1933 *Present :* **Dalton A.C.J. and Drieberg J.**

VYTHIAMPILLAI *v.* SADANATHA.

197—D. C. Jaffna, 16,400.

Partition action—Intervention after interlocutory decree—Burden of proof on intervenient—Discharge of onus.

A party, who has obtained an interlocutory decree in a partition action, is not bound to prove his title afresh against an intervenient who has failed to establish his right to intervene.

APPEAL from an order of the District Judge of Jaffna.

N. E. Weerasooria (with him *Gnanapragasam* and *Subramaniam*), for seventh, eighth, and ninth added parties, appellants.

H. V. Perera (with him *Kandiah*), for substituted intervenient, respondent.

Cur. adv. vult.

June 26, 1933. DALTON A.C.J.—

The partition action out of which this appeal arises commenced in the year 1921. The land the subject of the partition consists of that extent of land subdivided into lots 1 to 6, as set out on plan No. 4,122 of July 1, 1922, and on plan No. 4,288 dated February 7, 1923, produced in the case. Although in each plan the extent appears to be the same, the land has not been subdivided in the same way. In the course of time and much handling, the record of the case, including the journal entries, has become so much mutilated that it is difficult to trace with accuracy the different steps in the action taken since its commencement. Owing also to the careless way in which the records have been kept I find it very difficult to find my way about them. It would appear, however, that the plaintiff allotted an undivided 1/6th of the land to himself and to the tenth to thirteenth defendants, and the remaining undivided 5/6th to the first defendant Vetharaniya Visuvanatha in his capacity as trustee of the Athivaramadam, a charity inn in India, to which institution this share was stated to belong. After trial an interlocutory decree was entered in March, 1922, decreeing the shares to the parties as set out in the plaint. There has never at any time apparently been any dispute as to the undivided 1/6th share allotted to the plaintiff and the tenth to thirteenth defendants, all the subsequent disputes relating to the remaining 5/6th share.

Various additional parties seem to have been added at different times, to whom it is not necessary now to refer, except to the present appellants and the respondent. In February, 1924, the present appellants intervened, and were added as the seventh, eighth, and ninth added parties. They claimed the undivided 5/6th that has been given by the interlocutory decree to the first defendant as trustee of the Athivaramadam.

On this intervention the trial Judge held in his judgment of November 14, 1927, that these intervenients were not entitled to any interest in the land to be partitioned. He held that the 5/6th share claimed by them

was the property of the Athivaramadam (issue 11), that the trustees of the madam had been in possession of this land since 1872 (issue 13), that the first defendant was entitled to that share as trustee (issue 14), and that the absence of any vesting order in his favour was immaterial to this case (issue 13). A commission was therefore ordered to issue for the partition of the lots 1 to 6 as directed in the interlocutory decree. As I have stated, so far as the first defendant was concerned the decree was in his favour as trustee of the Athivaramadam. I might add here it seems clear from the judgment that, as the case was presented to the trial Judge, the charity inn, the Vetharaniar Athivaramadam as he calls it, was part of the institution, the Vetharaniar temple, one of the richest temples in Southern India, which he points out had a number of lands scattered over the Jaffna peninsula.

From this decision the intervenients, the seventh, eighth, and ninth added parties, appealed successfully. The Supreme Court, in its order of July 18, 1928, held that although the first defendant was trustee of the Vetharaniar temple in India, to which so far as I can ascertain it was never denied up to that time that the madam which was on the tank bund near the temple was appurtenant, the first defendant as such trustee had failed to show any title to the 5/6th share of the land in dispute. The intervenient appellants on the other hand, it was held after a review of the evidence, had shown they had "for many years past" been in possession of the land, whereas there was no evidence that the land had ever been in possession of the temple. It was therefore ordered that the interlocutory decree entered be varied by declaring the intervenients entitled to the interest they claimed.

From this decision of the Supreme Court the first defendant commenced proceedings to obtain leave to appeal to the Privy Council, but did not proceed with them.

The next step with which we are concerned is an intervention on July 18, 1929, by one Suntharavalliamma claiming that she was trustee of the madam, that the 5/6 share in dispute has been donated to the madam in 1872, and that therefore this undivided 5/6th of the land sought to be partitioned should be allotted to her as such trustee. Before, however, she could proceed with her claim she died, and the respondent to this appeal was substituted as intervenient in her place. He claims to be her grandson, and to be trustee of the madam, under an appointment by the heirs of Suntharavalliamma. After a hearing on this intervention at which evidence was led on both sides, on July 25, 1932, the trial Judge held that the present respondent had established his right to intervene, and further that the Athivaramadam was entitled to the 5/6th share of the land in dispute. From that decision the seventh, eighth, and ninth added parties, the earlier successful intervenients, now appeal.

The first matter that the present substituted intervenient has to establish is his right to intervene. The trial Judge and also counsel for the substituted intervenient in the lower Court have not, it would seem, given this question the attention it requires, for if the right to intervene is not established the claim must fail. They have given most of their time and attention to the question whether the land in dispute is the property of the madam. The learned Judge does indeed in the opening

words of his judgment say that the intervenient has established his claim as trustee of the Athivaramadam at Vetharaniya by documents to intervene, but it would certainly have been helpful to have the reasons for that conclusion as I am unable to find any satisfactory evidence on the record, documentary or otherwise, to show that the intervenient is trustee as he claims.

An examination of the evidence, commencing with the substituted intervenient respondent, shows that he claims to have been appointed by deed trustee of the madam in 1930 by the heirs of Suntharavalliamma on her death. It would seem that this deed was produced by him when he was in the witness box, and was marked R2, but it is not now forthcoming nor has it been specifically referred to by the trial Judge in his judgment. What has happened to it no one can now say. We have not therefore had the benefit of seeing what it contains, or who were the individuals who made the appointment. On the question as to who were the heirs of Suntharavalliamma, the witness does not say who the heirs were. He states that Suntharavalliamma had four daughters and two sons, but he admits that one at any rate of the surviving daughters had not signed the deed of appointment. Whether the other surviving sons and daughters or the children of deceased children of Suntharavalliamma joined in his appointment he does not say. There is no witness but himself as to his appointment as trustee. Even assuming that the right of succession to the trust such as is alleged, about which he is silent, is to be effected in this way, his evidence is to my mind quite inconclusive as to his proper appointment.

The next point arising on the evidence is as to Suntharavalliamma's claim to be trustee. On this question also, in support of her intervention, the only witness is the present respondent, her grandson, at the time he gave evidence a young man of 25 years of age. He admits he knew nothing about the case before his grandmother's intervention in 1929. He states, however, she became trustee of the madam on the death of one Sevanthinatha Kurukkal, when she succeeded to the management of the madam and its properties. Sevanthinatha Kurukkal, he states, died about forty years ago. He died, he states, leaving four daughters including Suntharavalliamma. The witness states his grandmother had three sisters and no brothers, but there is no explicit statement that Sevanthinatha had no other children, as he might possibly have had by another wife. There is no clear or definite statement in his evidence as to who were Sevanthinatha Kurukkal's heirs. Which was his eldest daughter is not stated. As to Suntharavalliamma being trustee, it is admitted she never had any deed of appointment. All that the witness can say on that point is "we agreed amongst ourselves to allow Suntharavalliamma to manage the madam". He, having regard to his age, could clearly not have been any party to such an agreement on Sevanthinatha's death or for many years afterwards.

There is no evidence, beyond the statement of this young man, that his grandmother was ever trustee at all. He states she acted as trustee for about twenty-five years, that she took the income from the land in dispute and remitted every year to the madam in India. He assumes she must

have left accounts, but can produce none nor can he produce any other evidence to support his statements about her. What she was doing during the previous proceedings in this case from 1921 to 1929, if she was in possession of the land, he does not say. The evidence in support of Suntharavalliamma's intervention is, in my opinion, worthless, and there is no other evidence on the record to support her claim.

The only witness, apart from a brief official witness, that respondent calls to support his intervention, namely, Sittampalam Mudaliyar who lives near the land, does not mention Suntharavalliamma at all. His evidence would lead due to conclude that the first defendant was the trustee of the lands in dispute. The first defendant, respondent admits, is a close relative of his. He does deny, however, that first defendant was the trustee of the madam, although he admits he was trustee of the Vetharaniya temple. This latter piece of evidence constitutes, so far as I have been able to ascertain, the first suggestion (and even here it is not very definitely made) that the Athivaramadam at Vetharaniya was a separate foundation or institution in no way appurtenant to the Vetharaniar Athivara temple.

Up to this point then the evidence, in my opinion, quite fails to establish that the substituted intervenient had any valid appointment as trustee, or that he was trustee as he claims. It does not show further, in my opinion, that his grandmother Suntharavalliamma was ever trustee at all, or that she had any right to intervene. There are further defects in the claim now put forward, if one go back in point of time prior to the death of Sevanthinatha Kurukkal, for there is, in my opinion, no evidence of any value that the parties to the deed of 1872 (R1 or P14) relied upon by the intervenient, under which Sevanthinatha Kurukkal was appointed, were the heirs of Kanthappa Kurukkal as claimed. It is, however, sufficient to say for the purpose of this intervention that neither the intervenient nor the substituted intervenient has disclosed any right to intervene.

In view of this conclusion it is not necessary to consider the effect of the judgment obtained by the present appellants against the first defendant as trustee, as against the present respondent, or whether various unregistered old deeds prior to 1840 were properly admitted in evidence, or other questions raised on the appeal before us.

One further matter must be mentioned. The appellants are the holders of a decree of the Court declaring them entitled to the land in dispute. It was argued on behalf of respondent that in the event of a subsequent intervention they must be put to the proof of their title afresh as against the present respondent and his grandmother. The learned trial Judge, however, rightly held that the respondent had first to establish his right to intervene. The burden of proof was on him and if he fails in discharging that onus, the matter ends. There is no requirement for a party who has obtained an interlocutory decree to prove his title afresh against every successive intervenient (*Appuhamy v. Gunaratne*[1]) where such intervenients have not discharged the onus that lies upon them.

[1] *Wijewardena's Reports 60.*

For the reasons I have given, the learned Judge was wrong in holding that the respondent established his right to intervene as trustee of the Athivaramadam at Vetharaniya. His claim should therefore have been dismissed. The interlocutory decree of July 25, 1932, must therefore be set aside, and the earlier decree in favour of the appellants must be restored.

The appeal is allowed with costs in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.