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**PEMALATHA AND ANOTHER**

**Vs.**

**JAYAWARDENA AND OTHERS**

COURT OF APPEAL  
SAMAYAWARDHENA, J.  
CA/648/1999/F  
DC AVISSAWELLA 18031/P

**Civil Procedure Code, section 87, 403— Dismissal of an action for want of appearance of the plaintiff on the trial date—Positive bar to the maintainability of a subsequent action—Res judicata—Abatement—Abuse of process of the partition law**

A previous action filed by the plaintiff for declaration of title to the land in suit and ejectment of the 2nd and 3rd defendants was dismissed in terms

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of section 87(1) of the Civil Procedure Code for want of appearance of the plaintiff on the trial date. Soon after the said dismissal, the plaintiff filed a partition action seeking predominantly the same reliefs. The District Court entered judgment as prayed for by the plaintiff. On appeal, the contention of the 2nd and 3rd defendants before the Court of Appeal was that the matter was res judicata between the plaintiffs and the 2nd and 3rd defendants, and therefore the partition action could not have been maintained.

**Held:**

1. In terms of section 87(2) of the Civil Procedure Code, if an action is dismissed due to the absence of the plaintiff on the trial date, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action. This is not res judicata in the true academic sense but a positive bar to the institution of a fresh action on the same cause of action.
2. The plaintiff filed the partition action soon after the abortive declaration of title and ejection action, seeking to vindicate his title to the property and ejection of the 2nd and 3rd defendants. The intention of the plaintiff in both actions was the same: to eject from the land the 2nd and 3rd defendants who, according to the plaintiff, had no soil rights to the land.
3. The cause of action upon which a partition action is based is the inconvenience of common ownership. However the partition action was not filed to end common ownership. The filing of the partition action was an abuse of the provisions of the partition law. The plaintiff's second action shall fail.

**Cases referred to:**

1. Herath v. Attorney General (1958) 60 NLR 193 at 222
2. De Silva v. Juwa (1935) 37 NLR 165
3. Abeyesundera v. Babuna (1925) 26 NLR 459
4. Selenchi Appuhami v. Livinia (1905) 9 NLR 59

APPEAL from the Judgment of the District Court of Avissawella.

Ranjan Suwandarathne, P. C., with Anil Rajakaruna for the 2nd and 3rd Defendant-Appellants.

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H. Withanachchi with shantha Karunadhara for the Plaintiff-Respondents.

*cur. adv. vult.*

January 1, 2019

**SAMAYAWARDHENA, J.**

The three plaintiffs filed this action against the three defendants seeking to partition the land described in the schedule to the plaint between the 3rd plaintiff (subject to the life interest of the 1st and 2nd plaintiffs) and the 1st defendant in equal shares. The 2nd and 3rd defendants, according to the plaint, were made parties because they are in forcible occupation of the land without any soil rights. The 1st defendant did not contest the case of the plaintiff.

The only contesting defendants were the 2nd and 3rd defendants who are wife and husband respectively. The 2nd defendant is not an alien. She is the daughter of the 1st and 2nd plaintiffs, and the sister of the 3rd plaintiff.

The 2nd and 3rd defendants took up two positions at the trial. One is they have prescribed to the land-vidue issue Nos. 9 and 10. The other is the plaintiffs cannot maintain this action on res judicata in view of the decree entered in case No. 17478- vide issue Nos. 11 and 12.

The learned District Judge held against the 2nd and 3rd defendants on both points and decided to partition the land as prayed for in the plaint.

It is against this Judgment that the 2nd and 3rd defendants have preferred this appeal.

When this matter came up before me for argument on 26. 07. 2018, the learned President's Counsel for the 2nd and 3rd defendant-appellants informed Court that he confines his argument only to the question of res judicata.

The plaintiffs in the plaint did not say a word about case No. 17478/L, which the 2nd and 3rd defendants disclosed in their statement of claim. However, the 1st plaintiff during the course of cross-examination admitted the said case. The case record was marked as 2V1- 2V5 through the 1st plaintiff without any objection.

According to 2V1- 2V5, there cannot be any dispute that the said case was filed by the same three plaintiffs against the 2nd and 3rd defendants

on the same basis seeking virtually the same reliefs. That is, that the 3rd plaintiff is entitled to 1/2 share of the land subject to the life interest of the 1st and 2nd plaintiffs and the 2nd and 3rd defendants are in forceful occupation of the land. The reliefs sought were declaration of title, ejection and damages. In other words, the only difference between the two cases is that the earlier one was a declaration of title action and the present one is a partition action. However, the plaintiffs' action in the earlier case was dismissed with costs on 13. 05. 1985 for want of appearance of the plaintiffs on the trial date in terms of section 87(1) of the Civil Procedure Code. Thereafter, the plaintiffs made an application to vacate that order in terms of section 87(3) of the Civil Procedure Code but the Court has, by order dated 07. 10. 1985, refused that application. The plaintiffs have hurriedly filed this action 16 days after the said order-Le. on 23. 10. 1985.

Section 87(2) of the Civil Procedure Code reads as follows:

*Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.*

It is in this context that the 2nd and 3rd defendants have stated that the matter is res judicata between the plaintiffs and the 2nd and 3rd defendants. This is in fact not res judicata in the true academic sense, but a positive bar to the institution of a fresh action on the same cause of action.

The learned counsel for the plaintiff-respondents in the written submissions cites *Herath v. Attorney General*<sup>1</sup> to say that a decree of dismissal under section 84 of the Civil Procedure Code on non-appearance of the plaintiff (which is similar to section 87 of the present Code) does not operate as res judicata. It is pertinent to note that as the Civil Procedure Code stood at that time, there was no similar provision to the present section 87(2), which was introduced by Act No. 20 of 1977.

I could not find a decided case where the present issue has been directly dealt with, i. e. whether the dismissal of a declaration of title action on non-appearance of the plaintiff operates as a bar to the subsequent filing of a partition action.

However, in *De Silva v. Juwa*<sup>2</sup> it has been decided:

*The abatement of an action for declaration of title to land is a bar against the institution of an action for partition in respect of the land where the same question of title is involved.*

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Insofar as the question of abatement is concerned, as the Civil Procedure Code stood at that time, there was (and still is) a similar provision to section 87(2). That is section 403, which reads as follows:

*When an action abates or is dismissed under this Chapter, no fresh action shall be brought on the same cause of action.*

The learned District Judge in this case has taken the view that the cause of action in the earlier declaration of title action and the present partition action is not the same. In this regard, in *De Silva v. Juwa* (supra) the Supreme Court at pages 166- 167 states as follows:

*But is the action "brought on the same cause of action?" The cause of action in the earlier proceedings in case No. 2, 680 was the denial by the defendant of the plaintiff's claim to be the owner of these premises, the question at issue then being whether the plaintiff or the defendant was the true owner of the entirety of this land. As a result of the respondent's intervention in this action, identically the same question arises for decision and the plaintiff when he instituted this action must have realized that unless he was completely successful in his subterfuge that was the question which would arise for determination immediately notice of the pendency of this proceeding reached the intervenient. Inasmuch as he is now a defendant that is the one question which arises for determination. It is quite true that in theory an action for partition is a proceeding between co-owners, the purpose of which is to resolve their respective interests in common into holdings in severalty. But in a large percentage, perhaps too large a percentage, of cases what the Court has to determine is the respective rights of parties who are frequently if not generally in conflict as to such rights. In such cases a proceeding instituted under the Partition Ordinance is in substance, and I think in fact, an action for a declaration of title. Though in form actions for partition they are often in reality actions for a declaration of title to land. In *Ponamma v. Arumugam* [8 NLR 223], the Privy Council held that a certain action for partition brought under the provisions of the Partition Ordinance though in form an action for partition was, in reality an action for the recovery of the land and as such was . . . obnoxious to the provisions of section 547 of the Civil Procedure Code which prevented such an action being maintained until administration to the estate had been obtained.*

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“The cause of action upon which a partition action is based is inconvenience of common ownership.” (Abeysondera v. Babuna<sup>3</sup>) However did the plaintiffs file the partition action to achieve that objective? On the facts and circumstances of this case, they did not. There was no dispute between the plaintiffs and the 1st defendant regarding ownership or possession of the land. When the plaintiffs conclusively failed to eject the 2nd and 3rd defendants by a declaration of title action, they filed this partition action immediately after the final decision in the declaration of title action to achieve the same objective and not to end the co-ownership between the plaintiffs and the 1st defendant. This is nothing but an abuse of the provisions of the Partition Law to achieve the ulterior motive of the plaintiffs, which is the ejection of the 2nd and 3rd defendants from the land. Vide Selenchi Appuhami v. Livinia. 4

In my view, the learned District Judge was wrong when she answered issue Nos. 11 and 12 in the negative. The plaintiffs’ action shall fail.

I set aside the Judgment of the District Court and allow the appeal of the 2nd and 3rd defendants with costs both here and in the Court below.

*Appeal allowed.*

*Judgment by: Mahinda Samayawardhena, J.*

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