

1938

*Present: Soertsz J.*SAMARASUNDERA *v.* SAMARASUNDERA.75-76—*Gampola, 2,699.*

Appeal—Decree against three defendants jointly—Appeal filed by two defendants—Third defendant not a party to the appeal—Regularity of appeal—Civil Procedure Code, s. 760.

Where a decree is entered against several defendants upon a finding which applies to all of them equally and one of them appeals the other defendants are not necessary parties to the appeal.

A PPEAL from a judgment of the Commissioner of Requests, Gampola.

H. V. Perera, K.C. (with him Gratiaen), for defendants, appellants.

N. E. Weerasooria (with him E. B. Wikramanayake and J. R. Jayawardana), for plaintiff, respondent.

Cur. adv. vult.

February 23, 1938. SOERTSZ J.—

Mr. Jayewardana takes the preliminary objection that this appeal has not been properly constituted for the reason that the third defendant has not been made a party respondent to it, and he asks that the appeal be rejected.

The action was one brought by the plaintiff against three defendants who, she alleged, were the co-owners of the land Horagahawatta to the south of her land "Contentment Estate". She complained that the first defendant was disputing the correct location of her southern boundary, and was claiming a strip of her land as part of the land belonging to the defendants. The first and second defendants filed answer but not the

third. The case was, however, fixed for trial as between all the parties. After trial, the Commissioner entered decree in favour of the plaintiff as against the three defendants and ordered that they do jointly and severally pay the plaintiff's taxed costs.

The first and second defendants appeal from that decree. They have made the plaintiff the only respondent to the appeal. Mr. Jayewardana contends that the third defendant was himself a necessary party to the appeal because, he says, if the appeal succeeds, it will succeed only to the benefit of the first and second defendants and not to that of the third defendant who has not appealed. He will remain bound by the decree, and will be in a more onerous position in the matter of costs because he will be, in that event, solely liable for them.

In my opinion, the fallacy underlying this argument is the assumption that the appeal can succeed only so far as the first and second defendants-appellants are concerned and that the third defendant cannot share in that success. It seems to me that this is just such a case as is contemplated by section 760 of the Civil Procedure Code. That section provides that "where there are more plaintiffs or more defendants than one in an action, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any of the plaintiffs or defendants may appeal against the order, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants as the case may be". This section is a verbatim reproduction of section 544 of the Indian Code of Civil Procedure, XIV. of 1882. In the course of his comment on that section, O'Kinealy (as revised by Rampini, 6th ed.) says, "it has been held that it (*i.e.*, 544) only applies to decrees affecting in the same manner the whole of the plaintiffs or defendants, that is to say a decree incapable of division, and upon which it would be impossible for a Court to find in one sense for some of the plaintiffs or defendants and in the opposite sense for the other plaintiffs or defendants, for instance, where the suit relates to property in which all the plaintiffs or defendants are co-sharers or joint owners". (*Sreeram Ohuttuck v Brojo Mohun*¹.) That is the position in this case. All the defendants were sued on the ground that they were co-owners of the land on the south. It would have been impossible for the Court to find one boundary line as between plaintiff and one or more defendants and another as between the plaintiff and the other or others. The decree entered is "incapable of division", and as it was pointed out in the case of *Puran Mal v. Krant Singh*², where there is "a decree against several defendants upon a finding which applies equally to all of them, any of the defendants may appeal against the whole decree in favour of all the defendants".

In that view of the matter, the objection fails.

The case of *Wickramasooriya v. de Silva*³, which was cited at the argument refers to a different state of things and is clearly distinguishable.

I would, therefore, direct that this appeal be listed for hearing in due course. The costs of this argument can, I think, be better dealt with when the appeal is decided.

¹ 11 W. R. 449.

² 20 All. 8.

³ 16 Law Rec. 240.