1933 *Present :* **Akbar J. and de Silva A.J.**

PAULUSZ *v.* PERERA.

173—D. C. (Inty.) Colombo, 39,503.

District Court—Partition action—Order of dismissal wrongly entered—Power to set it aside.

Where a District Court dismissed a partition action upon a misconception regarding the documents filed in the case,—

Held, that the Court had no power to set aside the order of dismissal.

APPEAL from an order of the District Judge of Colombo.

This was an action brought by the plaintiff for a declaration of title to a land, which he claimed by virtue of the final decree entered on August 27, 1928, in partition case No. 22,065 of the District Court of Colombo. The question for determination was whether the final decree entered in the partition case was a binding one.

It would appear that the partition action No. 22,065 was dismissed by the District Judge of Colombo on October 10, 1927, on the grounds that (*a*) the deeds produced before him were copies and not the originals and (*b*) that some of the documents that were tendered in evidence had not been filed.

After the order of dismissal it was pointed out to the Judge that the documents in question had been given to the clerk in charge of the record, who had omitted to send them up. After a consideration of the documents the Judge set aside the order of dismissal entered on October 10, 1927, and set down the case for inquiry. On August 27, 1928, the decree in question was entered. It was urged that the learned District Judge had no jurisdiction to set aside the order of dismissal and that therefore the subsequent decree for partition did not possess the binding effect of a decree regularly entered.

H. V. Perera (with him *M. T. de S. Amerasekera* and *J. R. Jayewardene*), for defendant, appellant.—The main issue is whether the partition decree is binding on first defendant. Decree is void as being passed by the Judge when *functus officio*. The Judge cannot vacate his own judgment.

Section 189 refers to decrees, and though amendment, Ordinance No. 26 of 1930, applies to judgments also, here there is not merely correction of accidental or clerical error but usurpation of appellate power. If judgment is erroneous, then remedy is by appeal. Jurisdiction of the Court is (1) to adjudicate, (2) after that, the functions are formal, *e.g.*, framing decree. After adjudication, Court loses jurisdiction, see *Dionis Appu v. Arlis*[1], when Judge's powers are restricted to section 189.

If the judgment embodies the intention of the Court, it cannot be altered. Here the intention was formed on wrong material. The remedy is by way of appeal.

Section 839 does not permit arrogation of powers Court has not got.

[DE SILVA A.J.—"Does not section 839 take away the effect of codification and give Court powers it had before the Code?"]

It does. Where there is no procedure, then the Court may invent; not where procedure is laid down, as in setting aside a judgment, where Code is complete, viz., appeal, revision, *restitutio in integrum*.

Counsel also cited *Silva v. Silva*[2]; *Randeni v. Allis Appu*[3]; *Dingiri v. Appuhamy*[4]; and *Sarkar on Civil Procedure, 6th edit., p. 765.*

Choksy (with him *D. W. Fernando*), for plaintiff, respondent.—The original judgment was entered *per incuriam*. The Judgment was entered on a wrong assumption; there was no mistake of parties. It is an act of justice to correct it.

[DE SILVA A.J.—"It must be an act of justice which the Court has power to do."]

Court has power under section 839.

[DE SILVA A.J.—Where are you going to draw the line? Suppose the Judge when making order had forgotten to apply his mind to a decision which had been cited to him and wishes to alter his order after considering it—has he power to do so?]

Every Court has inherent powers. The Code is not exhaustive. Though remedy is by appeal, the power to rectify its own mistakes exists.

In *Mudalihamy v. Ran Menika*[5], in criminal or civil matters the Court has the right to do natural justice. The Judge cannot amend in every case but in certain cases, where through no fault of parties, the Court is led into error, he may do so. If error was only an error in law, then the Court has no power to revise.

Counsel also cited *Singh v. Habib Shah*[6].

Amerasekera, in reply, cited *Attorney-General v. Nonnohamy*.[7]

[1] *23 N. L. R. 346.*
[2] *15 N. L. R. 146.*
[3] *1 Br. 284.*
[4] *3 C. W. R. 48.*
[5] *8 C. L. Recorder 202.*
[6] *35 Allahabad 331.*
[7] *8 C. W. R. 84.*

May 8, 1933. DE SILVA A.J.—

The plaintiff in this case claims to be the owner of a block of land by virtue of the final decree entered on August 27, 1928, in partition case No. 22,065 of the District Court of Colombo. She complained that the first defendant had wrongfully cut and removed some trees standing on the land with the aid of the second defendant and also that the second defendant was in unlawful occupation of the land from October, 1927, purporting to act on a lease from the first defendant. Neither the first nor the second defendant is a party to the partition case. The first defendant did not file answer in this case; the second defendant did so and a number of issues were framed between the parties on July 18, 1932. The case went to trial on issues 1, 2, and 5 and the question for decision under these issues is whether the final decree entered in the partition case is binding on the first and second defendants.

The learned Judge on October 10, 1927, dismissed the partition action on the grounds (*a*) that the deeds produced before him were copies and no explanation had been given as to the absence of the originals, and (*b*) because some of the documents that were tendered in evidence and marked had not been filed in the case. After the order of dismissal had been made it was brought to the notice of the learned District Judge by Counsel on behalf of the plaintiff in that case that the documents had been tendered to the clerk in charge of the record who had omitted to send them up with the record. After a consideration of the documents the learned District Judge was of opinion that he would not have made the order of October 10 if the documents had been before him; he set aside his own order of October 10 dismissing the partition case and set down the case for further inquiry. Later, on August 27, 1928, the decree which is now being challenged was entered.

The second defendant-appellant contends that the learned District Judge had no jurisdiction to enter the decree of August 27, 1928, and he claims, at least so far as he and the first defendant are concerned, that it does not possess the binding effect of a decree regularly entered in a partition case. It is argued for him that a District Court has no power to vary its own decree and that the learned District Judge, having dismissed the plaintiff's action, could not have set aside his own order.

The principle of law that a Court may not set aside its own order is well established and rigorously enforced. It is a very important principle as on it depends the finality of judicial decisions. If a Judge can review his own decision, there is no limit to the number of times upon which he might do so or upon which he may be invited by the parties so to do. He may be asked to do so not only where there is obvious hardship but also wherever a point that is arguable arises, because it is impossible to draw a clear line between the one case and the other.

It is contended that section 839 of the Civil Procedure Code enabled the learned District Judge to set aside his own order. The section

reads—"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." In the first place it will be seen that this section does not create new powers but leaves unaffected inherent powers already possessed by a Court. There was never at any time an inherent power in a District Court to vary its own order; in fact there was a strong and clear principle of law which prevented it from varying its orders, and for these reasons I do not think that section 839 gave the learned District Judge the necessary jurisdiction. Further, it is to be noted that the inherent powers which are unaffected are those which are "necessary for the ends of justice or to prevent abuse of the process of the Court". There is no question in this case of an abuse of the process of the Court. Could it be said that it was necessary for the ends of justice to make the order in question. The correction of all errors of fact and law of a District Court is vested by the Court's Ordinance, No. 1 of 1889, in the Supreme Court. The revision of an order of a District Court can be undertaken by the Supreme Court and by the Supreme Court only. The appropriate remedy open to the parties in the partition case when the incorrect order of October 10 was made was to appeal from it to the Supreme Court. As this remedy has been very definitely provided by the Code it was not "necessary" for the District Court to revise its own order. A remedy already existed, and, whenever a remedy has been given by the Code, I do not think that section 839 provides a collateral remedy. It is not possible to interprete the very general words of the section in this way.

I am of opinion that the decree of Augest 27, 1928, has been entered without jurisdiction. In the case of *In re The London Scottish Permanent Building Society* [1] Charles J. stated that it was sometimes extremely difficult to distinguish between what is excess of jurisdiction, and what more irregularity of procedure. He went on to state that it was, however, quite clear that it was an excess of jurisdiction warranting an application for a writ of prohibition for a Judge without the consent of parties to discharge or vary his own order. In the partition case under consideration there was a request by Counsel for the plaintiff to set aside the order of October 10, but it does not appear to have been consented to by the other parties. Charles J. was not dealing with a case such as a partition case a decree in which is binding on persons not parties to the case and creates rights *in rem.* I do not think that a District Court has jurisdiction to reopen an order of dismissal in a partition case even with the consent of parties.

The judgment of Wright J. in the case referred to points to the conclusion that, after the learned District Judge made order dismissing the partition case, he was *functus officio* and had no jurisdiction to make further orders adjudicating on rights of parties.

In the case of *Sweetland v. The Turkish Cigarette Company* [2] a County Court reviewed its own decision and it was held by Darling J. that such action was in excess of jurisdiction warranting the issue of a writ of prohibition.

[1] (1894) 63 *L. J. N. S. Q. B. D. 112.* [2] 80 *L. T. Rep. N. S. 472.*

The proposition that a District Court does not have the right to set aside an order of dismissal made by it is not only good law but necessary for the proper working of partition actions. The plaint in a partition action has to be registered. The rights of a person entering into a transaction affecting the land who has examined the record and found an order of dismissal as the last order might be gravely prejudiced, if not defeated, by a subsequent order of a District Court setting aside its own order of dismissal.

The position of the parties to the partition case amongst themselves has not been argued before us, and, it is not necessary for the purposes of this case to enter into the question of their rights against each other. It is clear, however, that the decree is not binding on the defendants in this case. It is unfortunate in the circumstances of this case that this should be the result of the application of the legal principles I have set out above. Any relaxation of these principles will cause interminable difficulties, not in one case but in a large number of cases. Indeed, I do not see how upon the law as I find it I could relax these principles even if I were inclined so to do.

I set aside the order of the learned District Judge and send the case back for further hearing. If the action is dismissed altogether, the plaintiff may have difficulty in seeking an adjudication upon such causes of action, if any, as she may have which are not set out in the plaint. For this reason the plaintiff will be given an opportunity to amend her pleadings and to raise other issues if she desires to do so. The costs of the proceedings up to date, including the costs of appeal, will however be borne by the plaintiff.

AKBAR J.—I agree.