

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and
Mr. Justice Middleton.

1906.
May 15

FERNANDO *v.* FERNANDO.

D. C., Colombo, 21,125.

*Appeal to the Privy Council—"Party"—Courts Ordinance (No. 1 of 1889),
s. 42—Ordinance No. 14 of 1901—Charter of 1833, cl. 52.*

Any person who is prejudicially affected by a judgment or order of the Supreme Court made in any action is a "party" to that action within the meaning of section 42 of the Courts Ordinance (amended by Ordinance No. 14 of 1901), which regulates the right of appeal to His Majesty in Council.

APPPLICATION for a certificate under section 42, as amended by Ordinance No. 14 of 1901, preparatory to appeal to His Majesty in Council from the Judgment of the Supreme Court in *Fernando v. Fernando* (1). The application was opposed by the respondent.

Walter Pereira, K.C., for respondent.—The applicant was not a party within the meaning of section 42 of the Courts Ordinance. He was merely a claimant of a certain sum of money which was in deposit under section 350 of the Civil Code. The proceeding as between the applicant and the respondent was only an incidental one; it was not an action.

Dornhorst, K.C. (F. M. de Saram with him), for applicant.—The respondent has all throughout treated the applicant as a "party" to the suit. "Party" means any person who has made a claim in a suit, and whose rights have been adjudicated on by the Court. "Action" is defined by the Code, and the proceeding between the applicant and the respondent comes within that definition.

Walter Pereira, K.C., in reply.

Cur. adv. vult.

15th May, 1906. LASCELLES A.C.J.—

This is an application under the section which by Ordinance No. 14 of 1901 was substituted as section 42 of the Courts Ordinance, 1889, for a certificate that the case is a fit and proper one for appeal to His Majesty in Council.

It is objected that the applicant, who is an unsuccessful claimant for the balance of the proceeds of the sale of certain property which

(1) (1906) 9 N. L. R. 1.

1906. remains in Court after satisfying a mortgage debt, is not a party to
 May 15. the action within the meaning of the above-mentioned section, and
 — that he is consequently excluded from the right of appeal thereby
 LASCELLES granted. Various sections of the Code of Civil Procedure have been
 A.C.J. cited with the object of showing what, under our procedure, is the
 true meaning of the term " party to an action."

Reference to the Code of Civil Procedure is not in my opinion of any material assistance. Section 42 of the Courts Ordinance is merely a re-enactment or confirmation of the right of appeal given by clause 52 of the Charter of 1833, and the language of the two enactments, so far as is material to the point under consideration, is identical. The question is whether the Charter of 1833 restricted the right of appeal to the Sovereign in Council to persons who in the strictest sense of the term were parties to the action, or whether the term " party or parties " to any action in clause 52 is to be understood as including all persons whose rights are affected by any final judgment, decree, or sentence, or by any rule or order having the effect of a final or definitive sentence. I have no doubt but that the latter construction of the clause is the correct one. Having regard to the comprehensive terms of clause 52 of the Charter it would be unnecessary and repugnant to the apparent meaning of the clause to hold that a person, who appeared and was heard by counsel, and who was directly affected by the order of this Court, was not a party to the action within the meaning of the clause. I can find no indication either in the Charter or in the Courts Ordinance of any intention that the right of appeal to the King in Council was to be restricted to persons who in the narrowest sense of the word are parties to the action. Any person who is prejudicially affected by a judgment or order of this Court is, in my opinion, a party to the action for the purpose of appealing to the Privy Council. I think the certificate should be allowed:

MIDDLETON J.—I agree.

