

1948

Present : Basnayake and Gratiaen JJ.

KIRI BANDA, Appellant, and WEERAPPA CHETTYAR
et al., Respondents

S. C. 47—D. C. Kandy, P 405

Partition action—Application to intervene—Interlocutory decree entered—Order for security—Power of Court.

In a partition action the Court has power to make an order requiring the furnishing of security before an application to intervene after interlocutory decree is allowed.

A PPEAL from a judgment of the District Judge, Kandy.

H. W. Jayewardene, with *Vernon Wijetunge*, for intervenient-appellant.

C. E. S. Perera, with *Christie Seneviratne*, for defendants respondents.

A. L. Jayasuriya, for plaintiff respondent.

Cur. adv. vult.

December 3, 1948. BASNAYAKE J.—

This is an appeal by an intervenient in a partition action against an order permitting him to intervene on furnishing security. The order of the District Judge against which he complains is as follows :

“ Intervention will be accepted provided security in Rs. 1,000 cash given on or before 14.10.46. Otherwise it will be rejected.”

This action was instituted on March 5, 1940, but it did not come up for trial till February 22, 1943. On that day the learned District Judge made order declaring the plaintiff and the first defendant entitled to the land in the proportion of $\frac{1}{3}$ rd and $\frac{2}{3}$ rd and directing a partition thereof. The second defendant's appeal against that decision was dismissed by this Court with costs on June 9, 1944. Thereafter on July 20, 1944, one D. Dhammajoti Thero moved to intervene and he was allowed to do so on depositing in Court Rs. 150 as security. His intervention was rejected as he failed to deposit security.

Thereafter steps were taken for the final partition of the land in terms of the interlocutory decree, and on August 29, 1945, the day on which the final plan was filed, one M. R. PUNCHIRALA moved to intervene. Both the plaintiff and the first defendant asked for security if the intervention was to be allowed. They also alleged that the interventions were being instigated by the unsuccessful second defendant. The applicant was allowed to intervene on his giving security in Rs. 500 for the cost of the plaintiff and in a further Rs. 500 as costs of the first defendant. The security was furnished and the intervention was allowed on September 21, 1945. A further intervenient appeared on May 13, 1946, and was permitted to intervene on giving security in Rs. 500. Then on September 27, 1946, the present appellant sought to intervene and the learned District Judge made the order quoted above.

On account of the far-reaching effect of a final decree in a partition action it has been the practice to permit persons who claim rights in the land sought to be partitioned to intervene at any stage of the action until final judgment is entered under section 6 of the Partition Ordinance. The question that arises for consideration here is whether a conditional order can lawfully be made permitting a person to intervene in a partition action on his furnishing security. The Partition Ordinance makes no provision for intervention by any person in a partition action, but section 18 of the Civil Procedure Code authorises the Court to order that the name of any person who ought to have been joined as defendant be added on such terms as the Court thinks just. It has been held by this Court¹ that it is lawful for the Court trying a partition action to call in aid the provisions of section 18 of the Civil Procedure Code.

It will be sufficient for the purposes of this case if I refer to the case of *Lebbe v. Marikar*², in which an order allowing a person to intervene in a partition action on terms was affirmed by this Court. Middleton J. says therein : “ I cannot find anything in the Partition Ordinance, No. 10

¹ *Peries v. Perera* (1896) 1 N. L. R. 362.

Ratwatte v. Banda (1892) 1 S. C. R. 345.

Lebbe v. Marikar (1910) 4 Leader Law Reports 126.

² (1910) 4 Leader Law Reports 126.

of 1863 which excepts proceedings in partition from the rules of procedure laid down in the Civil Procedure Code relative to civil actions so far as they may be applicable under the circumstances, even if proceedings in partition are not strictly speaking actions as being proceedings for the prevention or redress of a wrong (section 5) they may, I think, be deemed applications for relief from joint ownership obtainable through the exercise of the Court's power (section 6). I think also that under section 4 this Court has impliedly power to sanction procedure on the lines laid down in section 18 as applying to partition proceedings."

As the order of the learned District Judge is one which he had power to make the only question that remains to be determined is whether he has properly exercised his discretion in determining the amount of security.

The history of this case which I have set out briefly shows that the proceedings have been unduly prolonged by repeated interventions after the dismissal of the second defendant's appeal. The intervenient-appellant does not in his affidavit explain why he did not come into court all these years. The appellant cannot complain that the terms imposed on him are exceptional for earlier intervenients have also been placed on like terms. In the circumstances I am not prepared to say that the amount of security fixed by the learned District Judge is unreasonable.

The appeal is dismissed with costs.

GRATIEN J.—I agree.

Appeal dismissed.

