[In Revision.]

1921.

Present : Bertram C.J. and De Sampayo J.

APPUHAMY *v.* WEERATUNGA *et al.*

D. C.—Negombo, 13,952.

Supreme Court—Application for revision by a person not a party to the case.

It is open to the Supreme Court to exercise its powers of revision on the application of an aggrieved person not a party to the record.

THE facts appear from the judgment.

E. W. Jayawardene, in support.

Croos-Dabrera, contra.

November 14, 1921. Bertram C.J.—

This is an application made to the Court in the exercise of its powers in revision by a person not a party to a partition case to revise the decree for sale made in that case, on the ground that the decree is at variance with the judgment, or with the intention that the learned Judge had in delivering his judgment. The application is made in pursuance of the principle embodied in section 189 of the Civil Procedure Code, which enacts that the Court in such cases has power to amend the decree so as to bring it into conformity with the judgment. The applicant not being a party to the case conceives that it was not open to him to move the Judge in the Court below, but has applied to us to make the necessary amendment, in view of the special powers which we possess under the Code.

We have to consider, in the first place, whether it is open to us to exercise these powers on the application of an aggrieved person not a party to the record. There seems to be no doubt that we may exercise these powers of our own motion. If that is so, I think we may justly exercise them when an aggrieved person brings to our notice the fact that, unless the decree is amended, he will suffer

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injustice. We have, therefore, to consider the facts of the case which are these :—

The land sought to be partitioned was described in the plaint as consisting of a divided portion of about ten parrahs from and out of the field called Kandanekumbura, which is described with reference to its boundaries. The deed on which the partition action is based is a deed in favour of Louisa Samarasekera, and purports to convey to her all that divided portion of about ten parrahs out of the field Kandanekumbura. It gives the boundaries of the whole land, and states that within the said boundaries the land comprises thirteen parrahs of paddy sowing extent. The land, sought to be partitioned, therefore, is a divided portion of the field called Kandanekumbura. But it will be observed that the location of this divided portion in the field is not described either in the deed or in the plaint.

On February 18, 1920, the Court issued a commission to the surveyor to make a survey of the lands specified in the schedule, and the fourth of these lands was described as being all that divided portion of about ten parrahs of paddy sowing extent from and out of the field called Kandanekumbura. The boundaries of the whole land were stated; no reference was made to the total extent nor to the locality of the divided portion referred to. The surveyor attached to his report a plan showing this field and other adjacent fields which were also included in the partition action. He had divided Kandanekumbura into two lots, A 1 and A 2, the latter of which is coloured as a field, the former of which—understood to be high land—is not coloured, and he mentioned that lot A 1 is divided off and possessed by one Marthelis Appu of Negombo.

On February 22, 1921, a motion was made for the sale of the land sought to be partitioned, and the case thus came before the learned Judge. The trial took place. No reference appears throughout the trial to have been made to the question of these two divided lots, or as to whether the land sought to be partitioned included lot A 1. Marthelis Appu, whom the surveyor had reported to be in occupation of A 1, was not summoned as a party. Finally, on June 15, the learned Judge made the following order: "Enter decree for sale. Shares as in plaint. Costs *pro ratâ*."

In pursuance of that order, a decree was drawn up, and the decree expressly included both lots A 1 and A 2. A sale took place in pursuance of the decree, but up to the present no certificates have been issued under section 8 of the Partition Ordinance. The question for us is, has a mistake been made in drawing up the decree? The applicant in this case, who appears to claim under Marthelis, asserts that the learned Judge could only have intended to include A 2 in the land sought to be partitioned. There seems certainly some ground for this suggestion. The learned Judge has not made any precise indication of his intention. If he had intended

to include A 1, presumably he would have first noticed Marthelis Appu or any person claiming through him. It is, however, for the learned Judge himself, on looking at the record and the various papers, to say what his intention was. I think that the justice of the case will be best served if the matter is remitted to the learned Judge to inquire into the suggestion that the decree is at variance with the intention of his judgment, and, if he so finds, to make the necessary amendment under section 189. As I have said, no certificates of sale have been issued, and consequently any amendment will involve less difficulty than might otherwise be occasioned. I would point out, however, that in *Natchia v. Natchia*[1] this Court allowed an amendment on a partition decree under section 189, even after subsequent conveyances of the shares allotted had been issued.

In my opinion the case should go back to the learned Judge. I think the costs of this application should abide the result of the learned Judge's inquiry.

DE SAMPAYO J.—I agree.

Sent back.