

1946 *Present* : Keuneman S.P.J. and Jayetilleke J.

DE ZOYSA, Appellant, and GUNASEKERA *et al.*, Respondents.

46—D. C. (*Inty.*), Balapitiya, 1,339.

Partition action—Party defendant in representative capacity—His right to intervene in personal capacity after interlocutory decree is entered.

In an action for partition a party who appeared in a representative capacity and not personally is entitled to intervene in his personal capacity after interlocutory decree is entered and before the date of the final decree. The court can, however, put him on terms where the intervention is dubious or belated.

A PPEAL from an order of the District Judge of Balapitiya.

This was an application to intervene in a partition case after preliminary decree was entered. The intervenient, Arthur de Zoysa, was already the fifth defendant in the case, having been made party defendant in his capacity as the administrator of the estate of one Robert de Zoysa.

He filed answer as administrator and took no further steps whatever. On the trial date, after evidence was heard, interlocutory decree for partition was entered. According to the evidence, the fifth defendant was not entitled to any share in the property in question. He subsequently made application to intervene, claiming four acres of the land as belonging to him in his personal capacity on a deed executed by the original owner of the land. The learned District Judge dismissed his application holding that the interlocutory decree bound the parties to the partition action and that an original defendant could not thereafter come in as an intervenient.

Cyril E. S. Perera (with him *E. A. G. de Silva*), for the intervenient, appellant.

L. A. Rajapakse, K.C. (with him *D. D. Athulathmudali*), for the plaintiff, respondent.

October 1, 1946. KEUNEMAN S.P.J.—

I do not think the order of the District Judge disallowing the intervention of the intervenient can be supported. No doubt the intervenient was a party to the proceedings and to the interlocutory decree

but he was a party in a representative capacity and not personally. He would accordingly be entitled to intervene up to the date of the final decree, subject to this that the court would be entitled to put him on terms where the intervention was dubious or belated. However, in this case the appellant in his affidavit has given some explanation of his delay in putting forward the claim he now wishes to put forward.

In all the circumstances I think the order of the District Judge must be set aside and the appellant will be entitled to intervene in this case and file statement if he will give security for costs in the sum of Rs. 200 to the satisfaction of the court within one month of the date of the record of this case reaching the District Court of Balapitiya. If he fails to give this security within the time required his application for intervention will be refused.

There will be no costs of appeal or of the inquiry in the lower court.

JAYETILEKE J.—I agree.

Order set aside.

