

1943            *Present: Moseley S.P.J. and Wijeyewardene J.*

WIJEYSEKERE Appellant, *and* WIJEYSURIYA, Respondent.

31—*D. C. Tangalla, 4,123.*

*Partition action—Application for intervention—Power of Court.*

In a partition action a Court should not deny to parties the right to intervene until the final decree is entered.

In granting an application for intervention the Court has power to impose such terms as may appear fair and equitable.

**A** PPEAL from an order of the District Judge of Tangalla.

A. R. H. Canekeratne, K.C. (with him Cosme), for intervenient-appellant.

C. V. Ranawake (with him H. W. Jayawardene), for substituted plaintiffs, respondents.

*Cur. adv. vult.*

July 7, 1943. WIJEYWARDENE J.—

This is an appeal from an order rejecting the appellant's application to intervene in a partition action. The case was filed in 1936 and decree was entered in September, 1938, dismissing the action on the ground that the third defendant had acquired title to the entire land by prescriptive possession. In appeal, the finding on the question of prescriptive possession was set aside and the case was remitted to the District Court for trial "on the question of title and any other question that may arise in the case other than the points" decided by this Court. At the conclusion of the second trial, the District Judge entered a preliminary decree for partition in March, 1941, declaring the original parties entitled to certain undivided shares. An appeal taken against that decree by the third defendant was dismissed in June, 1942. No final decree has been entered.

The appellant filed a statement in September, 1942, setting out her title to an undivided share of the land and moved to intervene in the action. That statement, I may add, raises a question which was raised unsuccessfully by the third defendant at the second trial. The substituted

plaintiffs, respondents, who received notice of the application objected to the intervention. The District Judge made the following order disallowing the application:—

“This case was instituted so far back as October, 1936. The intervenient gives no reason for this belated application. This application is only to delay a much delayed case. I refuse the application.”

The learned Judge did not give an opportunity to the appellant to explain her delay in filing her statement of claim. It is, no doubt, true that the appellant's intervention will have the effect of “delaying” the case, but that is a necessary result of all interventions and cannot be regarded as a good ground for the order made by the District Judge.

In view of the conclusive effect given to final decrees by section 9 of the Partition Ordinance, Court should not deny to parties the right to intervene in a partition action, until the final decree is entered (*vide Menika v. Mudiyanse*). On the other hand section 18 of the Civil Procedure Code empowers a Court in an appropriate case to impose such terms as may appear fair and equitable while granting an application for intervention (*Vide Abdul Rahiman Lebbe v. Ismail Lebbe Marikar*.) I think that this is a case in which such an order should be made.

I set aside the order against which this appeal is taken and direct the District Judge to admit the intervention, if the appellant deposits in Court Rs. 150 before August 31, 1943; as security for the costs that may be incurred by the substituted plaintiffs, respondents, in consequence of the intervention. If the appellant fails to make such deposit, her application for intervention will stand dismissed.

The appellant is entitled to the costs of appeal as against the substituted plaintiffs, respondents.

MOSELEY S.P.J.—I agree.

*Appeal allowed.*