1973 *Present :* **Deheragoda, J., Wimalaratne, J., and Sirimane, J.**

U. D. ARIYARATNE, Appellant *and* M. LAPIE and others, Respondents

S. C. 195/68 (Inty.)—D. C. Avissawella, 11906/P

Partition action—Pronouncement of judgment of Court—Intervention of parties thereafter before interlocutory decree is signed—Not permissible—Partition Act (Cap. 69), ss. 26, 49, 70, 79—Civil Procedure Code, s. 188.

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 that Act, but before interlocutory decree has in fact been signed.

Wijeratne v. Samarakoon (71 C. L. W. 87) partly overruled.

The conditions prescribed by section 79 of the Partition Act for applying the provisions of the Civil Procedure Code to a *casus omissus* in any matter of procedure are satisfied for applying section 188 of the Civil Procedure Code to the manner of entering an interlocutory decree in a partition action.

APPEAL from an order of the District Court, Avissawella.

D. R. P. Goonetilleke, for the intervenient-appellant.

No appearance for the respondents.

Cur. adv. vult.

1**—A 00580 (8/73)

May 23, 1973. DEHERAGODA, J.—

This is an appeal from an order made by the learned District Judge of Avissawella, which has been referred to a Divisional Bench due to a conflict between the case of *Wijeratne v. Samarakoon*,[1] reported in 71 C. L. W. 87, and the earlier decision in *Petisingho v. Ratnaweera*,[2] 62 N. L. R. 572. The question for decision is whether the Court has power under section 70 of the Partition Act to allow an intervention of a party after judgment has been pronounced in terms of section 26 of that Act, but before interlocutory decree has in fact been signed.

In the instant case an action was filed for the partition of two contiguous allotments of land and the case went to trial on 7th July 1968. On that date, at the end of the trial, judgment was delivered declaring the parties entitled to certain shares in the corpus and an order was made to "enter interlocutory decree accordingly"—interlocutory decree was to be tendered on 17th August 1968.

The intervenient-appellant filed petition and affidavit on 30th July 1968 and moved for permission to intervene and to be added a party defendant. On the same date proctors for the plaintiffs and for the 3rd defendant objected to the intervention, and 17th August 1968 was fixed for the inquiry into the objections. Interlocutory decree was tendered on 17th August 1968. The inquiry was held on the same date, and on 8th September 1968 the learned District Judge made order refusing the intervention with costs. The interlocutory decree was signed on the following day and dated 7th July 1968, following the date of the judgment. This appeal is from that order.

At the inquiry, the case of *Wijeratne v. Samarakoon* (*supra*) was cited in support of the application for intervention. In that case Manicavasagar J., with Alles J. agreeing, took the view that under the circumstances of that case section 70 of the Partition Act enabled a party to intervene up to the date on which the interlocutory decree was in fact signed by the Judge. The case of *Petisingho v. Ratnaweera* (*supra*) was also cited, but it was contended on behalf of the intervenient-appellant that inasmuch as there is provision governing interlocutory decrees in the Partition Act, recourse should not be had to section 188 of the Civil Procedure Code, and that the provision of the Civil

[1] *(1967) 71 C. L. W. 87.* [2] *(1959) 62 N. L. R. 572.*

Procedure Code would only apply to a *casus omissus*. The learned District Judge preferred to follow the decision in 62 N. L. R. 572 and refused the application as stated earlier.

In the case of *Petisingho v. Ratnaweera* (*supra*) judgment was delivered on 15th October 1956 and interlocutory decree was fixed for 30th October 1956. On 19th October 1956 the proctor for the appellant filed a statement of claim and moved that it be accepted and filed of record, and supported his application on 23rd October 1956 on the basis that interlocutory decree had not in fact been entered by that time. The respondent's proctor had objected to the addition of the appellant as a party and his objection was upheld by the learned District Judge. In appeal Basnayake C. J. agreed with the learned District Judge that section 70 of the Partition Act did not empower a court to add as a party a person who applied to be added as such after judgment had been pronounced in terms of section 26. He expressed the view that the entering of the interlocutory decree under section 26 was a purely ministerial act and that the Judge is bound by that section to enter the decree in accordance with the findings in the judgment. He referred to section 188 of the Civil Procedure Code which, according to him, was applicable to partition proceedings. Basnayake C.J., with Sansoni J. agreeing accordingly held that the court had no power to add a party under section 70 after the date on which the judgment as required by section 26 was pronounced. He did not however give any reasons for holding that the Civil Procedure Code is applicable to proceedings under the Partition Act.

The case of *Wijeratne v. Samarakoon* (*supra*) came up for decision on a later date before Manicavasagar J. and Alles J. In that case one of the defendants moved to withdraw his claim to a right of way as he had divested himself of his interests, and his claim was dismissed. Order was made for documents to be tendered on 13th December 1965 and judgment was reserved for 20th December 1965. On the same date these dates were advanced to 3rd December 1965 for the filing of documents and 6th December 1965 for the judgment. On 6th December 1965 the court delivered judgment and directed that interlocutory decree be entered, and ordered the decree to be tendered on 17th January 1966. On that date itself, namely 6th December 1965, the appellant filed a petition moving for intervention in the action. This was submitted to the Judge on 9th December 1965

and after an inquiry held on 24th January 1966 the Judge made order on 11th March 1966 dismissing the appellant's application for intervention. Between the date of inquiry and the date of the order, on 21st February 1966, the proctor for the plaintiff had tendered the interlocutory decree and moved that it be entered. The appellant had filed a petition of appeal on 16th March 1966 and the interlocutory decree was "entered" on 2nd May 1966. In allowing that appeal Manicavasagar J. stated as follows :—

> "The appellant's application was accepted by the Court even before interlocutory decree was tendered, and her application was heard and determined before the decree was entered by the Court. On this ground alone the appellant is entitled to succeed."

He relied on an additional ground, namely, that even before the judgment was delivered the Court was possessed of the fact during the hearing of the action that the appellant had a claim to a servitude of a right of way (presumably for the reason that the defendant, who had divested himself of his interests and withdrew from the action, had transferred his rights to the appellant), and that it was the obvious duty of the court to have given the appellant an opportunity of applying to be added as a party if she so desired. It may be that Manicavasagar J. was largely influenced in taking this view of the appellant's right of intervention by this fact and the fact that it was on the very day the judgment was pronounced that the appellant moved to intervene. It is noteworthy that in this case the question was not considered whether the act of "entering" the interlocutory decree within the meaning of section 26 of the Act is necessarily the same as the date of the physical act of drawing up of that decree and signing it, or whether it is the date of the judgment to which the act of signing relates back by virtue of a provision of law. The earlier case of *Petisingho v. Ratnaweera* (*supra*) too was not considered in this judgment, presumably for the reason that no reference was made to it in the course of the arguments.

It is contended for the intervenient-appellant in the instant appeal firstly, that as section 26 (1) of the Partition Act provides for the entering up of an interlocutory decree in accordance with the findings in the judgment, and it also provides for the signature of the Judge to be attached to that decree without

requiring that it should be dated as at the date of the judgment, that that provision is complete in itself relating to the entering of such a decree, and that section 188 of the Civil Procedure Code should not be brought in to supplement it.

The second argument is based on a comparison of the provisions of the now repealed Partition Ordinance (Cap. 56 of the 1938 edition of the Enactments) with section 26 of the Partition Act relating to the entering of a decree. He argues that while the repealed Partition Ordinance requires the judgment to be pronounced and the decree to be entered and signed on the same date, section 26 of the Partition Act provides for two separate acts, namely, dating and signing the judgment at the time of pronouncing it and the entering and signing of the interlocutory decree as soon as may be after the judgment is pronounced. That being so, he argues that the right of intervention allowed by section 70 continues up to the date of signing of the interlocutory decree.

I shall consider first the contention that section 26 is complete in itself and that section 188 of the Civil Procedure Code has no application to an interlocutory decree in a partition action. Section 26 (1) reads as follows :—

> "26 (1). At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court shall pronounce judgment in open court, and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the judge."

Section 79 of the Act which enables any *casus omissus* to be governed by the Civil Procedure Code runs as follows :—

> "79. In any matter or question of procedure not provided for in this Act, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not inconsistent with the provisions of this Act."

According to this section, in order to introduce the procedure laid down in the Civil Procedure Code into partition actions, the following conditions have to be satisfied :—

(*a*) There must be the absence of a provision relating to procedure in the Partition Act which is laid down in the Civil Procedure Code ;

(b) That procedure in the Civil Procedure Code should not be inconsistent with the provisions of the Partition Act.

Section 188 of the Civil Procedure Code runs as follows :—

> "188. As soon as may be after the judgment is pronounced, a formal decree bearing the same date as the judgment shall be drawn up by the court in the form No. 41 in the First Schedule or to the like effect specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The decree shall also state by what proportions costs are to be paid, and in cases in the Courts of Requests shall state the amount of such costs. The decree shall be signed by the Judge."

Section 26 of the Partition Act only requires the interlocutory decree to be entered in accordance with the findings of the judgment and such decree to be signed by the Judge, while section 188 of the Civil Procedure Code, which incidentally calls the decree a "formal decree", requires—

(i) that it should bear the same date as the judgment,

(ii) that it shall be drawn up by the court in the form prescribed in the First Schedule or to the like effect,

(iii) that it should specify in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action,

(iv) that it shall state by what parties and in what proportions costs are to be paid,

(v) that it should be signed by the Judge.

It would therefore appear that whilst section 26 of the Partition Act sets out the minimum requirements of an interlocutory decree under that Act, section 188 of the Civil Procedure Code prescribes how the decree should be drawn up, giving its contents in detail and even prescribing its form. These are matters not provided for in the Partition Act and the procedure set out in section 188 as to the manner of entering a decree is not inconsistent with the provisions of that Act. In my view, therefore, the conditions prescribed by section 79 of the Partition Act for applying section 188 of the Civil Procedure Code to an interlocutory decree in a partition action are satisfied.

The second point raised by appellant's counsel is in my view without substance. It is true that while the repealed Partition Ordinance requires the judgment to be pronounced and the decree to be entered simultaneously, section 26 of the Partition Act contemplates two separate acts in respect of the judgment and the decree. This innovation in the Partition Act is obviously meant to surmount the practical difficulty which would have arisen under the repealed Partition Ordinance of having to have a decree drawn up and in readiness for the Judge's signature on the date of the pronouncement of the judgment, especially in a case where the judgment is delivered immediately after the hearing is concluded. The present provision would enable a Judge to sign the decree on a subsequent date which is convenient to him and by the operation of section 188 of the Civil Procedure Code to relate back the date of the decree to the date of the judgment. The same result is thereby achieved as that provided for in the repealed Partition Ordinance by a different means. In my view, it is not possible to argue that the intention of the Legislature in prescribing two separate acts, namely for the pronouncement of the judgment and for the entering of the interlocutory decree in accordance with the findings of that judgment, is to enable a party to intervene under section 70 of the Act after judgment is pronounced, however long it might take thereafter to draw up the decree and sign it.

The appellant is not left without a remedy, as section 49 of the Partition Act enables him to pursue his remedy by way of a separate action for damages.

Learned counsel for the appellant in the course of his argument referred to two cases, namely that of *Grace Perera v. Lilian Silva*[1] (68 N. L. R. 234) and the unreported case of *Lebbe Sally v. Unus Lebbe,* S. C. 102/68 (Inty)—D. C. Kurunegala 1737/P (S.C. Minutes of 14th December 1969). Both these cases do not relate to an intervention of a party after interlocutory decree, but to cases where parties who were already on record, having failed to appear on the date fixed for trial or on a subsequent date, had moved that the judgment or decree entered against them be set aside and the case be restored to the trial roll. These decisions have no application to the question raised in this appeal.

[1] *(1963) 68 N. L. R. 234.*

For these reasons it is my view that the appellant is not entitled to intervene in this action after the date of pronouncement of the judgment. Accordingly the order of the learned District Judge is affirmed and the appeal is dismissed without costs.

WIMALARATNE, J.—I agree.

SIRIMANE, J.—I agree.

Appeal dismissed.