1961 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

S. D. NORIS, Appellant, *and* P. M. G. CHARLES and others, Respondents

S. C. 422/59—D. C. Galle, 862/P

Partition action—Failure to register lis pendens *in correct folio—Final decree—Denial of right of intervention of new parties thereafter—Partition Act, No. 16 of 1951, ss. 26, 36, 48, 49—Evidence Ordinance, s. 44.*

Where final decree has been entered in terms of section 36 of the Partition Act, No. 16 of 1951, it is not open to a new party to intervene by having the decree set aside on the ground that *lis pendens* was not registered in the correct folio. The provisions of sub-section 3 of section 48 do not enable such intervention.

APPEAL from a judgment of the District Court, Galle.

A. L. Jayasuriya, with *D. R. P. Goonetilleke*, for the plaintiff-appellant.

A. W. W. Gunawardene, for the 22nd defendant-respondent.

Cur. adv. vult.

September 22, 1961. SINNETAMBY, J.—

This is an appeal from an order made by the learned District Judge of Galle allowing an intervention by the 22nd defendant after a final decree for partition had been entered under Section 36 of the Partition Act, No. 16 of 1951. It would appear that the present 22nd defendant moved to intervene on the ground that *lis pendens* had not been registered in the correct folio. The matter was fixed for inquiry and the learned Judge, by his order dated the 27th of August, 1959, set aside the final decree

and permitted the 22nd defendant to intervene. The question that arises for decision in this appeal is whether it is open to a party to seek to set aside on that ground the final decree entered under Section 36. For the purpose of our decision, I do not think it necessary to come to a finding on the question of whether the registration of *lis pendens* by the plaintiff was entered in the correct folio or not. Even assuming that it was not registered in the correct folio, I have come to the conclusion that it is not open to the 22nd defendant to have the final decree set aside and be permitted to intervene.

Under the old Partition Ordinance, interventions were generally never allowed after final decree was entered. The final and conclusive effect given by Section 9 of the old Ordinance related to the decree that was entered under Section 6 in the case of an order for partition and under Section 4 in the case of an order for sale. Once there was a confirmation of the partition proposed by the Commissioner and final judgment entered under Section 6, interventions were not permitted. A decree duly entered under Section 6 would be final and conclusive against all parties if in terms of Section 9 it was entered " as hereinbefore provided ". If the steps taken prior to the entering of the decree under Section 6 were not " as hereinbefore provided ", it did not give a party affected by the decree, who was not a party to the action, the right to have the decree set aside. It only gave such a party the right to dispute the conclusive effect of that decree and to maintain that it was not binding on him. That was the effect of the cases decided under the provisions of the old Partition Ordinance. It was always open to a party after the interlocutory decree had been entered and before final decree to intervene in proceedings under the old Ordinance and trials had in consequence to be adjourned from time to time as a result of successive interventions made sometimes at the instance of an unsuccessful party. This followed as a necessary consequence from the decisions of our Courts which refused to give to the interlocutory decree entered under Section 4 the final and conclusive effect contemplated by Section 9. It seems to me that the Partition Act of 1951 sought to put an end to the considerable delay occasioned by such interventions. Section 48 of the new Act expressly provided that the interlocutory decree entered under Section 26 which corresponds with the interlocutory decree under Section 4 of the repealed Ordinance shall have a final and conclusive effect. No intervention thereafter would ordinarily be permitted and Section 48 further provided that both the interlocutory decree entered under Section 26 and the final decree entered under Section 36 shall " be good and sufficient evidence of title of any person as to any right share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever " ; and it further went on to provide that this would be so " notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action ". This conclusive effect was subject to the provisions of sub-section 3 to which I shall refer later.

It seems to me that by expressly denying the right of intervention on the ground of " omission or defect of procedure or in the proof of title or the fact that all the persons concerned are not parties to the partition action ", the new Act sought to negative the effect of any failure to conform to the earlier essential steps contemplated by the words " as hereinbefore provided " in Section 9 of the Partition Ordinance, as interpreted by judicial decisions. The object of the legislature no doubt was to enable partition actions to be brought to a speedy conclusion. Under the old Ordinance, it was not uncommon for actions to be pending for lengthy periods of time extending in some cases to as much as 25 to 30 years and even more. Once the interlocutory decree was made final and conclusive no intervention should ordinarily be permitted thereafter, and a partition action would consequently be brought to a much speedier conclusion. The legislature at the same time realised that persons may be adversely affected by the conclusive effect given to both the interlocutory and the final decree and by Section 49 re-enacted the provisions of the proviso to Section 9 of the earlier Ordinance which gave such persons the right to bring an action for damages. In the case of persons who are not parties to the action, however, sub-section 3 provides, inter alia, that the fact that the *lis pendens* had not been properly registered would deprive the decree of its final and conclusive effect. That is all that sub-Section 3 provides. A person who was not a party to the partition action is not bound by the interlocutory decree if *lis pendens* had not been properly registered. This does not mean that he is entitled to intervene and have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are sought to be taken under it. He is in exactly the same position as a claimant to an interest in land which had been partitioned under the repealed Ordinance, where the final decree had not been entered " as hereinbefore provided".

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 sub-section 2 even the provisions of Section 44 of the Evidence Ordinance are made not applicable to 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* [1].

Our attention has been drawn to the decision of this court in *Siriwardene v. Jayasumana* [2] where it was held that the final and conclusive effect given to an interlocutory decree by Section 48 of the Partition Act does not deprive a party, who has not been duly served with summons, of the right to have the decree set aside. In that case, however, the appellant was already a party to the partition action at the time of the interlocutory decree and it can, on that ground, be distinguished from the

[1] *(1922) 23 N. L. R. 370.* [2] *(1958) 59 N. L. R. 400.*

present case. In *Petisingho v. Ratnaweera* [1] the view was taken that a new party cannot be added after judgment had been delivered and order made for the entry of the interlocutory decree. With that view I would with great respect agree.

After judgment was reserved in the present appeal, our attention was drawn to the unreported case of *Don Gardin Arangala v. Tuduhenage Methias et al.* [2] wherein this court set aside an interlocutory decree at the instance of a petitioner intervenient on the ground that *lis pendens* had not been properly registered. In a short judgment, Sansoni, J. in that case, permitted the intervention. The effect of Section 48(3) was not considered and I would, with great respect, disagree with the views therein expressed.

There are, however, several cases where the Supreme Court, acting in revision, has set aside interlocutory and even final decrees. I wish to add that the powers of this court to act in revision are in no way restricted by the provisions of the Partition Act. The present appeal is not a case in which we should, in my opinion, act by way of revision.

I would, therefore, hold that the learned District Judge was wrong in setting aside the final decree entered in this case. If, in point of fact, the *lis pendens* had not been registered in the proper folio it would not be conclusive as against the 22nd defendant. If, on the other hand, it had been properly registered, then it would be conclusive. That question we do not propose to deal with and would arise only if steps are taken against the 22nd defendant under the partition decree, or his proprietary rights are in any way challenged in other proceedings. The order of the District Judge is accordingly set aside and the appeal allowed with costs both here and in the court below.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

[1] *(1959) 62 N. L. R. 572.*

[2] *S. C. 74 D. C. Inty. Colombo No. 8116 (P) S. C. Minutes of 3.2.61.*