1975 *Present :* **Udalagama, J., Vythialingam, J. and Ratwatte, J.**

K. A. MUDIYANSE, Appellant, and R. A. T. PUNCHI BANDA RANAWEERA, Respondent

*S. C. 68-69/70—D. C. Kegalla 17622/P.*

*Partition action—Failure to appeal against incidental order—Order goes to root of action—Appeals only after delivery of judgment—Preliminary objection that the appeal is out of time—Partition Act Sections 19, 25, 63, 79—Civil Procedure Code Section 85.*

In a partition action the 1st defendant though served with summons and had ample opportunity to file his statement of claim failed to file his statement of claim. After the case was fixed for trial but about six weeks before the date of trial the 1st defendant tendered to Court his statement of claim on 13.2.70. The trial Judge made order rejecting the statement of claim as no explanation was given for the default. The 1st defendant did not appeal against this order nor did he renew his application to have his statement of claim accepted on the date of trial. The case proceeded to trial and judgment was delivered on 26.3.70. A preliminary objection was taken that the 1st defendant's appeal was really against the order rejecting his statement of claim and since that order was made on 13.2.70 the appeal filed on 9.4.70 was out of time.

*Held* by Vythialingam J. and Ratwatte J. (Udalagama J. dissenting) that a party aggrieved by an order made in the course of the action, though such order goes to the root of the case, has two courses of action open to him, namely (*a*) to file an interlocutory appeal or (*b*) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal. "If he adopts the latter course he cannot be shut out on the ground that his appeal being against the incidental order is out of time".

The applicability of Section 85 of the Civil Procedure Code to partition action is discussed.

Per Udalagama, J.—

A party aggrieved by an order made in the course of the action and which goes to the root of the case must appeal against such order, if dissatisfied with it, within the stipulated time. He cannot wait to do so till the end of the trial.

*Obiter :*

Where all the possible claimants to the property are manifestly before court no higher standard of proof should be called for in determining the question of title, than in any other civil case.

Where a defendant fails to file or cause to be filed a statement of claim together with an abstract of the devolution of title, he will not be permitted to raise any dispute contained in any averment in the plaint except with the leave of court.

APPEAL from a judgment of the District Court, Kegalla.

*N. Senanayake*, for the 1st defendant-appellant in S. C. 69/70.

*D. R. P. Goonetilleke*, for the 3rd defendant-appellant in S. C. 68/70.

*K. Thevarajah* with *S. G. Wijesekra* for the plaintiff-respondent in both appeals.

*Cur. adv. vult.*

March 21, 1975.

UDALAGAMA, J.—The plaintiff-respondent brought this action to partition the land called Puwakgahawalakadahena in extent about 3 pelas paddy sowing, averring inter-alia, that the 1st defendant-appellant had no title whatsoever to the said land, but was disputing the plaintiff's titie thereto. Summons was issued on the defendant-appellant returnable for 21.4.66, on which date, it was represented to Court that summons on the 1st defendant-appellant was served. On 21.4.66 proxy was filed on behalf of the 1st defendant-appellant. On 20.7.66 the case was called for statement of claim of the 1st defendant-appellant, but it was not filed. Thereafter *seven-dates* were given to the 1st defendant-appellant to file his statement of claim, besides the several dates when the case was called for the return of the surveyor's plan and etc., and finally on 15.7.69 the case was called ( it was by then over 3 years after the proxy of the 1st defendant-appellant was filed) and trial fixed for 26.3.70. Thereafter on 13.2.70 Proctor for the 1st defendant-appellant tendered an answer on behalf of the 1st defendant claiming priority over the plaintiff-respondent's deed No. 2576 of 22.11.29 (P3). The learned District Judge rejected the statement of claim of the 1st defendant, as the 1st defendant had not given an explanation for his default. The 1st defendant-appellant did not appeal against this order or even renew his application to have his answer accepted, on terms, on the trial date, although he was represented by Counsel. The case was thereafter heard by the learned District Judge and judgment delivered on 26.3.70. On 9.4.70 the 1st defendant filed petition of appeal against the order of the learned District Judge dated 13.2.70 rejecting his statement of claim. At the hearing of this appeal, Counsel appearing for the plaintiff-respondent took up a preliminary objection, that the 1st defendant-appellant's appeal was out of time and that it be rejected.

Counsel for the 1st defendant-appellant submitted that he was entitled to wait till the end of the case and see whether he would be given his due share and then appeal if necessary, because the Judge was under an obligation under the Partition Act to investigate the title of each of the parties, before he declared the respective parties entitled to shares in the land. The fallaciousness of this argument becomes apparent when one examines the petition of appeal filed by the 1st defendant-appellant in this case. His prayer is not that the learned District Judge had failed to examine his title and give him his due share but that the judgment and the interlocutory decree be set aside and he be permitted to file his statement of claim. Clearly his appeal, is

from the order of the learned District Judge dated 13.2.70 rejecting his statement of claim. Without setting aside the judgement, there would be no meaning in allowing him to file his statement of claim. It was not Counsel's contention, that he had no right to file an interlocutory appeal from the order of 13.2.70, but that at the end of the case if the 1st defendant-appellant's rights had not been preserved, he had a right of appeal. The order of 13.2.70 was not an incidental order, but an order which went to the root of the 1st defendant-appellant's claim. Probably this argument may have had a semblance of validity had the plaintiff in his plaint or any of the other defendants in their answers given the 1st defendant-appellant a share and the 1st defendant-appellant without filing answer had appeared on summons and accepted the share. In the instant case the 1st defendant-appellant had no alternative but to file an answer if his claim was to be investigated. In the absence of his answer, what further investigations could the learned Judge have embarked on ? In 52 N. L. R. 44 Gratiaen, J. held :

> " When in a partition action all possible claimants to the property are manifestly before Court, no higher standard of proof should be called for in determining question of title than in any other civil suit ".

All the claimants to the property were manifestly before the learned District Judge and on the evidence led in this case he has determined the title to the land. I cannot share the view that the learned Judge had failed in his duty in regard to the investigation of title to the land. With the rejection of 1st defendant's answer, his claim to any share in the land was lost. If he chose to pursue the matter, he should have appealed against the order of 13.2.70. I would hold that it is too late for him to wait till the end of the case to do so.

My brother Vythialingam, J., drew my attention to the case of Catherina vs. Jamis 73 N. L. R.—49 where Chief Justice H. N. G. Fernando held that :

> Where a case is fixed for trial on a particular date and that date is declared a public holiday, Section 8 (2) of the Interpretation ordinance does not render the next working date automatically the due date of trial, and therefore where a partition case is fixed for trial on a particular date and that date is declared a public holiday, Section 24 of the Partition Act read with Section 25 requires the Court to give notice to the defaulting defendant of the date fixed for the trial of the case.

I do not think there could be any disagreement with the learned Chief Justice on this ruling, but in the course of his judgment he states,

> "In the case of the Partition Act however, there is no provision which corresponds to Section 85 of the Code, and that Section will therefore apply only if Section 79 of the Partition Act can be said to bring it into application on the ground that there is a situation of a casus omissus."
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> The Partition Act, while it entitles the defendant to file a statement of claim and requires him to file a list of documents on which he proposes to rely, does not declare that a party may not prove his rights at the trial unless he has previously filed a statement of claim and a list of documents. If for instance a defendant relies solely on prescription, there is no provision in the Ordinance which expressly prevents him from leading evidence at the trial to establish his right".

I find myself in complete disagreement with these observations of the learned Chief Justice. In a partition case there is no doubt that a duty is cast on the trial Judge to investigate title to the land and find out who are the parties entitled to shares in the land. Hence, to that extent, there is no quesion of a partition action being heard ex-parte. The Judge is entitled to call upon the plaintiff to prove the title of those parties to whom he has given shares. It is for this reason, among others, the plaintiff is given the costs of all documents of the defendants produced by him under Section 20 of the Act. When a defendant fails to file his answer and prove his title at the trial the plaintiff is under an obligation to do so, if he accepts the position that the particular defendant is entitled to shares in the land, and there is no contest in regard to his rights. Under Section 19 (1) (*a*) of the Act any defendant who disputes any everment in the plaint relating to the devolution of title must file or cause to be filed in court together with his statement of claim, an abstract of the devolution of title with reference to pedigree, which shall be attached to the abstract. It necessarily follows from this provision that where a defendant fails to file or cause to be filed a statement of claim together with an abstract of the devolution of title, he will not be permitted to raise any disputes contained in any averments in the plaint. This prohibition arises in consequence of the default of the defendant. In such a case my view is that Section 85 of the Civil Procedure Code applies to the extent that until the defendant purges his default he would not be entitled as a matter of right to take part in the proceedings and dispute any averments in the plaint. Section 79 of the Partition Act lets in the Civil Procedure Code in the case of a casus omissus in the Act. In the Partition Act there is no Section analogous to Section

85 of the Civil Procedure Code. If the statement of the learned Chief Justice, that there is no provision in the Act to prevent a defendant, for instance relying solely on prescription, from leading evidence at the trial to establish his right without having filed a statement of claim is correct, it is my view, with my experience in the original courts, it would open the door to defaulting parties to spring surprises on parties with Judges helpless in controlling proceedings. The Partition Act was enacted after careful consideration to obviate unnecessary delays and prolongation of proceedings. If parties are to be allowed to come on the trial date, and raise contests without first having filed statements of claim. which the other parties have had no notice of, one could imagine the chaos that would result ! In the instant case the 1st defendant in his rejected statement of claim has raised a contest with the plaintiff that his deed by virtue of prior registration must prevail over the plaintiff's deed. Now if this is allowed to be raised at the trial without a statement of claim being filed, could the plaintiff have mèt it ? Obviously not. Is the plaintiff who had filed his pleadings, taken out summons on witnesses, filed list of documents and etc., and diligently got ready for the trial, to be deprived of meeting this contest ? Surely not. I have discussed this question of whether a party has a right to come to court and dispute a plaintiff's title, without having filed a statement of claim because it was contended by the defendant-appellant that he could have taken part in the trial without having filed a statement of claim and waited till the end of the trial to appeal against the judgment of the learned District Judge, in the event of his not having been given a share in the interlocutory decree.

In the instant case the 1st defendant-appellant should have appealed against the order of the learned District Judge dated 13.2.70 within the prescribed time. He has failed to do so. His appeal is rejected with costs payable to the plaintiff-respondent.

Let the appeal of the 3rd defendant-appellant, now, be listed for argument in due course.

VYTHIALINGAM, J.—

I have perused very carefully the judgment of my brother Udalagama, J. but regret very much that I have the misfortune to disagree.

There are two appeals in this case—No. 68/70 being by the 3rd defendant-appellant against the interlocutory decree as it has allotted no shares to him and has also allotted a greater share to the plaintiff than he was entitled to and the other by the 1st defendant No. 69/70. When the matter came up for argument learned Counsel who appeared for the plaintiff-respondent in both appeals took up the preliminary objection that the appeal of the first defendant was not competent as it was out of time. This is the matter which is the subject matter of this order and the appeal of the 3rd defendant need not concern us any more as it has still to be set down for argument.

Summons was served on the first defendant on 21.4.1966 and his proxy was filed on that date. Thereafter the case was called on various dates for different purposes and the journal entries show the statement of claim from the first defendant as being due on some of those dates. Ultimately on 15.7.1969 summons was reported served on 2B defendant. Apparently he was also the 4th defendant and he is said to have abided by the statement of claim already filed by him. The journal entry also shows that the statement of the 1st and 2nd defendants were not filed and the case was set down for trial on 26.3.70. Thereafter on 13 2.70 the proctor for the first defendant tendered the statement of claim of the first defendant with notice to proctor for the plaintiff and the 3rd and 4th defendants and moved that the same be accepted.

The Judge rejected the statement of claim as no explanation was given for the default. The case then proceeded to trial on 26.3.70 and although the first defendant was represented by Counsel he took no part in the proceedings. Interlocutory decree was ordered to be entered and the first defendant filed this appeal on 9.4.1970. Although the journal entries record the fact that the statement of claim was due from the first defendant on several dates yet not on one single date was the case postponed solely because of the failure of the first defendant to file his statement of claim. The case had of necessity to be postponed because some necessary and essential step had not by then been taken such as the failure to serve summons on parties substituted in place of a party who was dead, or because a fresh commission was issued at the instance of the 3rd and 4th defendants and was not executed on a number of dates.

It was on 15.7.1969 when summons was served on the 2B defendant apart from the fact that the first defendant had not by then filed his statement of claim, that the case was ripe for trial. So that it can hardly be said that the first defendant was responsible for the case dragging on from 21.4.1966 till 15.7.1969. However, even if the learned trial Judge was of the view that the first defendant was guilty of unreasonable delay he might have considered whether this was not an appropriate case in which he ought to have acted under section 63 (1) of the Partition Act. That section provides that "It shall be lawful for the Court at any stage of a particular action to order any party to give security for costs if the Court is of opinion that the party has been guilty of unreasonable delay in *presenting or prosecuting his claim* or for other good and sufficient cause". (The emphasis is mine). Or in the alternative he could have ordered prepayment of costs under sub-section 3 of that section.

Moreover the first defendant's statement of claim was presented about six weeks before the date of trial and no further steps such as the addition of new parties or the taking of a fresh survey was necessary as a consequence of his statement of claim. The trial could very well have proceeded on the date fixed for it. There was sufficient time for the plaintiff to meet the claim and no one would have been prejudiced by the acceptance of the statement of claim. Indeed the journal entry of 13.2.70 does not even show that anyone even objected to the acceptance of the statement of claim. Rejecting a party's statement of claim without giving the party the benefit of the provisions of section 63 of the Partition Act is a very serious matter in a partition case, as it might mean the loss of his rights in the land for ever or it might entail him in serious disabilities in proving his claim or establishing his rights.

However it is unnecessary for the purpose of the present order to decide whether the defendant was really in default or whether his statement of claim was rightly rejected. That remains to be decided at the main appeal. I am content for the present purpose to assume without conceding it, that the first defendant was in default and that in the absence of an explanation for this default the statement of claim could have been rejected. The learned Counsel for the plaintiff-respondent submitted that the first defendant's appeal was really against this order rejecting his satisfactory if I fix the quantum to be paid for the period of appeal filed on 9.4.70 nearly two months later was out of time.

In his petition of appeal the first defendant states that he is entitled to a 1/3 share of the land by virtue of deed No. 21029

dated, 28.1.1929, which deed is from the identical person Appuhamy from whom the plaintiff himself claims title to this one-third share on a latter deed No. 2576, dated, 21.11.1929. The first defendant's position is that his deed is entitled to prevail over that of the plaintiff both because it is earlier in point of time and because of prior registration. He also stated that he was old and infirm and therefore unable to file his statement of claim before the case was fixed for trial. He therefore prays that the judgment be set aside and that he be permitted to file his statement of claim.

It is important to note that he asks that the judgment and not the order of 13.2.70 rejecting his claim be set aside, apparently on the ground that he had not been given an opportunity to prove his claim at the trial, which as I shall show presently he could very well have done, this being a partition action. The fact that he also asks that he be given an opportunity to file his statement of claim does not alter the position. However, even assuming that the appeal is on the ground that his statement of claim was rejected his appeal is not out of time because the relevant date from which the time has to be calculated is not the date of the order but the date on which the interlocutory decree was entered which was the 26th March, 1970.

The real question for decision therefore is whether a party who is aggrieved by an incidental order can be penalised for being out of time if he does not file his appeal within the appealable time from the date of that order but instead files his appeal only after the case has been finally decided. I know of no requirement of law and none has been cited to us at the argument which binds the person aggrieved by an incidental order in the course of proceedings in an action to file an appeal against the order or which says that he would be shut out on the ground of his being out of time if he waits to file the appeal, even solely on that ground, at the close of the case as a whole.

A Judge makes several incidental orders of this nature in the course of an action, and one can well visualise the chaos that would result if there must be an appeal against such orders within the appealable time from the date of the order. A judge may make orders allowing an amendment of the plaint or answer adding or striking out parties, accepting or rejecting issues, allowing or rejecting documents, admitting or rejecting evidence, permitting or refusing to allow witnesses to be called and so on. If then the party has to appeal against such orders within the appealable time from that order then this court would be flooded with such appals, sometimes several times in the course of one action, and the chances of any case being concluded within a reasonable time after its institution are indeed very remote.

That is why this Court has always discouraged appeals against incidental decisions when an appeal may effectively be taken against the order disposing the matter under consideration at a final appeal. But where of course, the point, as in this case is not a mere incidental matter, but goes to the root of the case an interlocutory appeal is convenient, especially if it would prevent a party being shut out and thus obviate a second trial requiring his participation. A party so aggrieved, however, still has two courses of action : (1) to file an interlocutory appeal or, (2) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal. If he adopts the latter course he cannot be shut out on the ground that his appeal being against the incidental order is out of time. It might well be that in spite of the incidental order against him he might have still succeeded in the action.

In the case of *Thamotherampillai vs. Ramalingam* (34 *N. L. R.* 359) the plaintiff as the joint manager of a Hindu temple claimed a declaration that the first defendant was not entitled to a right of way over the courtyard of the temple. At the conclusion of the case the District Judge held that the plaintiff could not maintain the action without obtaining a vesting order. But he said in his order " Let the case be mentioned on the 27th instant. If by that time the plaintiff has taken steps under section 112 of the Trust Ordinance, this case will be laid by till after the results of his steps. If no such steps are taken on or before the 27th the action will be dismissed with costs ". This order was made on 15.2.1929 and the defendant did not appeal against the order. Thereafter the plaintiff had apparently obtained his vesting order and judgment was entered in his favour on 18.6.1931 and the defendant appealed and succeeded on the ground that the plaintiff could not cure this defect in title by obtaining a vesting order after the action was instituted.

In other words, it was held that at the conclusion of the earlier proceedings the Judge should have entered judgment dismissing the action and not given him an opportunity to cure the defect in his title. The appeal of the defendant was virtually against that order. Objection was taken that the defendant should have appealed against the order of 15.2.1929 without waiting till the plaintiff had obtained his vesting order, and the Judge had delivered his later judgment dated 18th June, 1931 in which he dealt with all the other issues in the case.

Dealing with this objection Garvin, J. said at page 361, " While I agree that this is an order which is appealable and from which it might perhaps have been as well for the defendant to have

appealed at the first instance, it remains to be considered whether the defendant has deprived himself of his right to appeal from the consequences of this order, merely because he did not do so at a time at which he might have entered an appeal had he been so minded. A party is not of course, bound to appeal from every interlocutory order and has the right to exercise his right of appeal upon all points when the proceeding in the Court below is determined by a final judgment". The appeal in that case being virtually against the order made on 15.2.1929 was hopelessly out of time when filed after the final judgment on 18.6.1931.

Even where an interlocutory appeal is rejected on some technical ground or on the ground that it was not competent for the party aggrieved to take the matter up by way of interlocutory appeal and without an adjudication on the merits of the appeal such a party would not be barred from taking up the very same point in an appeal after the case has been finally decided. Such a case was the case of *Balasubramaniam* vs. *Valliappan Chettiar* (39 *N. L. R.* 553). In that case the defendant filed an interlocutory appeal (No. 51) against an order refusing to permit him to lead parol evidence on certain issues. The case proceeded to trial thereafter and judgment was entered for the plaintiff. The defendant appealed against that judgment also on the identical ground. Both appeals were heard together and the interlocutory appeal was rejected on the ground that stamps to the correct value had not been tendered together with the petition of appeal and also on the ground that no interlocutory appeal lay against the admission or rejection of evidence only.

Nevertheless the main appeal was considered and allowed. Keuneman, J. in the course of his judgment said at page 559, "I do not think, however, and no authority has been cited to us to show that we are precluded from dealing with this point in the final appeal No. 286. The interlocutory appeal, in my opinion, being an appeal against the rejection of evidence merely, was in any event, wrongly constituted .. But in any case, the rejection of interlocutory appeal No. 51 cannot be said to be an adjudication on the points raised in that appeal and I think we are entitled to consider those points in the final appeal No. 286 ..... If the question of the wrongful rejection of evidence had been the only point in the appeal the case would have to be sent back for a new trial." The appeal however was allowed because the defendant succeeded on another point. If the contention here advanced that the appeal is out of time is valid then the final appeal in that case would have had to be rejected on that ground. Nevertheless

the court went on to decide the final appeal in favour of the defendant and said that if that had been the only point in the case they would have had to send the case back for a new trial.

The case of *Fernando vs. Fernando,* 8 *C. W. R.* 43 was a case on which an interlocutory appeal was rejected as being out of time. The very same ground was urged on an appeal against an order setting aside a sale and it was held that it was open to the appellant to raise the point by way of appeal. Bertram, C. J. said "Mr. J. S. Jayawardena argued that it was impossible for this point to be taken on the appeal because it was originally taken as a preliminary objection and though an appeal was lodged against the decision of the District Judge on the preliminary objection that appeal was rejected as being out of time. He maintained therefore that it was not open to the appellant to raise the point by way of appeal against the order which the District Judge finally made disposing of the subject. I do not think that that is a sound point. It is contrary to the general principles observed in this Court which discourages appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage."

Although this Court discourages interlocutory appeals nevertheless there may be cases in which an interlocutory appeal may be filed against an incidental order and would be entertained by this Court. The true position was explained by Gratiaen, J. in the case of *Girantha vs. Maria* (50 *N. L. R.* 519) where he said at page 521, "The correct view appears to be that although this Court undoubtedly has jurisdiction to entertain interlocutory appeals of this nature, the attitude of the Court in disposing of such appeals must necessarily depend on the circumstances of each case. The main consideration is to secure finality in the proceeding without undue delay or unnecessary expenses. On the one hand, therefore, this Court would always 'discourage appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at a final appeal' (per Bertram, C. J. supra) I do not think that either Keuneman, J. or Poyser. J. in Balasubramaniam vs. Valliappa Chettiar (supra) intended to lay down any principle of wider application than this."

"Cases may well arise, however," he continued, "where the point involved in an incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order should be tested at the earliest possible stage in an interlocutory appeal. Instead, as Sampayo, J. pointed out in Arumugam vs. Thambiah, 15 N. L. R. 253, an early decision of the Appellate tribunal on the point in dispute

might well obviate the necessity of a second trial. In such cases this Court would not refuse to entertain an interlocutory appeal against an incidental but far reaching order of the trial judge. Where, however the matter could more expediently be dealt with in a final appeal, an interlocutory appeal might be rejected as premature."

Although where the incidental order is far reaching a party aggrieved by such an order may file an interlocutory appeal, nevertheless as Garvin, J. pointed out he is not bound to do so and will not be precluded from raising the identical point in the main appeal after the case has been finally decided or be shut out as being out of time. In certain circumstances, he may be held to have acquiesced in the order and so be barred from raising it at a later stage. In Thamotherampillai's case (supra) Garvin, J. said at page 361 "In this case the only question for us, therefore, is whether it could fairly be said that the defendant has acquiesced in this order and is therefore debarred from inviting us to consider at this stage whether or not the District Judge was right". In the facts and circumstances of that case he held that the defendant was not so debarred.

In the instant case the order rejecting the statement of claim was indeed a far reaching order and the defendant may well have been advised to file an interlocutory order. But his failure to do so does not now debar him on the ground that he is out of time because he was not in law bound to file the appeal then. Nor can he in the facts and circumstances of this case be said to have acquiesced in the order. It is important to remember that this is a partition case because in such a case even though his statement of claim was rejected he could still have participated in the trial and cross-examined the plaintiff and his witnesses, given evidence and even produced his deed with the leave of Court as provided for in section 19 (2) (*a*) of the Partition Act.

Once he produced his deed which is earlier in point of time than that of the plaintiff's the latter would have to show that his deed took precedence by virtue of prior registration. In his answer he has also claimed prescriptive title and claimed the plantations and it was also open to him to establish these claims which did not depend on the production of any deeds or other documents. It was not necessary for him to file along with his claim an abstract of the devolution of title with reference to a pedigree as required by section 19 (1) because he was claiming title on a deed from the same man from whom the plaintiff claimed title to a share on a later deed from him and in respect of whom plaintiff had filed a pedigree.

In an ordinary civil action a party who is in default by not having filed his answer on the due date cannot participate in the proceedings or cross-examine witnesses unless he has purged his default. In the case of *Brampy vs. Peries* (*3 N.L.R. 34*) it was held that under the Civil Procedure Code a defendant who has obtained time to file answer and did not do so is not entitled to cross-examine witnesses for the plaintiff. Lawrie, A. C. J. said " Of course a defendant who has not answered may like all the rest of the world attend a public Court, but he has no right to take part in an ex parte hearing .... In my opinion the defendant ought not to have been allowed to cross-examine at the ex parte hearing ". These observations were approved and followed by Soertsz, J. and Poyser, S. P. J. in *Manchina Hamy vs. James Appu* (39 N. L. R. 249).

But this is because section 85 of the Civil Procedure Code sets out inter alia that if the defendant shall fail to file his answer on the day fixed therefor the Court shall proceed to hear the case ex parte and pass a decree nisi in favour of the plaintiff. This is an imperative provision and the Court has no power to take any other course of action. In the case of *N. M. Sally vs. M. A. Noor Mohamed* (66 *N. L. R.* 175) it was held that where a case was fixed for ex parte trial in terms of section 85 of the Civil Procedure Code the reasons for the default of the defendant cannot be considered before the ex parte trial. Basnayake, C. J. said " The Court has no power to take a course of action other than that prescribed in section 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the filing of his answer.

The case was cited with approval and followed in the case of *The Board of Directors, Ceylon Savings Bank vs. Nagodavitane* (*71 N. L. R. 90*). Despite decisions to the contrary (see Perera vs. Alwis, 60 N. L. R. 260 and Edirisinghe vs. Gunasekera, 68 C. L. W. 100) this Court has now approved the decision in Noor Mohamed's case and that of Nagodavitane—S.C. 182/72 (Inty) D. C. Kalutara 1149/D—S. C. Minutes. But I am firmly of the view that section 85 A and indeed the whole chapter in regard to the consequences for the default of appearances has no application whatever to partition actions and it was in this connection that I referred to the observations of H. N. G. Fernando, C.J. in the case of *Catherina vs. M. A. Jamis* (*73 N. L. R. 49*) during the course of the argument in this case.

I do not wish to repeat the passages from the judgment quoted by my brother Udalagama, J. except to express my respectful and complete agreement with the views set out therein with which Weeramantry, J. agreed. I would however like to quote

the following passages from the judgments which set out the reasons for the views H. N. G. Fernando, C.J. expressed. He said "In the case of the Partition Act however, there is no provision which corresponds to section 85 of the Code and that section will therefore apply only if section 79 of the Partition Act can be said to bring it into application on the ground that there is a situation of a casus omissus". (page 51).

And again at page 52 "Having regard to the wide terms of section 25 and the other considerations noted above, I am unable to hold that section 85 of the Code is applicable in the case of a partition action. The requirement in section 85 that there shall be an ex parte trial in the event of the failure of a defendant to appear or to file answer is inconsistent with the requirement in section 25 of the Partition Act which I have mentioned. That being so, the language of section 79 of the Act precludes the application of section 85 of the Code in a case where a defendant fails to file a statement of claim." It is to be noted that section 79 of the Partition Act requires the Court to follow the procedure laid down in the Civil Procedure Code on a like matter or question only if it is not provided for in the Act and if such procedure is not inconsistent with the provisions of the Act."

The statement of the law on this point as set out by H. N. G. Fernando, C. J. finds full and ample support in the judgment of Sirimane, J. with whom Samarawickreme, J. and Wijayatilake, J. agreed in the case of *Dingiri Amma Vs. Appuhamy* (*72 N. L. R. 347*). The question there was whether an earlier case which had been dismissed for want of appearance without any adjudication of the plaintiff's rights was res judicata or not. In a sense therefore the statement of the law on this point was obiter but it is a fully considered and strong view. Sirimane, J. said "I have examined the question so far on the basis that an order under section 84 of the Civil Procedure Code is an appropriate order in a partition action. But I must say, however, that I am very strongly of the view that the provisions of the Civil Procedure Code relating to the consequence and cure of defaults in appearing (Chapter 12) have no application at all to a partition action instituted under the Partition Act." (page 350).

He continued "Even a cursory examination of sections 84 and 85 of the Civil Procedure Code would reveal their inapplicability in a partition action ..... Section 85 provides for the ex-parte hearing of a case and the passing of a decree nisi if the defendant fails to appear on the day fixed for his appearance and answer. Such a procedure in addition to being obviously impracticable in a partition case, would also be contrary to the provisions of section 25 of the Partition Act which require the (page 351) Court to examine the title of each party before entering an Interlocutory Decree."

The case of *Sirimalee Vs. Punchi Ukku* (60 *N.L.R.* 448) was a case where parties had given a share to the 9th defendant who had not filed a statement of claim. But when it came to the trial, the parties took up a new position quite different to their pleadings and interlocutory decree was entered giving no interests to the 9th defendant, who was present at the trial but was unrepresented and was given no opportunity to say whether she accepted the new position or not. In setting aside the decree Sansoni, J. as he then was, with Weerasooriya, J. agreeing, said, "But I think the more serious objection to the manner in which this trial was conducted is the fact that the 9th defendant who was present in Court, seems to have been totally ignored. She appeared even before summons was served on her. It is true that she filed no statement, but her presence at the trial surely indicated that she had come to watch her interests. She does not seem to have been asked whether she accepted the new position taken by parties who had pleaded differently, nor whether she wished to give evidence, or even to cross-examine the plaintiff's husband whose evidence was directly against her interests."

It is true that the parties in that case had taken up a new position which denied to her the rights originally conceded, and in those corcumstances having regard to the duty cast on him, the Judge should have made a more careful investigation of title. But nevertheless the judgment illustrates the fact that in a partition case a party who fails to file a statement of claim is not entirely shut out until he purges his default. Moreover in the instant case also the parties took up a new position in the course of the trial. It was the plaintiff's case that the corpus consisted of lots 1 and 2 only. The first defendant's only contest with the plaintiff was in regard to the share of Appuhamy which he claimed.

On the other hand, the 3rd and 4th defendants took up the position that the corpus consisted of lots 1, 2 and 3 which they had included in the plan on a fresh survey. One of the points of contest raised at the trial was " (2) Do lots 1, 2 and 3 form part of the corpus or only lots 1 and 2 form the corpus ? " In the course of the cross-examination of the plaintiff it is recorded that " At this stage, it is agreed, that lot 3 forms part of the corpus sought to be part tioned." We do not know what the views of the first defendant, who was represented by Counsel, were in regard to this. As stated by Sansoni, J. he should have been giving an opportunity of stating what his position was. However, I see no reason why the right of a defendant who has not filed a statement of claim to participate and put forward his claim should be limited only to cases in which there has been in the course of the evidence

a deviation from the position taken up in the pleadings or where he is deprived of some rights which were conceded to him, although of course in such cases his position would be much stronger.

Applying the principles enunciated in the cases referred to by me, with which I am in respectful agreement the first defendant was in law entitled to participate at the trial and to put forward his claim even though he had not filed a statement of claim; but of course only to the extent permitted by the Act. Therefore there was no need for him to have appealed from the order at that stage and by not so appealing he cannot be said to have acquiesced in the order to the extent of his being now debarred from appealing against the interlocutory decree. It is true that he was represented by Counsel at the trial. But he took no part in the proceedings. Nor did he make any application to Court.

But this is quite understandable because apparently the District Judge himself, counsel and parties had all presumed, as was contended here, that the order rejecting the statement of claim was made under section 85 of the Civil Procedure Code. They could therefore naturally have assumed that the first defendant could not participate in the proceeding until he had purged his default. This cannot therefore stand in the way of the appeal by the first defendant.

Nor is a Court powerless to control proceedings in a partition action if persons in default are permitted to participate in the proceedings. There are several sections dealing with defaults which could be applied and moreover where a Court is satisfied that dilatory tactics are being adopted to delay the conclusion of the proceedings or to cause embarrassment to the other parties a robust application of the provisions of the Act in regard to costs, security for costs and prepayment of costs would remedy the situation and have a salutory effect.

I hold therefore that the first defendant is not out of time and overrule the preliminary objection. The appeal of the first defendant as well as that of the 3rd and 4th defendants should now be listed in due course for argument.

RATWATTE, J.—I agree with my brother Vythialingam, J.

*Appeal of 1st, 3rd and 4th defendants to be listed for argument.*