

Present: De Sampayo J. and Dias J.

LOKU MENIKA v. DINGIRIMAHATMAYA et al.

129—D. C. (Itg.) Ratnapura, 3,127.

Partition action—Intervention before date of trial—Order to pay costs of trial date.

When it appears to a Judge trying a partition action that any parties who have any interest are not before the Court, it is the duty of the Judge to stop the case and bring in all the parties, although the original plaintiff and the defendant may be ready for trial.

Where intervenients were ordered to pay the cost of the trial date to the other parties, the Supreme Court set aside the order as to costs and allowed the intervention without any condition.

THE facts appear from the judgment.

R. L. Pereira, for the appellants.

April 1, 1920. DE SAMPAYO J.—

The question in this appeal relates to the propriety of an order as to costs made by the District Judge. The plaintiff brought this action to partition a land, being part of a *nindagama*, between himself and the original defendants. The part sought to be partitioned was alleged to have been *bandara* land. Previous to the trial a survey was ordered, and then the intervenients appellants came in and stated that two of the lands included in the survey were not *bandara* lands, but lands of which they were tenants. This intervention was made a few days before the date of trial. The District Judge allowed the intervention, but ordered at the same time that the parties should be noticed, and that otherwise the intervenients should pay the costs. It appears that before the filing of the petition of intervention they gave notice to the proctors of the plaintiff and the defendants, and the order of the Court appears to have been that they should notice the parties personally. This appears to have been rather impracticable, and on the day of trial the District Judge, in pursuance of the previous order, required the intervenients to pay two-thirds of the taxed costs of the plaintiff and parties. It will be noticed that the intervenients came in at a comparatively early stage of the proceedings, before any trial took place and before any interlocutory order was made. The District Judge remarks that they failed to point out to the surveyor the claim they made to the Court subsequently. But it appears that the survey was a very large one, and it is not surprising that these

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villagers were not able to know exactly at that time whether any of their lands were included in the survey. I think the proper course for the court to have done was to allow the intervention, and if it be found at the end that it was unfounded, to make a proper order as to costs in regard to the whole matter. The present order would practically mean that the appellants would not be able to come in at all and establish their claim. This would be a very unfortunate result, and, I think, the just course is to set aside the order as to costs, and allow the intervention without any condition. The appellants, I think, are entitled to the costs of the appeal.

DIAS A.J.—

In my opinion this order as to costs has certainly been premature, even if it can be justified on any other ground. At present we do not know whether these intervenients have any just right to any portion of this *nindagama* or not, and until it has been proved that they have no such right, I do not see how the Judge can cast them in costs. It is true that it was within the power of the Judge to make an order as to the terms on which they should be allowed to come in. But, so far as the record goes, it is perfectly clear that there was no delay on their part in seeking to come in. In any case, when it appears to a Judge trying a partition action that any parties who have any interest are not before the Court it is the duty of the Judge to stop the case and bring in all the parties, although the original plaintiff and the defendant may have been ready for trial. So, in the present case, those intervenients who came forward *mero motu* ought not to be penalized by being made to pay the costs, even before their rights are adjudicated upon. In these circumstances, I agree to the order proposed by my brother.

Set aside.