrees, and enables a Court to dispose of questions relating to the execution which arise between the parties, instead of referring them to a separate action. It does not confer a special power on the Court to set aside its own decrees—see also *Bank of Chettinad v. Pulmadan Chetty*[5]. I do not think these cases apply to the facts of the present case. This inquiry was not held under section 344 of the Civil Procedure Code. The findings of facts of the Commissioner of Requests cannot be disturbed. Those findings show that there was no proper service of summons on the defendant, with the result that the proceedings were *ex parte* and bad. Under such circumstances it is rather late in the day to argue that the Court had no power to hold the inquiry it did, or to make the order which it did.

The appeal is dismissed with costs.

Appeal dismissed.