1974 *Present :* **Walgampaya, J., Ismail, J. and Vythialingam, J.**

M. A. P. GUNATILLAKE, Petitioner

and

E. M. MURIEL SILVA and 7 OTHERS, Respondents

S. C. 367/68—Application for Revision in D. C. Kalutara, 2204/P

Partition action—Application for intervention—Jurisdiction of Appellate Court invoked by a party not a defendant and who made no application in the original Court—Interlocutory decree already entered—Circumstances in which such application can be maintained—Partition Act, section 70(1).

Partition Act, sections 25, 48, 49—Duty of Court to investigate title of parties—Addition of necessary parties—Effect of interlocutory decree being entered without proper investigation.

Held (VYTHIALINGAM, J. *dissenting*) :

(1) That a party who is not a defendant in a partition action and who had made no application to intervene in the District Court, can in certain exceptional circumstances come before the appellate Court after entering of the interlocutory decree, either by way of revision or by way of an application in restitutio and ask for relief in instances where the District Court is made aware of the fact that such petitioner was a person who should properly have been added under section 70(1) of the Partition Act before decree was entered. Once the Court had been made aware of this fact it was its duty to add such petitioner as a party as well as the others disclosed along with him as having claims to the property ; and the mere fact that the person who disclosed their existence withdrew his application for intervention in the District Court is not a matter that should make the Court desist from acting as indicated under section 70(1).

(2) That further, it is the duty of the Court in a partition action under section 25 of the Partition Act to investigate the title of parties. In the present case the Court had signally failed to investigate title of the parties before Court or to pay attention to the claims of the parties disclosed as having claims or rights in the property. The interlocutory decree therefore having been entered without proper investigation of title and without addition of necessary parties of whose existence the Court had been made aware, should be set aside.

Per VYTHIALINGAM, J. *dissenting* : " A stranger to a partition action cannot move the Supreme Court in revision to set aside an interlocutory decree which had already been entered on the ground that his claim has not been investigated or on the ground that the title of the parties to the action had not been adequately investigated because if there has been an investigation of title even though it is inadequate the decere is final and conclusive. It is only where there is an appeal in a partition action that the decree can be set aside on the ground that there has been no proper investigation of title and when *hearing an appeal* the appellate Court has power to so act even by way of revision if the investigation of title had been inadequate. Where there has been no appeal the interlocutory decree is made final and conclusive. "

Cases referred to :

Fernando v. Marshall Appu, 23 N.L.R. 370 ; Cey. L. Rec. 50.
Jayawardena v. Weerasekera, 4 C.W.R. 406.
Gooneratne v. Bishop of Colombo, 32 N.L.R. 337 ; 8 Times of Cey. L.R. 153.
Umma Sheefa v. Colombo Municipal Council, 36 N.L.R. 38.
Menchinahamy v. Muniweera, 52 N.L.R. 409.
Adamjee v. Sadeen, 58 N.L.R. 217 ; 54 C.L.W. 58 (P.C.).
Cooray v. Wijesuriya, 62 N.L.R. 158.
Juliana Hamine v. Don Thomas, 59 N.L.R. 546.
Mariam Beebee v. Mohamed, 68 N.L.R. 361 (D.B.).
Rasah v. Thambipillai, 68 N.L.R. 145 (D.B.).
Amarasuriya Estates Ltd. v. Ratnayake, 59 N.L.R. 476.
Odiris Appuhamy v. Carolis Perera, 66 N.L.R. 241.
Noris v. Charles, 63 N.L.R. 501.
Nonnohamy v. Odiris Appu, 68 N. L. R. 385 (D.B.).
Ariyaratne v. Lapie, 76 N.L.R. 221.
Podisingho v. Ratnaweera, 62 N.L.R. 572.
Wijeratne v. Samarakoon, 71 C.L.W. 87.
Leelawathie v. Weeraman, 68 N.L.R. 313 (D.B.).
Siriwardena v. Jausumana, 59 N.L.R. 400 ; 55 C.L.W. 98.
Ukku v. Sidoris, 59 N.L.R. 90.
Siriya v. Amalee, 60 N.L.R. 269.
Perera v. Aron Singho & others, 64 C.L.W. 13.
Cathirina v. Jamis, 73 N.L.R. 49.
Suraweera v. Jayasena, 76 N.L.R. 413.

APPLICATION to revise a Judgment of the District Court, Kalutara.

Sam Silva, for the petitioner.

N. S. A. Goonetilleke, for the plaintiff-respondent.

E. St. N. D. Tillekeratne, for the 5th, 6th and 14th to 16th defendant-respondents.

Cur. adv. vult.

July 8, 1974. ISMAIL, J.

The plaint in this case had been filed on the 31st December 1955. There was only one defendant to this action. Thereafter on return of commission issued in this case 16 claimants have been disclosed and they had been added as 2nd to 17th defendants on 23.6.66. Summons thereafter had been ordered and issued on these additional defendants and ultimately statements of claim had been filed by 3rd, 4th, 12th and 14th defendants, by the 1st defendant on 12.3.67, and by the 17th defendant on 27.11.67 ; thereafter the matter had been fixed for trial for 25.3.68. On that day after trial, judgment had been fixed for 8.4.68.

On 31.3.68 before delivery of judgment one Tillakamuni Lily Gunasekera had intervened in the action and filed a statement of claim and she had been added as defendant. The statement

of claim of the 18th defendant disclosed in a list at the end 11 parties of whom the 9th party disclosed is the present petitioner, Mahadurage Allen Perera Gunatillake.

It would also be seen that on the 31.3.68 itself the intervenient Lily Gunasekera had been made a defendant to the action and her intervention had been accepted. Paragraph (C) under journal entry 26 of 31.3.68 states, " Judgment due on 8.4.68, be postponed until her application to intervene and prove her rights is inquired into " and paragraph (D) reads " Her statement of claim and pedigree filed be accepted and this matter to be fixed for inquiry ". It is also noted that proctors who appeared for plaintiff and some of the other defendants had objected to this and order had been made to mention this matter of the intervention on 8.4.68.

On 8.4.68, the day on which judgment was due certain proceedings had taken place. It would appear that the allegation has been made that the application for intervention had been made with a view to drag on this case as certain parties were exclusively enjoying the produce of the land and with a view to finishing off the case the plaintiff had indicated his willingness to give out of his share a ⅛ share to M/s. Wijemanne & Cooray's clients as claimed in Mr. Wijemanne's statement of claim.

Mr. Wijemanne had thereupon stated that he did not agree to this *as there were several other parties who were entitled to intervene and whom he had disclosed in his statement of claim.* It is to be noted that the present petitioner is one of the parties who had been disclosed in that statement of claim. The Judge had thereupon made a minute that as Mr. Wijemanne did not agree to take this share of land he was obliged to concede the right to Mr. Wijemanne's clients to go on with their statements of claim as they preferred to accept a judgment of Court. Thereafter an order for pre-payment of costs had been made and the matter was to be called on 5.6.68.

On 5.6.68 of consent the intervention had been dismissed. The intervenient had thereafter been added as the 18th defendant, which steps appear to be unnecessary in view of journal entry 26 by which she had already been added, and thereafter the following concessions appears to have been made to the 18th defendant, to reproduce the words, " Out of plaintiff's interests 1/6 of 13/16 be allotted to the 18th defendant. "

It will therefore be seen that the 18th defendant has been allotted 130/960 shares. Now according to the statement of claim filed by the 18th defendant she has indicated that Catherine Silva who has also been referred to in the plaint was entitled to a

⅓ share. She died leaving her husband and 5 brothers and sisters, whereby each brother became entitled to 1/30 shares. The 18th defendant in the claim had stated that she claims through Peter one of the brothers of Catherine Silva. Peter is therefore entitled to 1/30 shares. Peter died leaving his widow Baby Miranda who became entitled to 1/60 shares and 8 children including the intervenient—18th defendant and each child became entitled to 1/480 shares or 2/960 shares. Therefore, it is apparent that the 18th defendant had come into Court on the basis that she was entitled to 1/480 shares but by virtue settlement she has been given 130/960 shares which is more than 65 times the shares she has asked for. Therefore, there can be no doubt that the 18th defendant had been given very much more than she had asked for in order to induce her to withdraw this intervention and apparently for no other reason. It is clear from the proceedings in this case, that there had been no investigation of title in respect of the claim of the 18th defendant. It is also apparent that the investigation of the rights of other parties disclosed in this statement of claim of the 18th defendant has not been adjudicated upon, though the original Court entry under journal entry No. 26 indicated that this statement of claim would be inquired into.

The haste with which the plaintiffs have acted in this case in conceding 65 times of what had been asked for by the 18th defendant in order to withdraw the intervention should have made Court to act cautiously. Under sectoin 25 of the Partition Act, it is incumbent upon the Court to examine the title of each party and hear and receive evidence in support thereof and try and determine all questions of law and fact arising in that action with regard to the right, share, or interest of each party. Court on entering of interlocutory decree of the judgment stamps the title of each party with legality, authenticity and finality. It is precisely for these reasons that section 25 of the Partition Act had cast the duty upon Court to examine the title of each party carefully.

It is to be noted that according to the plaintiffs in this case, the plaintiffs derived title to a major portion of the shares they claim through Catherine Silva. In paragraph 7 it is averred that Charles de Silva by deed of gift No. 485 of 17.7.1929 had gifted certain rights to this Catherine Silva and these rights had passed on deed 4523 of 1953 produced marked P3. Reference to deed marked P3 indicates that there is no deed of gift by which the vendors had derived title bearing No. 485 of 1929 nor is there any other deed of gift. However there is reference to a deed of transfer No. 486 of 1929 and to deed No. 120 of 1939. Neither has deed No. 485 nor deed No. 486 been produced in this case,

though it would have been the simplest matter for the plaintiffs to have produced certified copies of these deeds from the Land Registry or to produce the relevant extracts of encumbrances.

I also find that reference to the schedule of lands dealt with in deed P3 compared with the lands in the schedule to the plaint indicate certain doubts with regard to the identities of those lands in regard to the names, extents and boundaries. For instance schedule 'C' to the plaint indicates the land bearing assessment No. 53/1, whereas the schedule in P3 deals with two lands bearing No. 58/1 but it does not deal with any land bearing No. 53/1. Now the land in the plaint bearing No. 53/1 is said to be in extent 2 roods. Then land No. 4 and land No. 3, according to P3 are the two lands which are said to have been dealt with by deed of transfer 486 of 1929. These two lands are said to be in extent 1 rood 2 perches and 1 rood respectively. Similarly, even with regard to the boundaries indicated in P3 when one compares them with the boundaries of the lands indicated in the schedule of the plaint it is apparent that these two sets of lands do not tally according to boundaries.

Examination of title would therefore have been imperative in order to determine whether the plaintiffs had the rights they claimed in these lands and whether they have enough rights to have given the 18th defendant so much more than what she has asked for in the intervention.

No conceivable reason has been adduced either in the plaint or in the proceedings why deed of gift 845 of 17.7.1929 referred to in paragraph 7 of the plaint or deed of transfer 486 of 17.7.1929 referred to in P3 have not been produced in this case or as to why the relevant certified extracts from the Register of encumbrances have not been produced. Therefore, the question does arise, in considering the rights of parties in this case whether the plaintiff had rights or sufficient interests in the land as claimed by them, for them to have conceded 130/960 shares to the 18th defendant, when the 18th defendant had really asked for herself only 1/480 shares.

It would therefore be seen that the plaintiffs' title in this case is suspect because of the non-production of deed of gift 485 of 17.7.1929 pleaded in the plaint and/or non-producing of deed of transfer 486 of 17.7.1929 referred to in P3, one is left to wonder whether the transferor on P3 had any title to convey to the transferee on P3. Therefore, it appears to me that vital link in the chain of title depended upon by the plaintiff is missing with the result, it is my opinion, that the plaintiffs cannot be said to have proved title to the shares they claimed.

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Another noticeable feature in this case is that this settlement by which the intervention had been arrived at was on 5.6.68, judgment had been delivered on 6.6.68, interlocutory decree had been tendered on 7.6.68 and had been signed by the learned District Judge on 11.6.68. Therefore it is obvious, when one considers the speed at which these various steps have been attended to, that the parties disclosed in the intervention had practically no time to come into Court and state their claims on the basis of the intervention filed in this case.

Attention of Court was drawn to section 49 of the Partition Act indicating that a party who is affected by entering of an interlocutory decree under circumstances similar to this would have the right to bring an action for damages. The facts in this present case however indicate that the existence of the present petitioner and 11 others alleged to have rights in this land have been disclosed to Court and to the plaintiff. Thereafter neither the plaintiff nor the Court had evinced the slighest interest in investigating and finding out whether this present petitioner and other disclosed parties had any rights to this land on the basis of rights indicated in the intervention filed by the 18th defendant. The 18th defendant had claimed rights precisely from the same source as the rights indicated by the present petitioner.

The plaintiff purposefully out of his own rights had given the 18th defendant a very much larger share then she claimed. It must necessarily follow that the present petitioner too would therefore have been entitled to rights though not a party to the action at that stage, claiming as she does from the same source. A proper investigation of title should have revealed if the 18th defendant was entitled to rights, and presumably it is on that basis that the plaintiffs had volunteered to give from what they say are their rights to the 18th defendant; if the 18th defendant did not have rights, one cannot conceive of the plaintiffs being so charitable as to give the 18th defendant several times more than what she had asked for in the intervention.

It is also necessary to draw attention to the provisions of section 70 of the Partition Act. Section 70 sub-section (1) reads, "the Court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to payment or pre-payment of costs as the Court may order—

(*a*) any person who, in the opinion of the Court, should be, should have been, made a party to the action, or

(b) any person who, claiming an interest in the land, applies to be added as a party to the action."

It appears to me from the facts of this case, if the Court had been diligent about this matter, this was a proper case where the Court should have proceeded to act under section 70 sub-section (1) (a), particularly, in the sense, the conscience of the Court should have been aroused when the plaintiff had acted so munificiently in giving the 18th defendant several times more than what she had asked for in order to enable her to withdraw her intervention, the effect of which was to shut out other parties who are indicated in that intervention as having rights to this land.

The question that now arises for determination is whether a party who is not a defendant to a partition action can at this stage, that is after interlocutory decree has been entered, come into the case and ask for relief, namely that the proceedings including interlocutory decree be set aside and the party be allowed to intervene or whether such a party since the interlocutory decree has been entered is left without remedy in the action itself.

In the case reported in 52 N.L.R. page 409 at page 415 occurs the following passage:—

"The situation which emerges in the present case is that Saineris was a party. He died before the trial without steps having been taken to substitute his heirs who were, therefore, not bound by all the subsequent proceedings. In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice.

In my opinion, therefore, the order of this Court should be that the petitioner and the other heirs of Saineris should be forthwith added as parties to this action, and that after she has filed her statement of claim, the District Judge should proceed to adjudicate on the merits of her application. It will also be the duty of the plaintiff to see that all the necessary parties are before the Court before any further adjudication is made. I would go further and say that in view of the irregularity in not joining Saineris' heirs, in my opinion both the interlocutory decree in this action and the

subsequent judgment of this Court in appeal are of no effect, because by reason of the non-observance of the steps in procedure no proper interlocutory decree was, in fact, entered in this case."

In this reported case, the facts indicate that the intervenient had disclosed the name of another necessary party, one N. In fact that party was dead on the date. This fact was brought to the notice of Court and notices were issued on N's heirs to be added in her place. Court issued an *order nisi* on N's son S and four other children of N to show cause why they should not be added. The *order nisi* was reported served and on the returnable date, they being absent, the Court entered order absolute. Subsequently S died, but no steps were taken to have his heirs, namely his widow and the children substituted in his place. The case proceeded to trial and entered interlocutory decree which was upheld by the Supreme Court in appeal.

Therefore the heirs of S moved the Supreme Court by way of restitutio in integrum. It was held that the interlocutory decree was irregularly entered and the case should be sent back for S's heirs to be added and for investigation of the claims of S and the children of N. Therefore it is apparent that though the petitioner in this reported case and the other heirs were not parties to the action at the time of the interlocutory decree, nevertheless their application by way of restitutio in integrum had been allowed by the Supreme Court.

The case reported in 58 N.L.R. at page 217 considered the conclusive effect of section 9 of the Partition Ordinance when the decree was being considered in a separate case and not in the same case. In the course of the judgment it was held, that if on an appeal in a partition action it appears to the Court of Appeal that the investigation of title has been defective it should set aside the decree and make an order for proper investigation. It was further held that where it appears to the Supreme Court in an appeal in a partition action that the investigation of title has been inadequate, it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision.

In the case reported in 62 N.L.R. at page 158, the Court considered, the effect of section 25 of the Partition Act. It was held that section 25 of the Partition Act imposes on the Court the obligation to examine carefully the title of each party to the action. Before the Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share.

In the case reported in 68 N.L.R. at page 36, it was held that section 48 of the Partition Act does not preclude the Supreme Court from exercising its powers of revision in an appropriate case in respect of an interlocutory or final decree entered in a partition action. The power of revision is an extraordinary power which is quite independent of and distinct fom the appellate jurisdiction of the Supreme Court.

In the case reported in 59 N.L.R. at page 546, the effect of section 25 of the Partition Act was again considered. It was held that this section makes it obligatory on the Court to scrutinise, quite independently of what the parties may or may not do, the title of each party before any share is allotted to him. Where a party fails to produce his material documents of title, or omits to prove his title, the procedure prescribed in section 20 and 61 of the Act should be followed.

The case reported in 71 Ceylon Law Weekly at page 87 has relevance to the facts of the present case. The facts in that case indicated that the party had sought to intervene in that action after judgment but before interlocutory decree was entered. But, the judge had rejected the intervention and thereafter that party had appealed from the order of the District Court. It was held that the party had the status to intervene in the action as the interlocutory decree had not yet been entered in that case. The *ratio decidendi* in that case was that there was however another reason for setting aside the decree, " The Court was possessed of the fact during the hearing of the action, even before judgment was delivered, that the appellant had claimed a servitude of a right of way over the land sought to be partitioned. In this situation it was the obvious duty of the Court, having regard to the provisions of section 70 of the Partition Act, and the conclusive effect of the interlocutory decree, to adjourn the hearing in order to give the appellant an opportunity of applying to be added as a party, if she decided to avail herself of that course of action ; this the Court omitted to do. In the result, the appeal is allowed and the record will go back to the Court of first instance for the appellant's claim to be heard and determined. "

When one considers this reported case with the facts of the present case, it will be seen that the appellant was not a party-defendant to the action but Court was aware of the fact that the party concerned was ostensibly entitled to certain rights or at least that the party had a claim to certain rights from the corpus. The Court had not proceeded to add this party as a party defendant to the action and had proceeded to enter

interlocutory decree without investigating the claims of this party whose existence the Court had been made aware of, and the existence of certain rights claimed by the party had been brought to the notice of Court.

The case reported in 68 N.L.R. at page 145 can be distinguished from the facts of the present case because the Court in this present case has been made aware of the fact that the present petitioner and several other parties were indicated as having rights to this property before interlocutory decree was entered in this case and before judgment. Therefore, it appears to me even if the 18th defendant was not inclined to go on with the intervention by reason of the fact that she herself had benefited much more than she was entitled to on the basis of her claim nevertheless it appears to me that it was the duty of Court to have investigated into the title of the parties disclosed by the 18th defendant intervenient.

In the case reported in 59 N.L.R. at page 476, after interlocutory decree was entered, the petitioner which was a limited liability Company sought to intervene because the land described in the schedule to the plaint and the interlocutory decree was different from, although adjacent to, the land depicted in the plan prepared by this surveyor, to whom the commission has been issued by that Court. The company was not a party to the partition action and it was only after the decree had been entered that it became aware that the land depicted in the Commissioner's plaint had been surveyed for the purposes of the action as that described in the schedule. It was held in revision that the interlocutory decree should be set aside and the trial Court should be directed to add the petitioner as a party and proceed with the action. It will be noted that this partition action had been brought under Partition Act No. 16 of 1951.

From that reported case, it would be seen that the petitioner who filed papers in revision was not a party to the action and was not even an intervenient before interlocutory decree. Nevertheless the Supreme Court acting in revision on an application made by that petitioner had made order to set aside the interlocutory decree and add the petitioner as a defendant and proceed on with the action.

On perusing the various authorities to which I have made reference it will be seen that a party who is not a defendant to a partition action can in certain exceptional instances come into this Court either by way of revision or by application for restitutio and ask for relief in instances where the Court is made

aware of the fact that such petitioner was a person who should properly have been added under section 70 (1) of the Partition Act before decree was entered. In the instant case the Court was made aware of the fact that the petitioner in this case was a person who was said to have a claim to this property. Once Court is made aware of this fact it appears to me that it was the duty of the Court to have proceeded to add this party as well as the others who were disclosed along with this party as having certain claims to this property. The mere fact that the party who disclosed the mere existence of the present petitioner and certain other parties withdrew the intervention for certain reasons is not a matter that should desist the Court from acting in the manner indicated under section 70 (1).

It is again the duty of the Court under section 25, to investigate the title of parties. In the present case, it is my opinion that the Court has signally failed either to investigate the title of the parties who were before Court or to pay any attention to claims of parties or rights of parties who were indicated as having certain claims or rights in this property.

In these circumstances, it is my opinion that the interlocutory decree in this case has been entered without proper investigation of title and without addition of necessary parties claiming rights to this property, of whose existence the Court has been made aware of. Therefore, I am of the opinion that the interlocutory decree in this case should be set aside and that the petitioner and other parties indicated in the claim of the 18th defendant should be added as party-defendants to this action under section 70 (1) and their claims in this case must be investigated and the trial should be proceeded with from that stage.

I accordingly set aside the judgment and interlocutory decree entered in this case and remit the case for further trial as ordered above. I award the petitioner costs in Rs. 210 against the plaintiff.

WALGAMPAYA, J.—I agree.

VYTHIALINGAM, J.

I regret very much that it is not possible for me to agree.

This is an application in revision to set aside the interlocutory decree for partition entered in this case and to order a new trial so that the interests of the petitioner may be allotted to him. The case proceeded to trial on 25.3.68 when evidence was recorded and judgment was reserved for 8.4.1968. On 31.3.1968

an intervenient Lily Gunasekera filed papers for intervention and in view of this, judgment was not delivered on 8.4.68. On that day, Counsel for the plaintiff stated that the application was being made to prolong these proceedings on behalf of certain persons who were in possession and in order to prevent that, he said, the plaintiff was willing to give a share to the intervenient out of plaintiff's one third share, proved at the trial.

But proctor for the intervenient did not agree as according to the claim of the intervenient there were several other parties who were entitled to intervene and the matter was fixed for 5.6.68 for the consideration of the claim of the intervenient on certain terms. On that date, however, a settlement was apparently arrived at and it is recorded as follows: "Of consent, intervention dismissed. Add Lily Gunasekera as 18th defendant. W. & C. for her. Out of plaintiff's interest 1/6 of 13/16 (13/96) be allotted to the 18th defendant. Judgment 6.6.1968." On 6.6.1968 judgment was delivered allotting, *inter alia*, 130/960 shares to the 18th defendant. Interlocutory decree was tendered on the following day and was signed by the Judge on 11.6.1968.

The present petitioner filed papers in revision in this Court on 20.7.1968. He states that he was disclosed in the petition of Lily Gunasekera and that since she was added as a party defendant in that case it was incumbent on the plaintiff to have added him and the other persons disclosed by her as parties and to have issued summons on them in terms of section 22 (1) (*b*) of the Partition Act. He states that he was resident in Colombo for a long period and was unaware of the entering of the interlocutory decree. The petitioner is the cousin of Lily Gunasekera, who claimed to be entitled to shares from one Catherine Silva. This Catherine Silva appears in the plaintiff's evidence and is so referred to in the petition of Lily Gunasekera. According to plaintiff, one Charles also transferred a ⅓ share of the land B in the schedule to the plaint on deed No. 485 of 17.7.1929 (P 2) to Catherine Silva. Charles also transferred to one Rosa Regina a ⅓ share of the land C in the schedule to the plaint on deed No. 403 of 17.4.1913 (P 1). Both Catherine Silva and Rosa Regina are alleged to have transferred their rights to Vincent Perera but this deed was not produced. Thereafter Vincent Perera transferred his rights along with Rosa Regina and her daughter Mary Theresa by deed No. 4523 of 16.5.1953 (P 3) to Paula Silva who was entitled to other interests also and they devolved as set out in the evidence of the plaintiff.

Thus, according to the plaintiff's evidence, the entire interests of Catherine Silva had passed to others. Lily Gunasekera in her statement of claim admitted that Catherine Silva was entitled to a one third share. But according to her, Catherine Silva was married to one Linton Soysa. She died leaving her husband who became entitled to a 1/6 share and five brothers and sisters each of whom became entitled to a 1/30 share. The transfer to M. Vincent Perera by Linton Soysa was she averred only in respect of his 1/6 share and did not affect the other 1/6 share which devolved on the brothers and sisters of Catherine Silva.

It is this 1/6 share which, Lily Gunasekera, as also the present petitioner, claimed as having devolved on them and the other persons disclosed in the statement of claim of Lily Gunasekera. Since the plaintiff had no deed in respect of the transfer to Vincent Perera he must have decided to part with this share in view of the risks involved in trying to prove his rights to this share and the considerable delay which necessarily would be occasioned by adding all these persons as parties and proceeding to trial thereafter. He did not stand to benefit at all by this settlement as he had conceded the entirety of the 1/6 share claimed by Lily Gunasekera on behalf of herself and the others including the present petitioner. Lily Gunasekera also admitted that Linton Soysa sold his share to Vincent Perera, but that it was only a 1/6 share.

Lily Gunasekera claims to be one of eight children of a brother of Catherine Silva, who became entitled to a 1/30 share. The present petitioner was disclosed by her as a child of a sister of Catherine Silva, one Emaliya who had nine children. Of these nine children, six claimed interests before the surveyor and were added as 5th to 10th defendants. They were duly served with summons, and although the 8th defendant filed a proxy, none of them took any interest whatever in the proceedings in the case or at the trial.

It is in this background that the application of the present petitioner has to be reviewed. It has been submitted that as Lily Gunasekera was made the 18th defendant in this case it was incumbent on the Judge to have made the persons disclosed by her as defendants, including the present petitioner, in terms of section 22 (1) (b) of the Act. Undoubtedly if Lily Gunasekera had been added as a defendant on the basis of her claim in the petition for intervention, then this should have been done and the failure to add the persons disclosed by her and to issue summons on them would have rendered the Interlocutory Decree void.

But this is not the basis on which she was added as a party defendant. Her intervention was dismissed. But as the plaintiff had agreed to give her a share out of his own share which he had proved at the trial, she was made a party defendant for this purpose only and not on the basis of her claim made in her petition. Undoubtedly she had driven a hard bargain and obtained from the plaintiff something more than what she had claimed for herself, that is the entirety of the 1/6 share which according to her should have gone to herself and the other persons disclosed by her including the present petitioner.

It was also submitted that even if this view be correct the trial Judge was at that time seised of the fact that others were also entitled to shares in the land as set out by Lily Gunasekera in her petition. It was argued that therefore, for a full and proper investigation of title which in terms of section 25 of the Act it was incumbent on him to carry out, the trial Judge should have added them as parties and issued summons. But as far as the trial Judge was concerned Lily Gunasekera had consented to her intervention being dismissed and the petition for intervention was no longer before him and it was not incumbent on him to add them as parties under the provisions of the Partition Act.

Moreover, he was equally seised of the fact that no less than six of the present petitioner's brothers had been added as parties but chose to stake no claim of any kind and took no part whatever in the trial, although they had claimed certain plantations before the surveyor. The trial Judge cannot shut his eyes to this fact particularly so in view of the allegation by the Counsel for the plaintiff that certain persons who were in possession of portions of the land were trying to prolong the case. The present petitioner's brothers and sisters the 6th, 7th and 9th and 10th defendants—had claimed certain plantations before the surveyor and now even if this application fails, the 9th defendant has paved the way to still further prolong the action by filing papers to set aside the Interlocutory Decree on the ground that summons was not served on him. The allegations of the Counsel for the plaintiff therefore seem justified and in this context the concessions made by the plaintiff are understandable.

The observations made by Dias, S. P. J. in regard to the old Partition Ordinance are not out of place. In the case of *Menchinahamy v. Muniweera,* 52 N.L.R. 409, a case instituted in 1939 he said at page 411, " this case is a melancholy example of the workings of our antiquated and cumbersome Partition Ordinance. This case forcibly reminds one of the famous, though mythical case *Jandyce v. Jandyce* immortalised by Charles

Dickens in Bleak House of which it was said—' And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends'. And now at the end of 1950, if the contention of the petitioner is right, the work of twelve long years will be of no effect, because the dispute which was settled by the interlocutory decree of the District Judge and the Judgment in appeal of the Supreme Court will have to be ignored and the matter dealt with anew. "

The Partition Act No. 16 of 1951 was intended to remedy these defects in the Ordinance. In the ' objects and reasons' of the Act it is stated " The essence of a partition decree is that persons declared entitled under it obtain title good against all the world. Various decisions of the Supreme Court have tended to eat away the indefeasibility of the title ". *Government Gazette* No. 8372, June 9, 1938 Part II, page 475. In this connection Sinnetamby, J. said " It cannot be impressed too strongly that the obligation to examine carefully the title of the parties becomes all the more imperative in view of the far reaching effects of section 48 of the New Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigours of the conclusive effect of section 9 of the repealed Partition Ordinance No. 10 of 1863. " *Cooray et al v. M. A. P. Wijesuriya,* 62 N.L.R. 150 at page 161.

Where a partition decree is entered without any investigation of title at all it does not have the conclusive effect provided by either section 9 of the old Partition Ordinance or section 48 (1) of the Partition Act. Thus *Gunaratne v. The Bishop of Colombo,* 32 N.L.R. 337, was decided on the basis that there was nothing to show " that the judge made any inquiries into title " and that " the decree was passed on the defendant's admission. " In the case of *Umma Sheefa v. Colombo Municipal Council,* 36 N.L.R. 38, it was held that the decree for sale did not have a conclusive effect because apart from the consent of parties there was no evidence in that case that the parties to the action or any of them were co-owners of the premises, so that it could not be said that there had been an investigation of title.

But it is different if there has been an investigation of title but it is not exhaustive or is defective. As Lord Cohen observed in the Privy Council in the case of *Mohamedaly Adamjee and others v. Hadad Sadeen and others,* 58 N.L.R. 217 at page 226, " Once it appears that the court has done so, then any defect in the method of investigation would not vitiate the decree any more than an error of law or of fact by a judge would, in the generality of cases, vitiate a decree duly entered and not

appealed from or confirmed in appeal." This would be so even whereas in that case, "The District Judge did hold an investigation into title although his investigation has not been sufficiently exhaustive to prevent the perpetration of the fraud which has take place." *ibid.* In such a case a decree in a partition case cannot be set aside in a separate action.

Different considerations also apply in the case of an appeal in a partition action for nothing is final or conclusive until the appeal is concluded. Consequently "On an appeal in a partition action if it appears to the Court of Appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation. Nothing in the partition action can be final or conclusive until the appeal is concluded .... Their Lordships would add that if it appears to the Supreme Court *when hearing an appeal* in a partition case that investigation of title has been inadequate it should, even though no party has raised the point, set aside the decree acting under its powers of revision." Per Lord Cohen, *ibid.*

This power to act in revision and set aside a partition decree on the ground that there has been an inadequate investigation of title, can only be exercised when the Supreme Court is hearing an appeal in a partition case and no party before it has raised the point. This is clearly indicated by the use of the words "when hearing an appeal" and is emphasised by Lord Cohen when he says in the same page "But the fact that lack of proper investigation may be sufficient for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 when the decree is being considered in a separate case."

Nor can a stranger to a partition action move the Supreme Court in revision to set aside an interlocutory decree which has already been entered, on the ground that his claim has not been investigated or on the ground that the title of the parties to the action has not been adequately investigated, because, if there has been an investigation of title though it is inadequate the decree is final and conclusive. The difference is that where there is an appeal "nothing in the partition action can be final or conclusive." Section 48 (1) of the Partition Act makes this quite clear when it sets out that "......the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of title......". This is not so where there is an application in revision. The interlocutory decree remains final and

conclusive where there has been no appeal, and the interlocutory decree cannot be set aside in such a case on the ground that there has been an inadequate investigation of title.

The position under the Act is now quite clear. No intervention by a stranger to the action can now be permitted at any stage after the interlocutory decree has been entered. This has now been laid down by authoritative decisions of the former Supreme Court which must be considered as taking the matter beyond the range of controversy. Express provision is made for the addition of parties in section 70 of the Partition Act which reads :—

> " The Court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order—
>
> (*a*) any person who, in the opinion of the Court, should be, or should have been, made a party to the action, or
>
> (*b*) any person who, claiming an interest in the land, applies to be added as a party to the action.
>
> (2) Where a person is a party to a partition action and his right, title and interest to or in the land to which the partition action relates are sold, during the pendency of the partition action, in execution of, or under, any decree, order or process of any court, the purchaser of such right, title and interest at the sale shall be entitled to be substituted for that person as a party to the partition action, and such purchaser, when so substituted, shall be bound by the proceedings in the partition action up to the time of the substitution. "

In the case of *Odiris Appuhamy v. Carolis Perera,* 66 N.L.R. 241, a Divisional Court of three judges (Sri Skanda Rajah, J. *dissentiente*) which however, is not binding on us, held that a stranger was not entitled to intervene after the interlocutory decree is entered. Basnayake, C. J. after quoting the provisions of section 70 said at pp. 242, 243. " The above quoted provision leaves no room for doubt as to the stage of a partition action at which a party may be added. While a substitution under sub-section (2) can be made at any time, an addition under sub-section (1) can be made only *before* interlocutory decree. In adding the respondent to this appeal as a party to the partition action, the learned District Judge did what he had no power to do. "

A similar view was taken in *Noris v. Charles,* 63 N.L.R. 501, by Sinnetamby, J. with H. N. G. Fernando, J. agreeing, though no reference was made to section 70. These two cases were expressly approved by a Divisional Bench of Five Judges (Sri Skanda Rajah, J. and G. P. A. Silva, J. *dissentiente*) in *R. Rasah v. Thambipillai,* 68 N.L.R. 145, where Sansoni, C. J., delivering the main judgment said "The effect of this provision (section 70) is that no intervention can be permitted at any stage after interlocutory decree has been entered", page 146. His Lordship also said that a contrary view taken by him in the unreported case of S. C. 74, D. C. Inty. Colombo 8116/P must be treated as wrong and now overruled.

In that case it was sought to equate the wrong registration of a *lis pendens* with the non service of summons on a party to the action by arguing that each constitutes a failure to take an essential step in procedure. But the majority of the Court rejected the argument. On the same day the same Bench of Five Judges by the same majority delivered another judgment to the same effect, 68 N.L.R. 385. The point must now be regarded as being covered by authority which makes the question one no longer at large.

Even after judgment has been pronounced but before the interlocutory decree has been signed a party cannot intervene. In the case of *U. D. Ariyaratne v. Lapie et al,* 76 N.L.R. 221, a Divisional Bench of there Judges held that section 70 of the Partition Act is not wide enough to permit the Court to allow a party to intervene in a partition action after judgment has been pronounced in terms of section 26 of the Act but before interlocutory decree has in fact been signed. An earlier decision in *Podisingho v. Ratnaweera,* 62 N.L.R. 572, on the same point was approved and followed. In both these cases the Judges did not even consider the grounds for intervention.

In *Wijeratne v. Samarakoon,* 71 C.L.W. 87, a different view was taken in similar circumstances but this case must now be regarded as overruled by the decision in *Ariyaratne v. M. Lapie,* (*supra*). However it may be noted that in *Samarakoon's case* one of the defendants had moved to withdraw his statement of claim to a right of way as he had divested himself of his interests and the intervention was allowed presumably on the ground that the right of way had been transferred to the person who sought to intervene. It is possible in these circumstances to have entertained the intervention under section 70 (2) of the Act. However, this case did not say that parties could be added after interlocutory decree had been entered for the intervention was allowed because the interlocutory decree had not yet been

entered in the sense that it had not been signed. In any event in this case the present petitioner did not intervene in the interval between the delivery of judgment and the entering of the interlocutory decree but long afterwards.

A person who has not been made a party to a partition action is not without remedy in appropriate circumstances. If his right in the land to which the action relates is extinguished or is otherwise prejudiced he may file separate action in terms of section 49 for damages from the party to the action whose act or omission caused the damage. Nor is such a person bound by the decree as set out in section 48 in the circumstances stated therein " the three subsections taken collectively indicate that notwithstanding—

(*a*) any omission or defect of procedure, or

(*b*) in the proof of title adduced before the Court, or

(c) the fact that all persons concerned are not parties to the partition action—

the decree is final and conclusive against all persons whomsoever except against a person who has not been a party to the partition action and claims a title to the land independently of the decree. Such a person must assert his claim in a separate action and can only succeed if—

(*a*) he proves that the decree had been entered by a Court without competent jurisdiction, or

(*b*) that the partition action has not been duly registered as a *lis pendens.*"

A partition decree can be set aside only when an imperative requirement of the Act as distinct from mere omissions or defects of procedure has not been followed or where there has been a failure to observe the cardinal principles of natural justice. Thus, interlocutory decrees have been set aside in the following circumstances :—

(1) where only a notice instead of a summons was issued on a party added as a defendant as required by sections 12 and 13 — *Leelawathie v. Weeraman et al.* 68 N.L.R. 313, 5 JJ.

(2) Where a defendant was not duly served with summons— *Siriwardena v. Jausumana,* 59 N.L.R. 400.

(3) Where notice of survey was affixed on a land different to that which was described in the schedule to the plaint as required by section 17 (2)—*Amarasuriya Estates Ltd. v. Ratnayake,* 59 N.L.R. 476.

(4) Where a defendant is a lunatic and no manager was appointed, at the instance of the defendant lunatic himself appearing by guardian—*S. Ukku v. M. Sidoris et al,* 59 N.L.R. 90.

(5) Where a party is dead and no substitution has been made—*Beebee v. Mohamed,* 68 N.L.R. 36, Five Judges.

(6) Where an interlocutory decree was entered in the absence of the contesting defendant who was prevented by causes beyond his control from attending Court on the trial date or giving instructions to his proctor. "In my opinion an omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rules of natural justice embodied in the maxim *audi alteram partem.*" Per Weerasooriya, J. in *Siriya v. Amalee,* 60 N.L.R. 269.

(7) Where a minor is not represented by a guardian *ad litem*—the interlocutory decree was set aside at the instance of another defendant—*Perera v. Aron Singho & others,* 64 C.L.W. 13.

and

(8) Where the date fixed for filing of a statement of claim is a holiday and a party thereafter had no notice of the trial date—73 N.L.R. 49.

This list is not intended to be exhaustive.

The extent to which this Court has gone to exclude interventions after interlocutory decree is entered is illustrated by the decision in *U. Suraweera et al. v. A. K. Jayasena,* 76 N.L.R. 413. In that case a contesting defendant died during the pendency of the action, and thereafter interlocutory decree was entered without his heirs being substituted. An heir of his made an application to set aside the decree but the District Judge held that he had no jurisdiction to set aside the decree on this ground. This Court held that he was right but acting in revision the decree was set aside and the case sent back for a fresh trial. But this Court directed that "apart from the statements of claim from the (deceased) 52nd defendant, the District Judge *will not entertain any fresh* statements of claim." at page 414. The emphasis is mine.

It is possible that the agreement arrived at between the plaintiff and Lily Gunasekera was collusive and perhaps, fraudulent. Section 44 of the Evidence Ordinance sets out that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The new Partition Act provides in sub-section 48 (2) that " The interlocutory dceree and the final decree of partition entered in a partition action have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees. "

In the case of *Noris v. Charles,* already referred to Sinnetamby, J. says at page 503, " Fraud and collusion are well known grounds on which in any ordinary litigation the decree can be set aside. But under the provisions of the Partition Act section 48 (2) even the provisions of section 44 of the Evidence Ordinance are made not applicable to a partition decrees. Indeed under the old Partition Ordinance, although there was no such specific provision, fraud was not a ground on which a partition decree could have been set aside—vide *Fernando v. Marshall Appu,* 23 N.L.R. 370. "

In the case of *Mohamedaly Adamjee and others et al. v. Hadad Sadeen and others* (*supra*) dealing with the subject of fraud and collusion under the old Partition Act, 58 N.L.R. page 217, the Privy Council held that a decree entered under section 8 or section 9 of the Partition Ordinance No. 10 of 1863 is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the Court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages (even though the property is still in the sole possession of the parties whose fraud is set up).

Lord Cohen quoted with approval the following passage from the judgment of Sir Alexander Wood Renton, C. J. in *Jayawardena v. Weerasekera,* (1917) 4 C.W.R. 406 at 407, " Now looking at the very distinct declaration contained in the 9th section, and to what must have been the object which the Legislature had in view, I can come to no other conclusion than that the proviso was meant to conserve the only remedy, except by way of appeal, which could be sought against a decree already pronounced, namely, one which sounded in damages ; if it were

not so, the operation of the Ordinance must be disastrous. No single decree could escape a litigious spirit to reopen it on the ground of fraud, and no date would exclude such contests. The object of the Partition Act was to quiet the title to land, and leave persons prejudicially affected by any such decree, by reason of any cause whatever, to their remedy in damages at law, and this to my mind is a full and perfect remedy, and it is unfortunate if any mere dicta should have led to any uncertainty on the point. " This is even more so under the Act.

In the circumstances I hold that the petitioner is not entitled to have the partition decree set aside, either on the ground that he had not been made a party, or on account of fraud and collusion between the plaintiff and the 18th defendant or that there had not been a sufficient investigation of title. I would therefore dismiss the application with costs.

Application allowed.